404(b) & 608(b)
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404(b) Research
608(b)

**Memorandum** **Office of the Independent Counsel**

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To : S. M. Colloton Date 7/12/95

From : E. H. Jaso

Subject: U.S. v. Tucker: Required Disclosure under Rule 404(b)

A 1991 amendment to Fed. Rule Crim. P. 404(b) requires that:

> "upon request by the accused, the prosecution . . . shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any [Rule 404(b)] evidence it intends to introduce at trial."

The Committee Note explains that both the request and the response should properly be submitted "in a reasonable and timely fashion." The Rule requires "no specific form of notice"; the Note reports that the Committee "considered and rejected a requirement that the notice satisfy the particularity requirements normally required of language used in a charging instrument." The Government must "apprise the defense of the general nature of the evidence"; the requirement does not "supercede [sic] other rules of admissibility or disclosure, such as the Jencks Act, nor require the prosecution to disclose the names and addresses of witnesses." The Rule does not include any specific sanction for failure to provide the required notice. See also 22 Wright & Miller, Federal Practice & Procedure sec. 5249 (Rule 404) (1994 Supp.).

Required Specificity of Government Response[1]

Most courts to address the subject have not read Rule 404(b) to require pretrial disclosure of specific facts regarding 404(b) evidence to be introduced at trial, following the Committee Note's admonition that "no specific form of notice" is required. For example, in United States v. Kern, 12 F.3d 122, 124 (8th Cir. 1993), a bank robbery case, the court held that the Government had provided sufficient notice of its intention to introduce evidence of a subsequent robbery allegedly carried out by defendants by informing the defense at a pretrial hearing that it "might use some evidence from some local robberies" and by later (one week prior to trial) providing the defense with copies of the state authorities' reports of the robberies, once they were obtained.

Along the same lines, the Eighth Circuit affirmed another bank robbery/firearms conviction, holding that two days advance notice of 404(b) evidence of illegal drug use by defendant was permissible where the Government did not obtain the evidence until a Friday five days before the trial and disclosed

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[1] Courts have held that the defense request for disclosure under 404(b) must be timely and reasonably specific, preferably mentioning the provision itself. See, e.g., United States v. Tuesta-Toro, 29 F.3d 771, 774-75 (1st Cir. 1994) ("at a minimum the defense must present a timely request sufficiently clear and particular, in an objective sense, to fairly alert the prosecution that the defense is invoking its specific right to pretrial notification [under 404(b)]"). The defense has met that requirement here. One court has noted that the Rule requires defendant merely to make a request of the Government; a motion before the court is unnecessary. United States v. Goldberg, 855 F. Supp. 725, 731 (M.D. Pa. 1994).

it to the defense on the following Monday. United States v. Sutton, 41 F.3d 1257, 1258-59 (8th Cir. 1994) cert. denied, 115 S. Ct. 1712 (1995). The court noted that the Government had previously turned over a witness statement implicating the defendant in an illegal drug buy on the day of the robbery, so that in any event the defense had notice that the Government might raise the issue of defendant's illegal drug use at trial. Id.[2]

In a case decided shortly after the notice amendment became effective, a Federal judge in Illinois rejected as overbroad a defense motion for disclosure under 404(b) nearly identical to the ones made by Tucker and Marks. United States v. Sims, 808 F. Supp. 607, 610 (N.D. Ill. 1992). Defendants sought production of "the dates, times, places and persons involved in the specific crimes or acts; the statements of each participant; the documents which contain such evidence; and a statement of issues to which the government believes such evidence may be relevant." Id. at 611. Noting that the Committee specifically considered and rejected a requirement that the pretrial notice "satisfy the particularity requirements normally required of language used in a charging document," the court held that neither the Rule nor the accompanying Committee Note entitles the defense to such specific pretrial discovery. Id. The notice

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[2] The court went on to hold that the evidence of defendant's drug use, which was offered as evidence of motive for the robbery, was inadmissible as unduly prejudicial, but the court ultimately held the error harmless. 41 F.3d at 1259-60.

requirement, the court observed, is intended to prevent surprise; it "is not a tool for open ended discovery." Id. at 610. Accord United States v. Damico, 1995 WL 221883 (N.D. Ill. April 10, 1995); United States v. Agunloye, 1995 WL 340760 (N.D. Ill. June 1, 1995); United States v. Jackson, 850 F. Supp. 1481, 1493 (D. Kan. 1994); United States v. Washington, 819 F. Supp. 358, 367-68 (D. Vt. 1993) (rejecting similar requests); see also United States v. Williams, 792 F. Supp. 1120, 1134 (S.D. Ind. 1992) ("the purpose of the . . . notice provision, to prevent surprise during trial, does not support providing a defendant with the materials which the Government possesses and plans to offer at trial"), followed in United States v. Richardson, 837 F. Supp. 570, 575-76 (S.D.N.Y. 1993) (notice of "general nature" of 404(b) evidence is "all that is required" by the Rule and is "sufficient to allow the defendant to adequately prepare for trial").

However, at least two circuits' decisions (and those of several district courts) suggest that the notice required under 404(b) must contain more than a general description of the extrinsic conduct to be introduced at trial. Citing the need for the trial court eventually to make a determination as to the admissibility for 404(b) evidence, these courts have seemingly imported into 404(b)'s pretrial notice requirement a requirement that the Government provide the defense and/or the trial court with certain details regarding the evidence, as well as a specific articulation of the purpose for which the 404(b) evidence is to be used at trial. The Sixth Circuit, surveying

several other courts' treatment of 404(b), held that "the government's notice must characterize the prior conduct to a degree that fairly apprises the defendant of its general nature." However, the court also declared that the notice "must be sufficiently clear so as 'to permit pretrial resolution of the issue of its admissibility.'" United States v. Barnes, 49 F.3d 1144, 1148-49 (6th Cir. 1995).[3] A case from the Tenth Circuit may also be read to require the Government's 404(b) notice to describe precisely each piece of evidence and "articulate with precision [its] evidentiary purpose." See United States v. Birch, 39 F.3d 1089, 1093 (10th Cir. 1994).[4]

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[3] Barnes also declares that a request for disclosure under 404(b) triggers a continuing duty on the part of the Government to disclose newly revealed evidence. 49 F.3d at 1148. But see United States v. Tuesta-Toro, 29 F.3d 771, 775 n.1 (1st Cir. 1994) (rule as read suggests that Government need only give notice of 404(b) evidence it intends to use as of the time the defendant's request is made).

[4] Birch, at least, may be distinguishable. The appellant there did not raise the specific issue of insufficient notice, but challenged generally the admissibility of the 404(b) evidence introduced at trial; the court found that the prerequisite articulation of evidentiary purpose was absent both from the Government's submitted pretrial notice and from the record of the Government's submission of the evidence at trial. See id. However, United States v. Kendall, 766 F.2d 1426, 1436 (10th Cir. 1985) cert. denied, 474 U.S. 1081 (1986), cited by the Birch court, held that such articulation was required at the time the evidence is offered for admission, to aid the trial court in making its determination and to make a record in case of appeal. Id. at 1436-37. Kendall obviously was decided well before 404(b) was amended to include a notice requirement; further, as several courts have noted (see infra), the purposes of the notice requirement differ greatly from those underlying the provisions of Rule 404 governing admissibility at trial. Thus, the most that Birch bears on the proper content of the Government's pretrial notice is that if the notice includes a precise articulation of the intended purposes of the 404(b) evidence to be used, the Government need not make another such articulation

The Committee Note to the 1991 Amendment does state that one of the Amendment's purposes was to "promote early resolution on the issue of admissibility." However, the Note plainly distinguishes between the requisite pretrial notice, of which "no specific form . . . is required" and the ultimate issue of admissibility, which is typically determined at trial; the Note specifically anticipates pretrial in limine rulings on the admissibility of 404(b) evidence, for which the court may require the Government "to disclose to [the court] the specifics of such evidence which the court must consider in determining admissibility." The court in United States v. Melendez, 1992 WL 96327 (S.D.N.Y. Apr. 24, 1992) recognized this distinction, noting that while the Rule requires only disclosure of the "general nature" of 404(b) evidence, "the Advisory Committee does not appear to contemplate that [the] notice need include 'the specifics of such evidence which the court must consider in determining admissibility,' since it refers to such specifics as something the Court may require to be disclosed in ruling in limine, a step to follow upon the notice." Id. at *1. The court nonetheless held that proper notice did require the government to identify "each crime, wrong or act by its specific nature" including dates, places, and type of wrong committed. Id. See also, e.g., United States v. Johnson, 1994 WL 805243 *5 (W.D.N.Y. Aug. 9, 1994) (requiring pretrial disclosure by Government "in sufficient detail to permit defense counsel to prepare and file

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prior to submitting the evidence for admission at trial.

appropriate motions in limine on the issue of admissibility"); United States v. Altimari, 1994 WL 116086 *8 (S.D.N.Y. Mar. 25, 1994) (ordering Government to give notice "in writing and in an understandable manner, of the specific prior act evidence it intends to offer"); but see Damico, 1995 WL 221883 *4 (rejecting defense request for specific disclosure of 404(b) evidence as overbroad, but citing the Committee Note in observing that "[t]his court may require the government to disclose to it [in camera] the specifics of such evidentiary detail which the court must consider in determining admissibility"); see also United States v. Williams, 1993 WL 270504 (D. Kan. June 16, 1993) (finding sufficient Government's pretrial notice containing "descriptions of the general nature" of 404(b) evidence to be introduced at trial, but ordering Government to disclose to defense, at least one day prior to introducing evidence at trial, specific evidence, including identification of the purpose for which evidence will be offered).

The court in United States v. Long, 814 F. Supp. 72 (D. Kan. 1993) held insufficient as notice a letter sent by the U.S. Attorney to defense stating that 404(b) evidence would be introduced, and noting that a particular witness would testify "consistent with his prior statement," which statement the Government had already produced to the defense. Id. at 73. The court denied the defense motion to prohibit introduction of the evidence, and instead ordered the Government to amend its notice to "describe the nature of the defendant's prior conduct the

government intends to introduce" via the witness's testimony. Id. at 74. Defendant's request did not seek "unduly detailed information . . . [r]ather, the defendant simply seeks notice of the general nature of such evidence to permit pretrial resolution of the issue of its admissibility." Id. The court apparently did not believe that the admissibility determination would require detailed information, although it did suggest that the Government include in its amended notice "the specific purpose, among those listed in [Rule 404(b)], for which the evidence is intended to be introduced at trial." Id. The court cited with approval Van Pelt, 1992 WL 371640 (D. Kan. Dec. 1, 1992), where the court held that the prosecution's notice providing "fairly detailed descriptions" of the 404(b) evidence was sufficient; nonetheless the court also quoted the Committee Note's admonition that the Rule did not intend to impose "the particularity requirements [of] a charging document" upon 404(b) pretrial notice. 814 F. Supp. at 74.

The Second Circuit has affirmed the intention expressed in the Committee Note to the 1991 Amendment that the Rule does not require the Government to disclose "either directly or indirectly" the identity of witnesses in advance of trial. United States v. Matthews, 20 F.3d 538, 551 (2d Cir. 1994). In Matthews, appellant objected that he had not received notice that the Government intended to introduce extrinsic evidence of his having attacked a woman with an icepick. The court held that where the testimony constituting 404(b) evidence itself would

reveal the identity of the witness (in this case, defendant had apparently ever attacked only one person with an icepick), the evidence itself need not be disclosed, either generally or specifically. Id.

The Eleventh Circuit has crafted a three-element test, analogizing the 404(b) notice requirement to other, more specific discovery notice requirements (e.g., Rules 609(b), 803(24), 805(b)(5)), to determine whether notice was sufficient in retrospect in a particular circumstance. United States v. Perez-Tosta, 36 F.3d 1552, 1560-63 (11th Cir. 1994). Pretrial notice under 404(b) is reasonable depending on:

> (1) When the Government, through timely preparation for trial, could have learned of the availability of the witness;
> (2) The extent of prejudice to the opponent of the evidence from a lack of time to prepare; and
> (3) How significant the evidence is to the prosecution's case.

Id. at 1562. Citing the Committee Note to the 1991 Amendment, the court observed that the determination must be made case-by-case, and that the decision with regard to admissibility of 404(b) evidence remains within the discretion of the trial court and is reviewed accordingly on appeal. Id. at 1561.

Additional Factors

Prior crimes and bad acts which are directly relevant to the criminal acts charged need not be disclosed. "Where the evidence of an act and the evidence of a crime charged are

inextricably intertwined, the act is not extrinsic and Rule 404(b) is not implicated." United States v. DeLuna, 763 F.2d 897, 913 (8th Cir.), cert. denied, 474 U.S. 980 (1985), quoted in United States v. Severe, 29 F.3d 444, 447 (8th Cir. 1994) (in context of admissibility challenge based on lack of notice under 1991 amendment to Rule 404(b)) cert. denied, 115 S. Ct. 763 (1995). Accord United States v. Oakie, 12 F.3d 1436, 1441-42 (8th Cir. 1993) reh'g en banc denied, Jan. 28, 1994.

Where the Government intends to use extrinsic 404(b) evidence solely for the purpose of impeaching the defendant when he testifies as provided under Rule 608(b), notice of such intended use need not be given. United States v. Tomblin, 46 F.3d 1369, 1388 n.51 (5th Cir. 1995). But see United States v. Matthews, 20 F.3d 538, 551 (2d Cir. 1994) (the notice provision "applies whether the government wishes to use the other-act evidence in its direct case, on rebuttal, or as impeachment") (citing Fed. R. Evid. 404(b) Advisory Committee Note); accord United States v. Jackson, 850 F. Supp. 1481, 1494 (D. Kan. 1994).

Where the defense is already aware of the Government's possession of and intention to introduce 404(b) evidence at trial, the Government's failure to provide formal notice in response to a motion for disclosure is of no moment, and will not affect the evidence's admissibility. See United States v. Adediran, 26 F.3d 61, 64 (8th Cir. 1994).

Timing of Government Response

The length of time in advance of trial required for adequate notice generally depends on circumstances, and is within the court's discretion to determine. For example, in United States v. Kern, 12 F.3d 122, 124 (8th Cir. 1993), the magistrate judge had ordered the Government to make its 404(b) disclosures at least two weeks prior to the trial. Where the Government had informed the defense orally at a pretrial conference of its intention to use 404(b) evidence pertaining to the later commission by defendant of a similar crime as the one charged, the appeals court held that the Government had provided sufficient notice by later (one week prior to trial) providing the defense with specific reports of such crimes once they were obtained from state authorities.

In United States v. Sutton, 41 F.3d 1257, 1258-59 (8th Cir. 1994) cert. denied, 115 S. Ct. 1712 (1995), the court held that two days advance notice that the Government intended to introduce evidence of illegal drug use by defendant was permissible where the Government did not obtain the evidence until a Friday five days before the trial and disclosed it to the defense on the following Monday, despite the trial court's order that the Government was required to give notice of all such evidence at least four days before trial.

In United States v. Williams, 1993 WL 270504 (D. Kan. June 16, 1993), the court ordered the Government to disclose to

the defense, at least one day prior to introducing 404(b) evidence at trial, specific details regarding such evidence, including identifying the purpose for which evidence would be offered.

Other examples of advance notice deemed "reasonable" are United States v. Johnson, 1994 WL 805243 *5 (W.D.N.Y. Aug. 9, 1994) (thirty days before trial, or prior to a scheduled pretrial conference); United States v. Messino, 855 F. Supp. 955, 965 (N.D. Ill. 1994) (thirty days prior to trial); United States v. Altimari, 1994 WL 116086 (S.D.N.Y. Mar. 25, 1994) (fifteen days before trial); United States v. Richardson, 837 F. Supp. 570, 576 (S.D.N.Y. 1993) (ten days prior to trial); United States v. Evangelista, 813 F. Supp. 294, 302 (D.N.J. 1993) (ten business days prior to trial "because alleged incidents occurred more than five years ago [and thus] defendants' preparation to respond to [the evidence] may require more effort than if the incidents had occurred more recently"); United States v. Williams, 792 F. Supp. 1120, 1133-34 (S.D. Ind. 1992) (ten days prior to trial); United States v. Green, 144 F.R.D. 631, 645 (W.D.N.Y. 1992) (thirty days prior to jury selection due to "the complexity and volume of the evidence") and United States v. Melendez, 1992 WL 96327 *1 (S.D.N.Y. Apr. 24, 1992) (fourteen days prior to trial).

At least one court has considered, and rejected, a defendant's argument that Rule 404(b) requires that the court set a pretrial deadline by which the Government must either disclose all "bad acts" evidence it intends to introduce, or be precluded

from further such disclosure and/or introduction. United States v. Van Pelt, 1992 WL 371640 *14 (D. Kan. Dec. 1, 1992).

22 Wright & Miller, Federal Practice and Procedure Rule 404
(TREATISE MAIN VOLUME)
(Publication page references are not available for this document.)

Federal Practice and Procedure
Federal Rules of Evidence
Charles Alan Wright
Kenneth W. Graham, Jr.



Chapter 5 Relevancy and Its Limits

Rule 404. Character Evidence Not Admissible to Prove Conduct: Exceptions: Other Crimes

TEXT OF RULE 404 (a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except: (1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same; (2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor; (3) Character of witness. Evidence of the character of a witness, as provided in Rules 607, 608, and 609. (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Advisory Committee's Note

Subdivision (a). This subdivision deals with the basic question whether character evidence should be admitted. Once the admissibility of character evidence in some form is established under this rule, reference must then be made to Rule 405, which follows, in order to determine the appropriate method of proof. If the character is that of a witness, see Rules 608 and 610 for methods of proof. Character questions arise in two fundamentally different ways. (1) Character may itself be an element of a crime, claim, or defense. A situation of this kind is commonly referred to as "character in issue." Illustrations are: the chastity of the victim under a statute specifying her chastity as an element of the crime of seduction, or the competency of the driver in an action for negligently entrusting a motor vehicle to an incompetent driver. No problem of the general relevancy of character evidence is involved, and the present rule therefore has no provision on the subject. The only question relates to allowable methods of proof, as to which see Rule 405, immediately following. (2) Character evidence is susceptible of being used for the purpose of suggesting an inference that the person acted on the occasion in question consistently with his character. This use of character is often described as "circumstantial." Illustrations are: evidence of a violent disposition to prove that the person was the aggressor in an affray, or evidence of honesty in disproof of a charge of theft. This circumstantial use of character evidence raises questions of relevancy as well as questions of allowable methods of proof. In most jurisdictions today, the circumstantial use of character is rejected but with important exceptions: (1) an accused may introduce pertinent evidence of good character (often misleadingly described as "putting his character in issue"), in which event the prosecution may rebut with evidence of bad character; (2) an accused may introduce pertinent evidence of the character of the victim, as in support of a claim of self-defense to a charge of homicide or consent in a case of rape, and the prosecution may introduce similar evidence in rebuttal of the character evidence, or, in a homicide case, to rebut a claim that deceased was the first aggressor, however proved; and (3) the character of a witness may be gone into as bearing on his credibility. McCormick ss 155-161. This pattern is incorporated in the rule. While its basis lies more in history and experience than in logic an underlying justification can fairly be found in terms of the relative presence and absence of prejudice in the various situations. Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutgers

22 Wright & Miller, Federal Practice and Procedure Rule 404
(TREATISE SUPPLEMENT)
(Publication page references are not available for this document.)

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1994 Supplement

Chapter 5 Relevancy and Its Limits

Rule 404. Character Evidence Not Admissible to Prove Conduct: Exceptions: Other Crimes

TEXT OF RULE 404

1991 Amendments

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Committee Note to 1991 Amendments

Rule 404(b) has emerged as one of the most cited Rules in the Rules of Evidence. And in many criminal cases evidence of an accused's extrinsic acts is viewed as an important asset in the prosecution's case against an accused. Although there are a few reported decisions on use of such evidence by the defense, see, e.g., United States v. McClure, 546 F.2d 670 (5th Cir.1990) (acts of informant offered in entrapment defense), the overwhelming number of cases involve introduction of that evidence by the prosecution. The amendment to Rule 404(b) adds a pretrial notice requirement in criminal cases and is intended to reduce surprise and promote early resolution on the issue of admissibility. The notice requirement thus places Rule 404(b) in the mainstream with notice and disclosure provisions in other rules of evidence. See, e.g., Rule 412 (written motion of intent to offer evidence under rule), Rule 609 (written notice of intent to offer conviction older than 10 years), Rule 803(24) and 804(b)(5) (notice of intent to use residual hearsay exceptions). The Rule expects that counsel for both the defense and the prosecution will submit the necessary request and information in a reasonable and timely fashion. Other than requiring pretrial notice, no specific time limits are stated in recognition that what constitutes a reasonable request or disclosure will depend largely on the circumstances of each case. Compare Fla.Stat.Ann. s 90.404(2)(b) (notice must be given at least 10 days before trial) with Tex.R.Evid. 404(b) (no time limit). Likewise, no specific form of notice is required. The Committee considered and rejected a requirement that the notice satisfy the particularity requirements normally required of language used in a charging instrument. Cf. Fla.Stat.Ann. s 90.404(2)(b) (written disclosure must describe uncharged misconduct with particularity required of an indictment or information). Instead, the Committee opted for a generalized notice provision which requires the prosecution to apprise the defense of the general nature of the evidence of extrinsic acts. The Committee does not intend that the amendment will supercede other rules of admissibility or disclosure, such as the Jencks Act, 18 U.S.C. s 3500, et seq. nor require the prosecution to disclose the names and addresses of its witnesses, something it is currently not required to do under Federal Rule of Criminal Procedure 16. The amendment requires the prosecution to

provide notice, regardless of how it intends to use the extrinsic act evidence at trial, i.e., during its case-in-chief, for impeachment, or for possible rebuttal. The court in its discretion may, under the facts, decide that the particular request or notice was not reasonable, either because of the lack of timeliness or completeness. Although the amendment does not address specifically the issue of sanctions for failure to provide notice, the Court in its discretion may enter appropriate orders. The amendment is not intended to redefine what evidence would otherwise be admissible under Rule 404(b). Nor is it intended to affect the role of the court and the jury in considering such evidence. See United States v. Huddleston, ___ U.S. ___, 108 S.Ct. 1496 (1988).

1987 Amendments

(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: (1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

* * * * * (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Committee Note to 1987 Amendments

The amendments are technical. No substantive change is intended. [FNa] [FNa]But see s 5231.1, this supplement.

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Federal Practice and Procedure
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1994 Supplement

Chapter 5 Relevancy and Its Limits

Rule 404. Character Evidence Not Admissible to Prove Conduct: Exceptions: Other Crimes

s 5249. OTHER CRIMES, WRONGS, OR ACTS--PROCEDURE

The same double standard that seems to mar the substantive application of Rule **404(b),** [FN2.1] now appears to be creeping into the procedure for implementing the Rule. [FN2.2]

In 1991 the Supreme Court adopted a notice provision for Rule **404(b).** [FN9.1] Under the amended Rule, the prosecution must give notice if the defense requests such notice. However, the rule provides no sanction for failure to give notice, the notice must only be of the "general nature" of the evidence, and can be delayed until the time of trial if the court finds "good cause" for such delay. This was apparently as much notice as the Justice Department was willing to tolerate; it remains to be seen if it will be of much use to criminal defendants.

One recent case suggests that the trial judge has no duty to engage in the balancing of probative worth and prejudice if the defendant does not request this. [FN19.1] If this means that the defendant must object and request balancing if the objection is overruled, it is clearly wrong. Both the Advisory Committee's Note and the better-reasoned cases make it clear that the balancing process is an essential part of the decision to admit other crimes evidence, and an objection suffices to trigger the duty to balance. [FN19.2]

One court has applied the Luce doctrine to other crimes evidence, holding that if the trial court rules on a motion in limine that evidence of other crimes will be admissible if the defense counsel makes a particular form of argument, the issue is not preserved for appeal unless counsel makes the argument and the other crimes evidence is admitted against the defendant. [FN20.1]

Even in the absence of an objection, admission of evidence of other crimes may be reviewable on appeal as plain error. [FN22.1]

In Huddleston v. United States [FN25.1] the Supreme Court rejected the argument made in the main volume and most of the caselaw on the proof of preliminary facts in the use of other crimes evidence. In an opinion by the Chief Justice, a unanimous Court held that proof of the preliminary facts was governed by Rule 104(b), rather than Rule 104(a). [FN25.2] Huddleston involved the use of other sales of stolen property to prove that the defendant knew that the goods he was charged with selling were stolen property. [FN25.3] The preliminary fact to be proved was whether the defendant had known the property involved in the uncharged crimes had been stolen and the Court held that the trial court need find only that a reasonable jury could find the preliminary fact by a preponderance of the evidence. [FN25.4] As with other questions of conditional relevance, the Court held that the other crimes evidence could be admitted subject to later proof of the preliminary fact. [FN25.5] In making its determination, the opinion suggests that the trial judge can consider not only the evidence with respect to the uncharged crime, but also with respect to the charged crime; that is, in determining whether the defendant was

guilty of the uncharged crime, the court can take into account evidence that suggests that he was guilty of the charged crime. [FN25.6] Although the opinion does not mention this, the trial court must instruct the jury to disregard the uncharged crime if they do not find the preliminary fact to have been proved by a preponderance of the evidence. [FN25.7]

Admissibility of evidence under Rule **404(b)** is not required to be resolved at a pretrial hearing to avoid prejudicing trier of fact in a court trial. [FN28.1]

It is important for the court to distinguish between evidence of other acts offered under Rule **404(b)** and those offered under Rule 608(b) because the requirements for admissibility are substantially different under each rule. [FN29.1]

In other cases the issues may be clear from the arguments of counsel or the tenor of cross-examination of prosecution witnesses. [FN38.1]

One court has held that before the defendant can be asked about any other crimes, the prosecutor must show a good faith basis for the questions. [FN46.1]

All of the prior federal caselaw on the standard for proof of other crimes has been swept away by a Supreme Court decision that such evidence is admissible merely on a showing that a reasonable jury could find the defendant committed the prior crime by a preponderance of the evidence. [FN47.1] It remains to be seen whether or not the state courts will take the same view.

In 1991 the Supreme Court adopted a notice provision for Rule **404(b).** [FN9.1] Under the amended Rule, the prosecution must give notice if the defense requests such notice. However, the rule provides no sanction for failure to give notice, the notice must only be of the "general nature" of the evidence, and can be delayed until the time of trial if the court finds "good cause" for such delay. This was apparently as much notice as the Justice Department was willing to tolerate; it remains to be seen if if will be of much use to criminal defendants.

The Louisiana Evidence Code specifically provides that the enactment of Rule **404(b)** and 104(a) does not alter the pre-existing caselaw that requires other crimes to be proved by clear and convincing evidence, but allows the courts to change these rules. [FN57.1]

The Fifth Circuit Court of Appeals, sitting en banc, has said that Rule **404(b)** does not incorporate the pre-existing caselaw governing the use of evidence of other crimes. [FN61.1] The court adopts a two-step analysis suggested by a student writer. [FN61.2] To be admissible under this scheme, evidence of other crimes must do no more than satisfy the minimal standard of relevance in Rule 401; [FN61.3] then the judge must apply the balancing test of Rule 403. [FN61.4] Although the court seems to read back some of the pre-existing caselaw into the trial judge's balancing under Rule 403, [FN61.5] the thrust of the opinion is that hereafter trial courts should admit evidence of other crimes more freely than has been done in the past. [FN61.6]

The court flatly rejects the notice that prior crimes must be proved by "clear and convincing evidence," holding that the proper standard is to be found in Rule 104(b). [FN61.7] The court does not specify what "preliminary fact" it thinks is involved in the proof of other crimes. [FN61.8] Moreover, the implicit ruling that the admissibility of character evidence is a question for the jury rather than the trial judge seems highly questionable. [FN61.9] It will be interesting to see if the court will apply Rule 104(b) to the determination of the admissibility of evidence under Rules 406-411 as well.

In Oklahoma, it has been suggested that where the prosecution uses proof of crime as other crimes evidence, it cannot thereafter be the basis of another prosecution against the defendant. [FN80.1] This would certainly tend to discourage the strategy of holding back stronger cases until they have been used as other crimes evidence in prosecutions where the evidence against the defendant is weaker.

Some courts have begun to emphasize the importance of the trial judge making an adequate record of his decision, including the purpose for which the evidence was admitted and the reasons therefor. [FN92.1]

A ruling that evidence of extrinsic offenses is inadmissible must be honored by the proponent; a deliberate attempt to prove the other crime by circumstantial evidence is egregious misconduct and grounds for a mistrial or a reversal on appeal. [FN96.1]

Perhaps for these reasons, the trial judge is under no duty to give a cautionary instruction sua sponte; it must be requested by counsel. [FN2.1]

Another procedural device used in the control of evidence of other crimes is the mistrial. [FN8.1]

There are a number of recent opinions that do offer guidance to trial judges in distinguishing the legitimate uses of this form of proof from the ersatz justifications sometimes offered by counsel. [FN11.1]

FN2.1 Double standard See s 5248, note 31, this supplement.

FN2.2 Creeping into See, e.g., U.S. v. Acosta-Cazares, C.A.6th, 1989, 878 F.2d 945, 949-950, certiorari denied 110 S.Ct. 255, 493 U.S. 899, 107 L.Ed.2d 204 (prosecutor's lying about intent to use other crimes evidence excused on grounds of ignorance; defense denied review of 403 balancing because counsel did not utter magic words in colloquy on admissibility at trial despite pretrial objections to use).

FN9.1 Rule **404(b)** notice The text of the amended rule and the Advisory Committee's Note thereto appear in this supplement immediately before the supplementary materials for s 5231.

FN19.1 No duty without request State v. Gollon, App.1983, 340 N.W.2d 912, 918, 115 Wis.2d 592.

FN19.2 Balancing essential See, for example, the two-step process for admission prescribed in the leading case of U.S. v. Beechum, C.A.5th, 1978, 582 F.2d 898 (described in s 5249 of this supplement). The correct view is also explained in the able dissenting opinion of Abrahamson, J., in State v. Rutchik, Sup.Ct., 1984, 341 N.W.2d 639, 650 n. 1, 116 Wis.2d 61.

FN20.1 Luce doctrine U.S. v. Ortiz, C.A.2d, 1988, 857 F.2d 900, 906. For a nice contrast to the Luce doctrine, see U.S. v. Sullivan, C.A.7th, 1990, 911 F.2d 2, 8 (defendant's failure to object to co-defendant's introduction of evidence of bribe by X allows government, which also did not object, to introduce evidence that X said that defendant had accepted a similar bribe--evidence totally irrelevant to rebut evidence admitted without objection). Motion in limine was not sufficient to preserve error in admission of other crimes evidence where the trial judge declined to rule until evidence was offered at trial and no objection was made at that time. Doty v. Sewall, C.A.1st, 1990, 908 F.2d 1053, 1056.

FN22.1 Plain error Improper admission of evidence of a prior crime or conviction, even in the face of other evidence amply supporting the verdict, constitutes plain error impinging upon the fundamental fairness of the trial itself. U.S. v. Parker, C.A.10th, 1979, 604 F.2d 1327, 1329.

FN25.1 Huddleston decision 1988, 108 S.Ct. 1496, 485 U.S. 681, 99 L.Ed.2d 771. For a good illustration of synergistic effect of reducing the standard of proof of other crimes, see U.S. v. Rodriguez, C.A.6th, 1989, 882 F.2d 1059, 1064 (evidence of another drug transaction by a person who visited defendant at about the same time admissible to show that defendant was in possession of drugs for sale). Testimony of police officer that defendant had sold him cocaine on prior occasion was admissible under Rule **404(b)** without any other evidence that substance was in fact cocaine. U.S. v. Gibbs, C.A.D.C.1990, 904 F.2d 52, 56.

FN25.2 Governed by 104(b) 108 S.Ct. at 1500-1501, 485 U.S. at 687-688.

FN25.3 Knew stolen 108 S.Ct. at 1498, 485 U.S. at ___ . Although the court does not discuss this, the relevance of the evidence was based on the "doctrine of chances"; that is, how likely is it that a person could sell so much stolen property without learning that it was not of legitimate origin?

FN25.4 Could find preponderance 108 S.Ct. at 1501, 485 U.S. at 689. Huddleston holds that trial court need not make any preliminary finding that the prosecution has proved another crime by even a preponderance of the evidence before submitting the evidence to a jury. U.S. v. Manso-Portes, C.A.7th, 1989, 867 F.2d 422, 425.

FN25.5 Later determination 108 S.Ct. at 1501 n. 7, 485 U.S. at 690. Since the Court cites this Treatise and points out that Rules do not alter the trial judge's discretion with respect to the order of proof, it seems safe to assume that the Court would accept the caveat in vol. 21, pp. 271 about prior determination of the preliminary fact where the proffered evidence is highly prejudicial.

FN25.6 Guilt of charged crime This is defensible in Huddleston where the relevance of the evidence of both the charged and uncharged crimes rests on the "doctrine of chances", see note 25.3 above, because the use of the evidence does not require any inference as to character or resort to circular reasoning. The Court's suggestion, however, could be read as an invitation to find that since there is evidence that the defendant was guilty of the charged crime, this can be used to support an inference that he was also guilty of the uncharged crime so that crime can be used to prove he was guilty of the charged crime, thus adding up two cases of proof by preponderance to one case of proof beyond a reasonable doubt. This seems to violate the policy of Rule **404(b)**, particularly where the inference from the proof of the charged crime to the uncharged crime is that the defendant has a criminal character and must, therefore, have committed the uncharged crime. Consider, for example, the common case where the defendant is charged with a sex crime as to which the jury could find guilt by a preponderance but not beyond a reasonable doubt and the prosecution wants the victim to testify the defendant did the same thing on five other occasions where there is no other proof of guilt on those occasions. It does not seem logical to say that the addition of these other uncorroborated accusations adds anything to the prosecution's case, but if the corroboration as to the charged crime allows the jury to infer that the defendant is a sex maniac who must be guilty of the others as well, the jury is likely to do just that.

FN25.7 Must instruct See vol. 21, pp. 271-272. Since most of the current instructions on the use of other crimes evidence are so poor, one shudders to think what such instructions will look like.

FN28.1 Court trial State v. Sirek, Minn.App.1985, 374 N.W.2d 481, 484.

FN29.1 Distinguish Rule 608(b) State v. Morgan, 1986, 340 S.E.2d 84, 91, 315 N.C. 626 (suggesting that because this is not easy to determine, that trial court indicate on the record the purpose for which the evidence is being admitted).

FN38.1 Arguments or cross-examination Mere reliance on mistaken identity defense did not remove issues of knowledge and intent from drug case where this was not clear when evidence was offered, defendant made no clear offer to stipulate, and argued "mere presence" in car where drugs were found was not sufficient to convict. U.S. v. Ferrer-Cruz, C.A.1st, 1990, 899 F.2d 135, 139. Trial court properly ruled that if defense counsel planned to argue that amount of heroin was as consistent with personal use as with intent to distribute that this would put intent in issue and open the door to use of other crimes to prove intent. U.S. v. Ortiz, C.A.2d, 1988, 857 F.2d 900, 904. Cross-examination of prosecution witness that suggested defendant had no knowledge of charged conspiracy opened door to proof of other bad acts on this issue. U.S. v. Walker, C.A.5th, 1983, 710 F.2d 1062, 1067. Evidence of other crimes offered to prove his opportunity to commit crime was admissible even though he did not "dispute" the issue in the ordinary sense of the term where defense theory of the case brought the issue into prominence as a practical matter. U.S. v. DeJohn, C.A.7th, 1981, 638 F.2d 1048, 1052 n. 4. In prosecution for misapplying tribal funds, cross-examination by defense counsel of witnesses concerning possible authorization of defendant's conduct placed in issue the defendant's wilfulness and it was therefor proper to permit use of other crimes on the issue of intent. U.S. v. Foote, C.A.8th, 1980, 635 F.2d 671, 673. Where defense counsel emphasized in his opening statement that knowledge that property was stolen was an essential element of the government's prima facie case, the issue was in dispute and could be proved by prior crimes. U.S. v. Berkwitt, C.A.7th, 1980, 619 F.2d 649, 655. When the

prosecution offers evidence of other crimes on an issue, counsel must express a decision not to dispute the issue with sufficient clarity to justify the judge in excluding any evidence or jury argument that raises that issue and in charging the jury that they need not find that element of the crime because it is not disputed; this can be done by a formal stipulation, but a stipulation is not necessary to remove the issue. U.S. v. Figueroa, C.A.2d 1980, 618 F.2d 934, 942. Defendant raised issue of entrapment by motion for directed verdict thus making admissible evidence of prior crime to rebut. Jackson v. State, 1984, 677 S.W.2d 866, 869, 12 Ark.App. 378. Where at the time evidence of other crimes was offered on the issue of intent, defendant had not conceded intent, did not state that identity was the only issue, and did not offer to stipulate to intent, prosecution was properly allowed to introduce evidence. People v. Johnson, 1981, 176 Cal.Rptr. 390, 123 Cal.App.3d 106. If the defense attempts to show that the complaining witness is mistaken in her identification of the defendant, identity is in issue and state may then introduce evidence of other crimes on this issue. State v. Harris, App.1985, 365 N.W.2d 922, 926, 123 Wis.2d 231.

FN46.1 Show good faith State v. Flannigan, 1985, 338 S.E.2d 109, 110, 78 N.C.App. 629 (holding confused hearsay statement of abused child was not sufficient). One wonders if the court has not, perhaps, creatively confused Rule **404(b)** with Rule 405(a). See s 5268, p. 622 in the main volume.

FN47.1 Merely preponderance Huddleson v. U.S., 1988, 108 S.Ct. 1496, 485 U.S. 681, 99 L.Ed.2d 771. Evidence of prior entrapment by DEA agents offered to support defense of entrapment failed to meet the Huddleston standard for admission because no reasonable jury could conclude prior incident was entrapment. U.S. v. Rodriguez, C.A.11th, 1990, 917 F.2d 1286, 1290, vacated in part on another point, on rehearing 1991, 935 F.2d 194. Under Huddleston, evidence of prior injuries to child was admissible in murder case without any proof that defendant caused these injuries beyond what could be inferred by his access to child at time of injury. U.S. v. Boise, C.A.9th, 1990, 916 F.2d 497, 501. After Huddleston, evidence of other crimes comes in even though the sole witness to them was an admitted liar whose uncorroborated testimony was given to avoid prosecution for his own crimes. U.S. v. Newton, C.A.8th, 1990, 912 F.2d 212, 213. Evidence that identifying marks had been obliterated from historical documents that defendant had offered for sale and from others found in his possession was sufficient to support conclusion that defendant had obliterated them. U.S. v. Mount, C.A.1st, 1990, 896 F.2d 612, 622. Huddleston standard for admission of other crimes was not met where defendant denied any knowledge of act, there was no evidence he was knowledgeable about prostitution ring, and he had been told he was not a target of grand jury investigation of ring. U.S. v. DeGerratto, C.A.7th, 1989, 876 F.2d 576, 585. Huddleston sweeps away all prior procedures for admissibility of other crimes and substitutes a "four-step framework" that requires a proper purpose, relevance thereto, balancing under Rule 403, and a limiting instruction under Rule 105. U.S. v. Record, C.A.10th, 1989, 873 F.2d 1363, 1374. An early call for Supreme Court clarification of the issue appeared in A.B.A. Section of Litigation, Emerging Problems Under The Federal Rules of Evidence, Joseph ed. 1983, p. 66 (seeming to lean toward the view adopted in Huddleston).

FN57.1 Louisiana La.Evid.Code Art. 1103: "Article **404(B)** and 104(A) neither codifies nor affects the law of other crimes evidence, as set forth in State v. Prieur, 277 So.2d 126 (La.1973), State v. Davis, and State v. Moore and their progeny, as regards the notice requirement and the clear and convincing evidence standard in regard to other crimes evidence. Those cases are law and apply to Article **404(B)** and 104(A), unless modified by subsequent state jurisprudential development."

FN61.1 Does not incorporate U.S. v. Beechum, C.A.5th, 1978, 582 F.2d 898. For a clear statement of the "demanding standards" applied prior to Beechum, see U.S. v. Herzberg, C.A.5th, 1977, 558 F.2d 1219, 1224. Requirement of clear and convincing evidence does not apply to evidence that bullet proof vest was found in same search that turned up charged drugs. U.S. v. McDowell, C.A.D.C., 1985, 762 F.2d 1072, 1075 n. 3. Court would follow Fifth Circuit in holding that Rule **404(b)** repealed requirement that other crimes be proved by "clear and convincing" evidence. U.S. v. Martin, C.A.4th, 1985, 773 F.2d 579, 582. Court rejects Beechum holding because it believes that requirement of clear and convincing evidence of other crimes serves a legitimate function. U.S. v. Byrd, C.A.7th, 1985, 771 F.2d 215, 222. Evidence of other crime did not meet the Beechum standards where witness could not identify the defendant as the perpetrator. U.S. v. Vitrano, C.A.11th, 1984, 746 F.2d 766, 770. Under Beechum, it is enough that the jury could reasonably find the other crimes took place. U.S. v. Walker, C.A.5th, 1983, 710 F.2d 1062, 1066. Testimony of eye-witness to prior crime was sufficient to satisfy Beechum standard for admission of such evidence. U.S. v. Mortazavi, C.A.5th, 1983, 702 F.2d 526. Eleventh Circuit follows decision in Beechum in

determining the propriety of admission of evidence of other crimes. U.S. v. Mitchell, C.A.11th, 1982, 666 F.2d 1385, 1389. Rule **404(b)** requires a two-step analysis for admissibility of other crimes evidence: (1) it must be relevant to an issue other than the defendant's character; (2) probative value must not be outweighed by the countervailing factors in Rule 403. U.S. v. Dothard, C.A.11th, 1982, 666 F.2d 498, 501. Prior procedural restrictions on the use of other crimes evidence are still of assistance in interpreting Rule **404(b)** but it would be contrary to the intended operation of the rule to use them as a rigid checklist in every case. U.S. v. Czarnecki, C.A.6th, 1977, 552 F.2d 698, 702. Proof of prior crime must only be sufficient to convince jury of probability of defendant's action. People v. Alexander, 1985, 370 N.W.2d 8, 10, 142 Mich.App. 231. Beechum is discussed with apparent approval in Survey, Federal Rules of Evidence, 1979, 11 Texas Tech.L.Rev. 485, 486-489. Beechum is found wanting by the author of Comment, The Jurisprudence of Similar Acts Evidence in the Eighth Circuit, 1980, 48 U.M.K.C.L.Rev. 342, 431. The Beechum holding is applauded in Note, Extrinsic Evidence at Trial under Federal Rule of Evidence **404(b)--The** Need for a Uniform Standard, 1979, 25 Wayne L.Rev. 1343.

But see Procedural requirement for use of other crimes evidence that were recognized prior to the adoption of the Evidence Rules remain valid now. U.S. v. Two Eagle, C.A.8th, 1980, 633 F.2d 93, 96 n. 5. The Eighth Circuit has held that the pre-existing requirements for proof of other crimes, including that the evidence be relevant to a disputed issue and that the evidence be clear and convincing, are still valid after the effective date of the Evidence Rules. U.S. v. Robbins, C.A.8th, 1979, 613 F.2d 688, 693. The Eighth Circuit has held that the requirements for the admissibility of other crimes evidence set forth in U.S. v. Clemons, C.A.8th, 1974, 503 F.2d 486, are unchanged by the enactment of Rule **404(b)** but that the balancing test of Rule 403 supplants the one laid down in that opinion. U.S. v. Frederickson, C.A.8th, 1979, 601 F.2d 1358, 1365 n. 9.

FN61.2 Two-step analysis Id. at 911. The student work is Note, Rule **404(b)** Other Crimes Evidence: The Need for a Two-Step Analysis, 1976, 71 Nw.U.L.Rev. 636.

FN61.3 Minimal standard Id. at 913. The way in which the court applies the standard to the facts of the instant case is instructive. The defendant was charged with having possessed a silver dollar that he knew had been stolen from the mail. The defendant denied that he wrongfully possessed the coin, claiming that he had found it loose in the mail and intended to turn it over to his supervisor. To prove intent, the government was permitted to introduce evidence that at the time of his arrest he was in possession of two unsigned credit cards issued to other persons which had been mailed to two addresses on routes that the defendant had serviced on some occasions in his capacity as a substitute letter carrier. The cards had been mailed some ten months prior to the date of the defendant's arrest. During his interrogation by postal inspectors the defendant refused to explain his possession of the credit cards. The majority opinion finds the credit card evidence relevant to prove intent, stating that "If [the defendant] wrongfully possessed these cards, the plausibility of his story about the crime is appreciably diminished." Id. at 907. But the balance of the court's opinion overlooks the "if" in the statement. Two pages later the court refers to the defendant's possession of the coin and two credit cards "none of which belonged to him." Id. at 9091. But the government did not prove this; all the evidence showed was that the cards carried the names of other persons and had been mailed to them. Yet the court suggests that the defendant had "possessed the cards for some time, perhaps ten months, prior to his arrest." Ibid. But so far as the evidence shows, the defendant might have picked up the cards on the street the day before. The court solves this gap in the government's case by shifting to the defendant the burden of proof on the other crime. "The obvious question is why would [defendant] give up the silver dollar if he kept the credit cards? In this case, the government was entitled to an answer." Ibid. With all due respect, the government is entitled to no such thing. The burden is on the government to prove the defendant guilty beyond a reasonable doubt of the crime with which he is charged. It is totally alien to the spirit of the Fifth Amendment to suggest that the defendant can be found to have a criminal intent because he has failed to prove himself innocent of another crime imputed to him by innuendo but never proved by the government. Later the opinion explains the relevance of the credit card evidence to the issue of intent: "The reasoning is that because the defendant had unlawful intent in the extrinsic offense, it is less likely he had lawful intent in the present offense." Id. at 911. But by this time most readers will have forgotten that the government never proved that the defendant had "unlawful intent in the extrinsic offense," unless the refusal of the defendant to answer questions concerning the credit cards on Fifth Amendment grounds is to be taken as proof that his possession of them was wrongful.

FN61.4 Balancing test Id. at 916-918.

FN61.5 Read back in E.g., the requirement that the issue on which the evidence is offered be in dispute. Id. at 914 n. 19, 916. Beechum holding is not inconsistent with rule that defendant's plea of not guilty in conspiracy case puts intent in issue unless defendant stipulates that if he did the charged acts, he had the requisite intent. U.S. v. Kopituk, C.A.11th, 1982, 690 F.2d 1289, 1335. Factors to be considered under the second prong of Beechum include the strength of government's case on issue the other crime is offered to prove, similarity and temporal relationship between charged and uncharged crime, and whether it appeared at outset that defendant was contesting the issue to be proved by the other crime. U.S. v. Mitchell, C.A.11th, 1982, 666 F.2d 1385, 1390.

FN61.6 Admit more freely The court argues that this was the intent of the Congressional amendment of Rule **404(b),** discussed in the main volume at pp. 331-333. See id. at 910 n. 13.

FN61.7 Found in 104(b) Id. at 913. Since the opinion cites this Treatise for the requisite standard of proof, it seems justifiable to point out that the court overlooks our argument that Rule 104(b) does not apply to the determination of the admissibility of evidence under Rule **404(b).** See vol. 21, s 5053, pp. 256-257. The same point is made in the main volume at pp. 534-535, but this volume may not have been available when the opinion was prepared. Proof of prior act need be only sufficient to support a finding that it occurred even where issue is whether or not act was done with particular intent. U.S. v. Moree, C.A.5th, 1990, 897 F.2d 1329, 1335. Defendant's own admissions would justify jury finding that he committed extrinsic offenses and thus satisfy this branch of Beechum. U.S. v. Edwards, C.A.11th, 1983, 696 F.2d 1277, 1280. Uncontroverted testimony of single witness was sufficient to meet Beechum standard for proof of uncharged crime. U.S. v. Terebecki, C.A.11th, 1982, 692 F.2d 1345, 1349. Prior conviction is sufficient proof of other crime to satisfy Beechum standard. U.S. v. Lippner, C.A.11th, 1982, 676 F.2d 456, 461. Evidence of other crime is only admissible if the jury could reasonably find that the defendant actually committed it; defendant's admission of crime satisfies this test. U.S. v. Tunsil, C.A.11th, 1982, 672 F.2d 879, 881. As a predicate to the admission of evidence of another crime, the prosecution must prove that the defendant committed it, but whether or not the preliminary fact has been adequately proved is to be determined by the jury under Rule 104(b). U.S. v. Dothard, C.A.11th, 1982, 666 F.2d 498, 502. It was error to admit evidence of other crime where the prosecution had failed to prove the defendant had committed the crime by evidence from which a reasonable jury could find this preliminary fact. U.S. v. Dothard, C.A.11th, 1982, 666 F.2d 498, 504. In civil action on insurance policy, evidence of alleged prior acts of arson by insured must be proved by proof sufficient to permit a reasonable jury to find the insured participated; evidence was inadmissible where there was no showing the insured had anything to do with prior fires. Garcia v. Aetna Casualty and Surety Co., C.A.5th, 1981, 657 F.2d 652, 655.

FN61.8 What "preliminary fact" Normally the writers distinguish between the "proffered evidence" and the "preliminary fact" that must be proved to make it admissible. It would seem that in a Rule **404(b)** issue, the "proffered evidence" is that the defendant has committed some extrinsic offense and that the only question involved is one of law; i.e., does the proffered evidence meet the requirements of the rule? Apparently the majority in Beechum is distinguishing between the other offense and proof that the defendant committed it, the latter being the "preliminary fact" to be proved by the lesser standard of Rule 104(b) so that the former is admissible. But this is nonsense. The government is not trying to prove that another crime was committed by some unidentified person and offering defendant's guilt only to make that evidence admissible. It wants to prove that the defendant committed the other crime and would be thrown into a fit of consternation if the defendant were to offer to stipulate to the admissibility of the proof that someone had committed the offense in order to prevent the prosecution from proving the "preliminary fact." Moreover, this notion that the issue of the defendant's guilt of the extrinsic offense is a preliminary fact is fraught with mischief. Does the court intend that the evidence of the other crime must first be heard out of the presence of the jury and that the defendant is free to mount an attack on his guilt of the other offense without being subject to cross-examination on the instant offense--the reverse of its holding in Beechum?

FN61.9 Questionable Is the defendant entitled to have the jury instructed that if it finds that he did not commit the other offense it must ignore the evidence? And if the jury is to determine his guilt, must they not also be instructed about the elements of the other offense when it is not the same as the charged offense?

FN80.1 Cannot be prosecuted Mayan v. State, Okla.Crim.1985, 696 P.2d 1044, 1045 (dictum).

FN92.1 Record important While the trial court made no on-the-record findings of Rule 403 balancing, this does not matter where the admissibility of the evidence was discussed at length, the judge relied on a case that mentioned Rule 403, and even if the judge had done the balancing the evidence would have been admitted. U.S. v. Santagata, C.A.1st, 1991, 924 F.2d 391, 394. Requirement that 403 balancing must be "on the record" does not require any explanation by trial judge of how the balance was struck; all it means is that the appellate court must be able to deduce from the record that the trial judge actually considered Rule 403. U.S. v. Ono, C.A.9th, 1990, 918 F.2d 1462, 1465 (deducing trial court must have considered the Rule from the fact that defense invoked it). For the results of allowing trial courts to get away with sloppy procedures that do not document grounds for admissibility, see U.S. v. Doran, C.A.10th, 1989, 882 F.2d 1511, 1524 (court forced to allow trial court to get away with a laundry list limiting instruction previously condemned on ground that defendant, who was never told why evidence was admitted, failed to object to the instruction). While judge should state his reasons for admitting evidence under Rule **404(b),** this is not necessary where reasons are obvious. U.S. v. Nolan, C.A.7th, 1990, 910 F.2d 1553, 1561. Court's failure to specify grounds for admissibility at time of admission was cured by the giving of a smorgasbord instruction on the proper use of the evidence. U.S. v. Binkley, C.A.7th, 1990, 903 F.2d 1130, 1136. It was not reversible error for trial court to fail to articulate grounds for admission of other crimes where prosecutors made some noises about why they were offering the evidence. U.S. v. Porter, C.A.10th, 1989, 881 F.2d 878, 885. It was error for court to admit evidence of other crimes without any identification or analysis of the purpose for which it was thought admissible. U.S. v. DeGeratto, C.A.7th, 1989, 876 F.2d 576, 585. Huddleston does not displace the requirement that the prosecution and the trial judge articulate precisely the basis on which other crimes are to be admitted. U.S. v. Record, C.A.10th, 1989, 873 F.2d 1363, 1375 n. 7 (but holding failure to do was harmless where purpose was apparent from the record). Before admitting evidence of other crime, court must specify the purpose for which it is being admitted; it is not enough to recite the language of Rule **404(b).** U.S. v. Orr, C.A.10th, 1988, 864 F.2d 1505, 1510 (but holding error harmless). Reversal was not required when trial court failed to state reasons for admission of other crimes evidence where no objection on grounds of relevance was made and no request for on-the-record findings was made. U.S. v. Prati, C.A.5th, 1988, 861 F.2d 82, 86. Trial court criticized for holding a five-page hearing on admission of highly prejudicial other crimes evidence, then reciting that it was admissible for all the purposes in Rule **404(b).** U.S. v. Fortenberry, C.A.5th, 1988, 860 F.2d 628, 634. Without a complete analysis on the record, an appellate court cannot determine whether a trial court's exercise of discretion was based upon careful and thoughtful consideration of the issue. State v. Smith, 1986, 725 P.2d 951, 953, 106 Wash.2d 772. A judge who records his reasons for admitting other crimes evidence is less likely to err because the process of weighing the evidence and stating specific reasons insures a thoughtful decision. State v. Jackson, 1984, 689 P.2d 76, 79, 102 Wn.2d 689.

FN96.1 Ruled inadmissible Where the trial court ruled that evidence of an allegedly forged commitment letter used by the defendant in an unrelated transaction was not admissible, it was an abuse of discretion not to grant a mistrial or new trial when the government attempted to get the forged letter introduced in evidence and to cross-examine the defendant about it. U.S. v. Westbo, C.A.10th, 1978, 576 F.2d 285.

FN2.1 Must be requested Where evidence of other crimes was admitted with a promise that the jury would be instructed on the proper use of the evidence, failure to give such an instruction was reversible error. U.S. v. Yopp, C.A.6th, 1978, 577 F.2d 362, 366.

FN8.1 Mistrial Defendant cannot complain on appeal that mistrial should have been granted when witness referred to defendant's escape from custody where the reference was in response to a question by defense counsel. U.S. v. Allen, C.A.11th, 1985, 772 F.2d 1555. Compare the Oklahoma doctrine of "evidentiary harpoons", described below. In prosecution for peonage, mistrial was not required at testimony that bones of migrant workers had been found in streams in the area of defendant's private Gulag. U.S. v. Warren, C.A.11th, 1985, 772 F.2d 827, 838. Mistrial was not required when prosecutor violated prophylactic motion in limine by eliciting evidence of other crimes without giving the court and opposing counsel an opportunity to consider its admissibility. U.S. v. Kendall, C.A.10th, 1985, 766 F.2d 1426, 1437. Mistrial was not required where prosecutor elicited proof of prior crime in violation of pretrial ruling where judge promptly struck the testimony and ordered jury to disregard it. U.S. v. Krevsky, C.A.8th, 1984, 741 F.2d 1090, 1093. Mistrial was not required to cure prosecution witness' reference to fact that defendant had

served time in a South American jail where the court promptly (i.e., the next morning) admonished the jury to disregard the evidence. U.S. v. Steele, C.A.6th, 1984, 727 F.2d 580, 587. In prosecution of prisoners for possession of homemade knives, mistrial was not required by mention that weapons were used as part of an escape attempt. U.S. v. Dennis, C.A.7th, 1984, 737 F.2d 617, 619. Trial court did not err in denying a mistrial when witness made reference to the fact that defendant had just been released from prison three months before the crime where a curative instruction was given and the evidence against the defendant was strong. U.S. v. Morrow, C.A.4th, 1984, 731 F.2d 233, 235 n. 4. Striking of evidence that co-defendant had served time and clear and positive instruction to jury to disregard it cures error and obviates need for mistrial. U.S. v. Steele, C.A.6th, 1984, 727 F.2d 580, 588. In prosecution for importation of tons of marijuana, evidence that a vial of cocaine was found in cargo plane was not so prejudicial as to require mistrial. U.S. v. Snowden, C.A.11th, 1984, 735 F.2d 1310, 1314. Where there was no evidence that government had elicited reference to defendant's alleged Mafia connections in bad faith, single reference that was immediately stricken did not require a mistrial. U.S. v. Reed, C.A.8th, 1984, 724 F.2d 677, 679. Prompt cautionary instruction was sufficient to cure error in mention of prior crime so that reversal was not required. U.S. v. Jordan, C.A.7th, 1983, 722 F.2d 353, 357. Prompt instruction to disregard was sufficient to cure error in mention of criminal record of RICO defendant where reference was ambiguous, did not mention a crime or defendant's last name, and took only moments in a 24 day trial. U.S. v. Kimble, C.A.5th, 1983, 719 F.2d 1253, 1257. Mistrial was not required at introduction of evidence that drug dealer said "we are not used to flashing it in public" where no objection was made at time and implication of prior dealings was slight. U.S. v. McCown, C.A.9th, 1983, 711 F.2d 1441, 1453. Mistrial was required where government elicited evidence that defendant charged with robbery had previously been incarcerated in state penitentiary. U.S. v. Sostarich, C.A.8th, 1982, 684 F.2d 606, 608. Instruction to disregard statement of witness that defendant was a hippy who took drugs was adequate remedy. U.S. v. Mangiameli, C.A.10th, 1982, 668 F.2d 1172, 1176. Trial court did not err in murder prosecution in failing to strike testimony of government witness that defendant had once pulled a gun on him where government was not responsible for testimony. U.S. v. Skinner, C.A.9th, 1982, 667 F.2d 1306, 1310. Mistrial was not required by reference to handing down of superseding indictment where jury could not possibly have thought this referred to another crime. U.S. v. Jackson, C.A.3d, 1981, 649 F.2d 967, 977. It was error not to grant a mistrial in a personal injury case after the plaintiff played a tape for the jury that contained references to the defendant's indictment for sexual offenses against young girls, his fugitive status, and alleged responsibility for murder of young girl. White v. Cohen, C.A.9th, 1981, 635 F.2d 761. Mistrial was not required in trial for firearms violations after the court granted motion to dismiss charge of obstruction of justice based on defendant's murder of girl friend's cat in reprisal for her (the friend, not the cat) finking on him. U.S. v. Bagley, C.A.9th, 1981, 641 F.2d 1235, 1240. Judge's decision that evidence of other crime was to be excluded under Rule 403 did not require that a mistrial be declared when the jury heard the evidence. U.S. v. Escalante, C.A.9th, 1980, 637 F.2d 1197, 1204. Where experienced government agent gave a nonresponsive answer revealing that defendant had been incarcerated for armed robbery, the resulting mistrial was not deliberately provoked by the prosecution so as to prevent retrial of defendant. U.S. v. Green, C.A.4th, 1980, 636 F.2d 925. Where evidence of loansharking and fixing horse races was irrelevant for any purpose but came in after questions designed to elicit other information, these unsolicited references were not so inflammatory that they could not be cured by instructions given by trial judge. U.S. v. Provenzano, C.A.3d, 1980, 620 F.2d 985, 994. It was not error to grant a mistrial when F.B.I. agent, in reading from defendant's confession, interpolated the fact that the defendant's education had been completed under the auspices of the Texas Department of Corrections. U.S. v. Doby, C.A.8th, 1979, 598 F.2d 1137, 1141. In determining whether a curative instruction was sufficient to cure error in admission of evidence of uncharged crime, court must weigh the forcefulness of the instruction and the conviction with which it was given against the degree of prejudice of the evidence. U.S. v. Johnson, C.A.9th, 1980, 618 F.2d 60, 62. It was not error to deny mistrial where judge promptly sustained objection to question insinuating that defendant was involved in another crime and instructed jury to disregard remark. U.S. v. Pappas, C.A.1st, 1979, 611 F.2d 399, 406. Where evidence of defendant's participation in uncharged crime was elicited by a co-defendant, it was not error to refuse to declare a mistrial where trial court gave a prompt and thorough admonition to the jury. U.S. v. Johnson, C.A.4th, 1979, 610 F.2d 194, 197. Sustaining of objection and instructing the jury to disregard statement about other crimes was sufficient to protect defendant and it was not error to deny motion for mistrial. U.S. v. John Bernard Industries, Inc., C.A.8th, 1979, 589 F.2d 1353, 1359.

State cases Mistrial was not required when sister of rape victim testified that victim was concerned about getting defendant in trouble because his sister was her friend and she knew defendant had been involved in prior offenses. Hines v. State, Alaska 1985, 703 P.2d 1175, 1178. General rule that evidence of serious unrelated bad acts not

otherwise admissible merits a mistrial does not apply to an unelaborated statement that defendant had previous involvement in criminal justice system. State v. Grijalva, App.1983, 667 P.2d 1336, 137 Ariz. 10. Mistrial was not required when witness unexpectedly explained recollection of particular day by mentioning defendant's arrest for another crime on that day. State v. Adamson, Sup.Ct., 1983, 665 P.2d 972, 136 Ariz. 250. Mistrial was not required when, upon being asked what sort of people were depicted in the photo spread from which he had selected the defendant's picture, the witness answered "criminals"; if defense felt prejudiced, it should have objected, moved to strike, and asked for an instruction to the jury. People v. Abbott, Colo.1984, 690 P.2d 1263, 1269. Trial court was not required to grant a mistrial when prosecutorial questions on cross-examination suggested vaguely that defendant had committed other wrongs. State v. Stellwagen, 1983, 659 P.2d 167, 232 Kan. 744. Mistrial was not required when prosecution elicited evidence of prior instance of similar conduct from pederasty victim. State v. Nichols, Me.1985, 495 A.2d 328. In rape prosecution based on uncorroborated testimony of victim which had been impeached by testimony of others that she had admitted it was false, mistrial was required where the prosecutor did not caution his witnesses not to mention charges involving another daughter and such evidence came before the jury. State v. Goodrich, Me.1981, 432 A.2d 413, 417. Mistrial was not required because of inadvertent reference during cross-examination of defendant's brother to defendant's time in prison. People v. McKeever, 1983, 332 N.W.2d 596, 123 Mich.App. 533. In view of the other sordid evidence in the record, mistrial was not required when a police witness let slip the fact that the defendant had told someone he did not want them "narking" on him because of his dope dealing. State v. Blanchard, Minn.1982, 315 N.W.2d 427, 432. Mistrial was not required when rape victim "blurted out" statement that defendant had smoked a marijuana cigarette during the crime. State v. Liddell, 1984, 685 P.2d 918, 925, 211 Mont. 180. While prosecution failure to admonish its witnesses not to mention defendant's parole status in violation of court order was inexcusable, two passing references to parole did not warrant the granting of a mistrial. State v. Gray, 1983, 673 P.2d 1262, 1266, 207 Mont. 261. Where it was clear from other evidence that the defendant had been the object of a manhunt and had been jailed, inadvertent reference to the crime that he was wanted for did not require a mistrial. State v. Gilbert, Sup.Ct., 1982, 657 P.2d 1165, 1167, 99 N.M. 316. Trial judge did not err in refusing to declare a mistrial when witness mentioned fact that the defendant had been in prison with him where this was not deliberately elicited by the prosecutor and the defense declined to have the court give an admonition that would have dissipated much of the prejudice. State v. Vialpando, C.A., 1979, 599 P.2d 1086, 1093, 93 N.M. 289. No mistrial was required where trial judge concluded that reference to another murder for which defendant was under investigation was an innocent response to a direct question by defense counsel. Wilkie v. State, 1982, 644 P.2d 508, 98 Nev. 192. In prosecution of college official for embezzlement, mistrial was not required where trial court promptly admonished jury to ignore reference in testimony to another scam involving defendant. Allison v. State, Okl.Crim.1983, 675 P.2d 142, 150. Mistrial was not required in homicide trial where witness inadvertently made reference to prior rape committed by defendant. King v. State, Okl.Crim.1983, 667 P.2d 474, 477. Mistrial not required even where prosecutor deliberately brings up subsequent crime in violation of court order made on motion in limine. State v. Beel, 1982, 648 P.2d 443, 32 Wash.App. 437.

FN11.1 Offer guidance For an example of such an opinion, see U.S. v. Emery, C.A.5th, 1982, 682 F.2d 493. For an example of a thoughtful opinion, see U.S. v. Dolliole, C.A.7th, 1979, 597 F.2d 102. In murder prosecution in which there was a serious question as to whether the death of the wife was an accident or a homicide, it was an abuse of discretion to admit evidence that two weeks before her death, husband dragged wife into yard and sprayed her with a garden hose during a marital dispute. People v. Deeney, 1983, 193 Cal.Rptr. 608, 145 Cal.App.3d 647. For an opinion that is a model, despite the fact that it drew a dissent, see People v. Goree, 1984, 349 N.W.2d 220, 228, 132 Mich.App. 693. For one of the best opinions in recent years, see People v. Golochowicz, 1982, 319 N.W.2d 518, 413 Mich. 298. For a careful sketch of the procedural requirements to admissibility under Wash.R.Ev. **404(b),** see State v. Saltarelli, 1982, 655 P.2d 697, 98 Wash.2d 358. For a well-done state court opinion, see State v. Pharr, 1983, 340 N.W.2d 498, 115 Wis.2d 334.

Supplement to Notes in Main Volume

FN2. Procedure important Seventh Circuit employs a four part test: (1) relevant to an issue other than propensity; (2) similarity and temporal recency; (3) evidence sufficient to support a finding act was done; and (4) probative value not outweighed by prejudice. U.S. v. Penson, C.A.7th, 1990, 896 F.2d 1087, 1091. Admission of prior crimes requires

trial court to find that it is offered for a purpose that does not require an inference to character, that probative value outweighs 403 factors, and the giving of a limiting instruction. U.S. v. Colon, C.A.2d, 1989, 880 F.2d 650, 656. See Slough, Other Vices, Other Crimes: Kansas Statutes Annotated Section 60-455 Revisited, 1978, 26 U.Kan.L.Rev. 161, 164-166. One opinion claims that the Tenth Circuit has imposed at least ten procedural controls on the admission of other crimes evidence, but rejoices that Huddleston has put the court back on the right path. U.S. v. Record, C.A.10th, 1989, 873 F.2d 1363, 1373. Admission of other crimes requires a two-step process; court must find evidence relevant to issue without resort to inference of propensity to prove conduct, then perform balancing under Rule 403. U.S. v. DiGeronimo, C.A.2d, 1979, 598 F.2d 746, 753. Before proof of other crime can be admitted under Rule **404(b),** there must be clear and convincing evidence of defendant's commission of it, it must not be too remote in time from the charged crime, it must be similar to charged offense, and it must be offered to prove a material element of charged offense. U.S. v. Bailleaux, C.A.9th, 1982, 685 F.2d 1105, 1110. To be admissible, evidence of bad act must be relevant to material issue, similar in kind and reasonably close to charged crime, must be clear and convincing, and probative worth must not be outweighed by prejudice. U.S. v. Marshall, C.A.8th, 1982, 683 F.2d 1212, 1215. In Ninth Circuit, other crimes evidence must meet three part test of admissibility; prior act must be similar and close enough in time to be relevant, evidence of prior act must be clear and convincing, and probative worth must outweigh potential prejudice. U.S. v. Hooten, C.A.9th, 1981, 662 F.2d 628, 635. Standards for admission of other crimes evidence in Eighth Circuit are quite familiar: (1) a material issue to which evidence is relevant must be raised; (2) proffered evidence is relevant; (3) evidence must be clear and convincing; (4) other crime must be similar in kind and reasonably close in time to the charged offense; (5) evidence must not be excludible under Rule 403. U.S. v. Burchinal, C.A.8th, 1981, 657 F.2d 985, 993. Evidence that defendant went behind desk at YMCA to obtain checks he later cashed with forged endorsements were identical to acts offered to show opportunity and were close in time, testimony of two eyewitnesses was clear and convincing evidence of other acts, and evidence was so highly probative that it outweighed prejudice to defendant. U.S. v. DeJohn, C.A.7th, 1981, 638 F.2d 1048, 1052 n. 4. Before evidence of other crimes can be admitted under Rule **404(b)** four prerequisites must be met: (1) a material issue has been raised; (2) the evidence must be relevant to that issue; (3) the evidence must be clear and convincing; and (4) the other crime must be similar in kind and reasonably close in time to the charge at trial. U.S. v. Farber, C.A.8th, 1980, 630 F.2d 569. The Clemons-Conley standards were reiterated in U.S. v. Young, C.A.8th, 1980, 618 F.2d 1281, 1289. For a masterful treatment of the procedural issues, see U.S. v. Figueroa, C.A.2d 1980, 618 F.2d 934 (per Newman, J.). Under Rule **404(b),** evidence of other wrongdoing is admissible only if the trial court finds that (1) a material issue is raised on a subject for which such evidence is admissible; (2) the proffered evidence is relevant to that issue; (3) the wrongdoing is similar in kind and reasonably close in time to the offense charged; (4) the evidence is clear and convincing; and (5) the probative value of the evidence outweighs its prejudicial possibilities. U.S. v. Drury, C.A.8th, 1978, 582 F.2d 1181, 1184. The Drury requirements were reiterated in U.S. v. Vik, C.A.8th, 1981, 655 F.2d 878, 881. It has been held that the prerequisites to admission are less stringent when the evidence offered consists of other acts of the defendant rather than other crimes. U.S. v. Greenfield, C.A.5th, 1977, 554 F.2d 179, 185. Evidence of other crimes is admissible only if the issue is disputed, the crime is relevant to that issue, the evidence of the crime is clear and convincing, and probative worth outweighs probable prejudicial impact. U.S. v. McMillian, C.A.8th, 1976, 535 F.2d 1035, 1038. Before evidence of other crimes can be admitted it must be shown that (1) an issue on which the evidence can be received has been raised, (2) that the evidence is relevant to that issue, (3) that the evidence is clear and convincing, (4) and that the probative worth outweighs its prejudicial effect. U.S. v. Conley, C.A.8th, 1975, 523 F.2d 650, 653-654. Colorado courts require the prosecutor to advise the court of the purpose for which evidence of other crimes is offered and the court to then and at the conclusion of the trial to instruct the jury as to the proper use of the evidence using neutral terms such as "other acts" instead of such loaded phrases as "similar crimes." Callis v. People, Colo.1984, 692 P.2d 1045, 1051. For evidence of other crimes to be admissible, there must be a valid purpose for which it is offered, it must be relevant to a material issue, and probative value must outweigh prejudice to defendant. People v. Casper, Colo.1982, 641 P.2d 274. Before evidence of other crimes is admissible, it must be offered for a valid purpose, be relevant to a material issue in the case, and probative worth must not be outweighed by prejudice. People v. Ray, Colo.1981, 626 P.2d 167. An interesting set of procedural restrictions, though limited to sex cases, appears in Colo.Rev.Stats. s 16-10-301(2)-(4): "(2) If the prosecution intends to introduce evidence of similar acts or transactions as provided in subsection (1) of this section, the prosecutor shall advise the trial court of the purpose for which evidence of similar acts or transactions is offered. The burden shall be on the prosecution to show the relevancy of evidence if objection to introduction of said evidence has been made. The trial court shall determine whether or not the evidence offered is relevant and, if relevant, whether or not the prejudice which would result to the

defendant by the introduction of the evidence outweighs the evidentiary value of the evidence. "(3) The trial court shall, at the time of the reception into evidence of similar acts or transactions and again in the general charge to the jury, direct the jury as to the limited purpose for which the evidence is admitted and for which the jury may consider it. The court in instructing the jury, and the parties when making statements in the presence of the jury, shall use the words 'similar act or transaction' and shall at no time refer to 'similar offenses'. 'Similar crimes', or other terms which have the same connotations. "(4) Before admitting evidence of similar acts or transactions, the court must find that the people have introduced sufficient evidence against the defendant to constitute a prima facie case, warranting submission of the case to the jury on the evidence presented other than that of similar acts or transactions." In admitting evidence of other crimes under Kans.Stat.Anns. s 60-445 the court, out of the presence of the jury, must determine that it is relevant to prove one of facts listed in the statute, that the fact is disputed, and that prejudice does not outweigh probative worth. State v. Breazeale, 1986, 714 P.2d 1356, 1360, 238 Kan. 714. In ruling on admissibility of evidence under K.S.A. s 60-455, court must determine if evidence is relevant to prove one of facts specified in the statute, that the fact is a disputed material fact, and balance probative value against prejudice. State v. Gowler, 1982, 644 P.2d 473, 7 Kan.App.2d 485. Before evidence of other crimes may be admitted, there must be substantial evidence that the defendant perpetrated it, there must be some special circumstance tending to show guilt of charged crime, it must be offered on material issue, and probative worth must not be outweighed by prejudice. People v. Betancourt, 1982, 327 N.W.2d 390, 120 Mich.App. 58. Under the Michigan similar acts statute, three things must be shown for admissibility; there must be substantial evidence that the defendant perpetrated the bad act, the act must be probative of motive, etc., in connection with the charged offense, and motive, etc., must be material to determination of guilt of charged offense. People v. Worden, 1979, 284 N.W.2d 159, 91 Mich.App. 666. Evidence of other crimes is admissible if the proof of defendant's participation is clear and convincing, the evidence is relevant and material, and probative worth outweighs prejudice. Ture v. State, Minn.1984, 353 N.W.2d 518, 521. In applying Minn.R.Ev. 404(a), court should first determine relevance and materiality, then see if proof of other crime is clear and convincing, and finally balance prejudice and probative worth. State v. Filippi, Minn.1983, 335 N.W.2d 739, 743. Key tests in determining admissibility of other crimes proof is whether there is clear and convincing proof of defendant's participation, the relevance and materiality of the evidence, and whether prejudice substantially outweighs probative worth. State v. Woelm, Minn.1982, 317 N.W.2d 717. Requirements for admission of other crimes are (1) similarity to charged crime, (2) nearness in time to charged crime, (3) tendency to show a common plan, scheme, or system, and (4) a determination that probative worth outweighs prejudice. State v. Stroud, 1984, 683 P.2d 459, 465, 210 Mont. 58. The procedures to be followed in Montana are spelled out in State v. Just, 1979, 602 P.2d 957, 184 Mont. 262. Before evidence of other crimes can be admitted to prove a requisite mental state, there must be proof beyond a reasonable doubt that the defendant committed the act charged. State v. Ohnstad, No.Dak.1984, 359 N.W.2d 827, 837. Trial court did not follow correct procedure in failing to specify purpose for which other crimes evidence was being admitted and not providing a reasoned explanation of why probative worth outweighed prejudice. State v. Shillcutt, App.1983, 341 N.W.2d 716, 719, 116 Wis.2d 227. To be admissible, proof of other crimes must be plain, clear and convincing, the crimes must not be too remote and offered for purpose sanctioned by Rule **404(b)**, the issue to be proved must be a material one in the case, and there must be a substantial need for the evidence. Bishop v. State, Wyo.1984, 687 P.2d 242, 246. For a discussion of recent Seventh Circuit decisions on these procedural issues, see Crowley, Modernizing and Liberalizing the Law of Evidence, 1981, 57 Chi.-Kent L.Rev. 191, 192-194. For description of a four-step procedure for determining admissibility that seems better than the two-step process embraced by some federal courts, see Roth, Understanding Admissibility of Prior Bad Acts. A Diagrammatic Approach, 1982, 9 Pepp.L.Rev. 297, 312. For a thoughtful set of suggested procedures, see Comment, Other Crimes Evidence: Relevance Reexamined, 1983, 16 J.Marsh.L.Rev. 371, 390.

FN3. Minnesota decisions Evidence of other crime was improperly admitted where state did not give notice of intent to use such evidence. State v. Doughman, Minn.1986, 384 N.W.2d 450, 455. Notice of intent to use other crimes evidence was not required where defense counsel was aware of other crimes through discovery and should have known the evidence would be offered to put the charged crimes in context. State v. Cermak, Minn.1985, 365 N.W.2d 238. Where defendant was properly charged with multiple offenses occurring over a period of time, she was not entitled to notice of these as "other crimes" since they were part of the episode for which she was being tried so that pleadings and discovery provided adequate notice. State v. Becker, Minn.1984, 351 N.W.2d 923, 927. Where the defendant had actual notice that the prosecution intended to offer proof of a prior robbery, failure to give formal notice in advance was not prejudicial even if error. State v. Johnson, Minn.1982, 322 N.W.2d 220. Montana requirement of notice and

dual set of cautionary instructions were crafted from similar procedural requirements in Minnesota. State v. Stroud, Mont.1984, 683 P.2d 459, 465.

FN5. Louisiana followed See also, La.Code Cr.Proc. Art. 720: "Upon motion of the defendant, the court shall order the district attorney to inform the defendant of the state's intent to offer evidence of the commission of any other crime admissible under the authority of Louisiana Code of Evidence Article 404. Provided however, that such order shall not require the district attorney to inform the defendant of the state's intent to offer evidence of offenses which relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding or other crimes for which the accused was previously convicted."

FN7. Other states Written notice to defense counsel of names of four rebuttal witnesses and that testimony they would give would include defendant's willingness to engage in other crimes was adequate to comply with Ariz.R.Cr.P. 15.1(f). State v. Linden, App.1983, 664 P.2d 673, 136 Ariz. 129. Claim that absence of notice of intent to use evidence of another crime was a denial of due process could not be maintained where record showed that counsel was aware of intent to offer evidence the day before and there was no request for a continuance to prepare to meet the evidence. People v. Ott, 1978, 148 Cal.Rptr. 479, 84 Cal.App.3d 118. Trial court did not err in refusing to instruct jury that it could not use other crimes evidence to show defendant's propensity to commit crimes. State v. Sanford, 1985, 699 P.2d 506, 509, 237 Kan. 312 (holding pattern jury instruction on proper use suffices; debatable ruling). It was reversible error to admit evidence of a prior sexual assault where prosecution had failed to give notice of intent to use the evidence. State v. Berg, 1985, 697 P.2d 1365, 1367, 215 Mont. 431. It was a denial of due process for trial court to reverse ruling excluding evidence of prior crimes after defendant had relied on ruling in planning and presentation of case by, for example, to conducting voir dire on this issue. State v. Doll, 1985, 692 P.2d 473, 476, 214 Mont. 390. It was error to admit evidence of other crimes where defendant did not get ten-day notice ordered by court on motion in limine. State v. Brown, 1984, 680 P.2d 582, 209 Mont. 502. It was not error to admit evidence of other crime where required notice was only delivered on the morning of trial where the defense was granted a two day continuance to investigate and had indicated it needed no more time. State v. Azure, 1984, 676 P.2d 785, 208 Mont. 233. State must provide defendant with written notice of intent to use evidence of other crimes before case is called to trial; notice must include a statement of purpose for which evidence will be offered. State v. Gray, 1982, 643 P.2d 233, 197 Mont. 348. Montana now requires that the prosecutor give the defendant notice of intent to use evidence of other crimes that must include specification of the purpose for which the evidence will be used. State v. Just, 1979, 602 P.2d 957, 184 Mont. 262. Evidence of offenses that are part of the entire transaction of the offense charged need not be noticed to the defense. Melvin v. State, Okla.Crim.1985, 706 P.2d 163, 164. Notice of intent to use other crimes evidence that was given five weeks before trial was timely and adequate. Mayhan v. State, Okla.Crim.1985, 696 P.2d 1044, 1045. State cannot be required to give notice of intent to use evidence of other crimes in rebuttal because it cannot be known in advance of trial what evidence will be relevant to rebuttal. Freeman v. State, Okl.Crim.1984, 681 P.2d 84. Where the prosecution did not learn of testimony concerning other crimes until the day before it was presented and promptly notified the defense, notice requirement was not violated. Seegars v. State, Okl.Crim.1982, 655 P.2d 563. Normally the state has a duty to give notice of intent to prove other crimes but this does not apply to testimony that when defendant was arrested a few moments after attempted burglary he was carrying a concealed weapon. Scott v. State, Okl.Crim.1983, 663 P.2d 17, 19. State complied with requirement for use of evidence of other crimes when it gave the defendant ten days notice of intent to use evidence, the court found evidence probative, and proof was clear and convincing. Odum v. State, Okl.Crim.1982, 651 P.2d 703. Notice to the defendant on the morning of trial of intent to use evidence of other crime was a breach of state's statutory duty to make a prompt **disclosure** of such material. State v. Harshman, 1983, 658 P.2d 1173, 61 Or.App. 711. The Comment to Del.R.Ev. 404 urges an amendment of the Superior Court Criminal Rules to require the prosecution to give notice of intent to offer other crimes evidence. Tex.R.Cr.Ev. **404(b)** requires notice upon request by the defendant. See s 5231 n. 39. The Vermont drafters amended that state's rules of criminal procedure to require notice of intent to use evidence of other crimes. Reporter's Notes, Vt.R.Ev. 404.

FN9. Declined to add The New York Law Revision Commission refused to add a provision requiring the prosecution to give notice of intent to use other crimes evidence, suggesting that Rule 403 might be used to exclude the evidence when lack of notice resulted in unfairness to the defendant. Comment, Prop.N.Y.Evid.Code s **404(b).**

FN10. Notice not required Prosecution was not required to give notice of intent to use evidence of other crimes. U.S. v. Fitterer, C.A.8th, 1983, 710 F.2d 1328, 1332. Where after government notice of intent to use evidence of other crimes, defense motion in limine to exclude evidence during government's case-in-chief was granted, it was not error to rule that evidence might be admissible on cross-examination of defendant. U.S. v. Kovic, C.A.7th, 1982, 684 F.2d 512, 515. It is apparently the practice of some prosecutors to give notice of intent to use other crimes evidence, even though this is not required. See, e.g., U.S. v. Herrera-Medina, C.A.9th, 1979, 609 F.2d 376, 378; U.S. v. Capo, C.A.5th, 1979, 595 F.2d 1086, 1094 n. 8; U.S. v. Powell, C.A.9th, 1978, 587 F.2d 443, 447. Notice is constitutionally required to forewarn a defendant of acts for which he may ultimately be convicted and sentenced; evidence of proof of an extraneous crime was no more required to be described in the indictment than any other piece of relevant, inculpatory evidence. U.S. v. Barrett, C.A.1st, 1976, 539 F.2d 244, 249. In U.S. v. Solomon, D.C.Ga., 1980, 490 F.Supp. 373, the prosecution gave notice of intent to use other crimes evidence under Criminal Rule 12(d)(1).

But see Court suggests that in future cases the prosecution should exercise the discretion given it by Criminal Rule 12(d)(1) and notify the defense before trial of its intention to introduce any evidence of prior bad acts. U.S. v. Foskey, C.A., 1980, 636 F.2d 517, 526 n. 8, 204 U.S.App.D.C. 245. Notice would be required under Report of the Eastern District of New York Criminal Procedure Committee on Case Management and A Uniform Pretrial Order, 1986, 111 F.R.D. 311, 315.

FN12. Denial of discovery It was not a denial of due process not to order the prosecution to reveal its other crimes evidence to the defendant in advance of trial. U.S. v. Kendall, C.A.10th, 1985, 766 F.2d 1426, 1440. Prosecution had no duty to reveal evidence of other crimes to defense and trial court did not err in not granting defendant a continuance so he could prepare to meet the evidence. U.S. v. Carr, C.A.8th, 1985, 764 F.2d 496, 499. In loansharking prosecution, trial court did not abuse discretion in admitting evidence that two defendants had engaged in drug deals with a third defendant. U.S. v. DiPasquale, C.A.3d, 1984, 740 F.2d 1282, 1295. Evidence of other crimes offered to rebut an entrapment defense did not fall within discovery order directed at evidence to be offered under Rule **404(b)** and failure of government to **disclose** did not preclude admission of evidence. U.S. v. Sonntag, C.A.11th, 1982, 684 F.2d 781, 787. Trial court did not abuse discretion in allowing prosecution to use evidence of other crime despite failure to make pretrial **disclosure** of intent to do so as required by pretrial order. U.S. v. Roe, C.A.11th, 1982, 670 F.2d 956, 965. No unfair surprise resulted when the government informed defense counsel of intent to call witness to testify concerning other crimes as soon as it became aware that the witness could testify. U.S. v. Wixom, C.A.8th, 1976, 529 F.2d 217, 220. Failure to comply with discovery rule was not prejudicial to defendant and prior crimes were properly admitted. U.S. v. Kimbrough, C.A.7th, 1976, 528 F.2d 1242, 1249. One trial judge, after denying the defendant's motion to discover evidence of other crimes so that he could make a motion in limine, then begged the prosecution to turn the evidence over to the defendant as a favor to the judge so as to expedite the trial. U.S. v. Kilroy, D.C.Wis.1981, 523 F.Supp. 206, 216.

FN13. Without good reason Denial of discovery of other crime which prevented defendant from adequately preparing his defense may deny the defendant a fundamentally fair trial and be grounds for federal habeas corpus relief. Williams v. Owens, C.A.7th, 1983, 731 F.2d 391.

FN14. Notice of change Federal court was not required to follow state rulings on admissibility of evidence of other alleged arson in a diversity action on a fire insurance policy. Warner v. Transamerica Ins. Co., C.A.8th, 1984, 739 F.2d 1347, 1351. Where the prosecution agreed in Omnibus hearing that it would not offer evidence of other crimes "unless subsequent developments **disclosed**", it was error for the trial court to admit substantial evidence of other crimes in the middle of the trial without inquiring as to whether the defendant had reasonable notice of intent to use such proof and without balancing the probative worth of evidence against prejudice to defendant. U.S. v. Jackson, C.A.5th, 1980, 621 F.2d 216. Defendant could not claim surprise in testimony concerning uncharged crime where the prosecution informed the defense of intent to use the evidence as soon as it learned of the evidence. U.S. v. Murray, C.A.2d, 1980, 618 F.2d 892, 901. Fact that introduction of evidence of other crimes was a violation of prosecution's pretrial agreement not to use such evidence would not be considered by the appellate court where this was not called to the attention of the trial judge. U.S. v. Witt, C.A.5th, 1980, 618 F.2d 283, 286. It was an abuse of discretion and reversible error for trial judge to reverse his ruling excluding evidence of other crimes three days into the trial. State v.

Doll, 1985, 692 P.2d 473, 476, 214 Mont. 390.

FN17. Prejudice to defendant In considering prejudice to defendant from use of other crimes, court notes that prosecutor gave defense advance notice of intent to use evidence and did not make careless references to it in opening statements. U.S. v. Lavelle, C.A.D.C.1985, 751 F.2d 1266, 1278.

FN18. Discretion to admit Court did not consider this possibility in case where defendant requested a continuance to meet pharmacist's "sudden recall" that defendant had used two other forged prescriptions. State v. Barringer, 1982, 650 P.2d 1129, 32 Wash.App. 882.

FN19. Motion in limine Rule **404(b)** does not require an advance hearing into evidence of other crimes that might have prevented the testimony about prejudicial detail of crime. U.S. v. Mickens, C.A.2d, 1991, 926 F.2d 1323, 1329. One court has ruled that when the prosecution makes a motion in limine to have other crimes evidence admitted and the motion is granted, the defendant cannot raise the propriety of the ruling on appeal if he has subsequently abandoned the issue on which the evidence was to have been admitted. U.S. v. Johnson, C.A.8th, 1985, 767 F.2d 1259, 1270. Where trial court never ruled on motion in limine to exclude prior crimes and defendant did not renew the motion at trial, no issue was preserved for appellate review. U.S. v. Wagoner, C.A.8th, 1983, 713 F.2d 1371, 1374. One advantage of the pretrial motion is that exclusion of the evidence may be the subject of an interlocutory appeal by the government. U.S. v. Margiotta, C.A.2d, 1981, 662 F.2d 131, 141. Where government gave notice of intent to use evidence of other crime well before trial and a hearing was had on motion in which trial court ruled evidence admissible, trial court's ruling should be given great deference. U.S. v. Longoria, C.A.9th, 1980, 624 F.2d 66, 68. For an illustration of the problems that can arise when the issue is postponed, see Grimaldi v. U.S., C.A.1st, 1979, 606 F.2d 332, 339 (after overruling objections to reference to evidence of other crimes in opening statement, court found the evidence inadmissible). If the motion in limine only suppresses certain evidence of the prior crime, an objection may still be necessary at trial if the prosecution attempts to get evidence in by some other means. State v. Patton, 1979, 600 P.2d 194, 183 Mont. 417. Slough, Other Vices, Other Crimes: Kansas Statutes Annotated Section 60-455 Revisited, 1978, 26 U.Kan.L.Rev. 161, 166. One danger in the use of the motion by the defendant is that if it is denied and the objection is not renewed when the evidence is offered at trial, the appellate court will only consider the evidence available to the trial judge at the time of the motion in reviewing the ruling. U.S. v. Cobb, C.A.8th, 1978, 588 F.2d 607, 610-611. It was not error for the court to refuse to rule on the admissibility of evidence of other crimes prior to the trial where the court did give the defense an opportunity to object and have the question of admissibility determined out of the presence of the jury at trial. U.S. v. Moore, C.A.9th, 1978, 580 F.2d 360, 363. One of the hazards of such preliminary rulings is that the defendant may claim prejudice when his own conduct requires an alteration of the ruling. See People v. Vidaurri, 1980, 163 Cal.Rptr. 57, 103 Cal.App.3d 450. Defendant was not prejudiced by timing of court's pretrial ruling concerning admissibility of other crimes evidence since this made it possible to make an informed decision as to whether or not to testify. State v. Brant, Minn.1984, 345 N.W.2d 248. On writ of prohibition following denial of motion in limine to exclude evidence of other crimes, court would not pass on merits of ruling but only on whether there was an abuse of discretion. State v. Hagen, Minn.App.1984, 342 N.W.2d 160. Where on motion in limine court ordered that defendant be given ten days notice of intent to use evidence of other crimes, error was adequately preserved for appeal even though no objection was made when evidence was introduced at trial. State v. Brown, 1984, 680 P.2d 582, 209 Mont. 502. An unsuccessful motion in limine does not suffice to preserve the issue of admissibility of other crimes evidence for appeal; defendant must object again when the evidence is offered at trial. State v. Harper, 1983, 340 N.W.2d 391, 215 Neb. 686. Ruling on motion in limine is not binding on trial court; in order to preserve objection it must be raised again during trial. Odum v. State, Okl.Crim.1982, 651 P.2d 703, 706. Trial judge could not rule on admissibility of other crimes evidence as rebuttal in response to a motion in limine because it had no way of knowing whether there would be anything to rebut; hence, it was not error to refuse to rule on the motion. Simpson v. State, Okl.Crim.1982, 642 P.2d 272. In most cases, only proffered evidence of other crimes that is unusually prejudicial should be ruled on before trial. State v. Browder, 1984, 687 P.2d 168, 170, 69 Or.App. 564. Where the trial court has granted a motion in limine admitting evidence to impeach experts, defendant did not have to call experts and have them impeached at trial in order to preserve issue for appeal. State v. Cochrun, S.D.1983, 328 N.W.2d 271 (holding unclear). Where motion in limine did not specify the particular evidence complained of on appeal, objection at trial is required to preserve issue. State v. Shaffer, Utah 1986, 725 P.2d 1301, 1308. When prosecution disclaimed any intent to use evidence of bad acts, trial court was

justified in declining to rule on motion in limine and waiting till issue arose at trial. State v. Bissonette, 1985, 488 A.2d 1231, 1237, 145 Vt. 381. Pretrial order precluding state from using other crimes evidence is appealable as of right as an order suppressing evidence. State v. Harris, App.1985, 365 N.W.2d 922, 924, 123 Wis.2d 231. Where defendant pleads guilty following a decision on a motion in limine that admits evidence of other crimes, he waives his right to appeal the ruling. State v. Nelson, 1982, 324 N.W.2d 292, 108 Wis.2d 698.

FN20. Objection Where tape had been furnished to defendant months in advance of trial, timely objection to other crimes should have been made before the tape was played. U.S. v. Castiello, C.A.1st, 1990, 915 F.2d 1, 4 n. 4. In absence of objection, it was not plain error to admit evidence of prior robberies to prove defendant committed charged robbery for thrills, not because insane. U.S. v. Medved, C.A.6th, 1990, 905 F.2d 935, 939. Where judge refused to rule on motion in limine, objection at time of trial was required to preserve issue of admissibility of other crimes evidence. U.S. v. Westbrook, C.A.8th, 1990, 896 F.2d 330, 334. Court would not consider error in use of the plaintiff's prior drug use in civil case where there was no objection or request for limiting instruction. Pinkham v. Maine Central R. Co., C.A.1st, 1989, 874 F.2d 875, 880. If no objection was made to other crimes evidence in trial court, defendant must show plain error on appeal; that is, that but for the admission of the evidence he would have been acquitted. U.S. v. Snyder, C.A.7th, 1989, 872 F.2d 1351, 1357. Objection on lack of proper foundation and lack of specificity was not sufficient to raise the propriety of the admission of other crimes under Rule **404(b).** U.S. v. Mascio, C.A.7th, 1985, 774 F.2d 219, 223. Of course, the fact that the defendant does not cite Rule **404(b)** and did not object on that ground below does not bar the appellate court from applying that Rule to his argument in order to shoot it down. U.S. v. Wolfe, C.A.11th, 1985, 766 F.2d 1525, 1528. Defendant's failure to object at trial to evidence of other crime operates as a waiver of that objection unless admission constituted plain error. U.S. v. Gironda, C.A.7th, 1985, 758 F.2d 1201, 1219. Where defendant did not object to evidence of his threats to kill under Rule **404(b),** he waived the issue on appeal. U.S. v. Medina, C.A.7th, 1985, 755 F.2d 1269, 1277. Where defendant made no objection to other crimes evidence at trial, review was by plain error standard. U.S. v. Darby, C.A.11th, 1984, 744 F.2d 1508, 1523. In prosecution for income tax evasion, objections to testimony that defendant was a pimp who lived off the income of hookers were too general to preserve issue. Clinkscale v. U.S., C.A.8th, 1984, 729 F.2d 940. Failure to object at trial waived contention in loansharking prosecution that evidence of other crimes should not have been admitted. U.S. v. Gigante, C.A.2d, 1984, 729 F.2d 78, 84. Where no objection was made to the admission of other crimes evidence at trial, issue was not preserved for appeal. U.S. v. Vitale, C.A.8th, 1984, 728 F.2d 1090, 1092. It was not plain error in prosecution for fraud to introduce evidence of sale of truck by the defendant to show his use of a front man to hide his interest in certain transactions. U.S. v. Murphy, C.A.5th, 1983, 703 F.2d 1335. Objection that evidence was inadmissible proof of other crimes was waived when it was not raised at trial. U.S. v. Carson, C.A.2d, 1983, 702 F.2d 351, 369. It was not plain error to admit evidence of other incidents of check forging before the period charged in the indictment; in the absence of objection issue was not reviewable. U.S. v. Simmons, C.A.3d, 1982, 679 F.2d 1042, 1050. Where no objection was made at trial to the introduction of evidence that an associate of the conspirators was murdered on eve of his appearance, review was limited to whether this was plain error. U.S. v. Howton, C.A.5th, 1982, 688 F.2d 272, 278. Where defense counsel objected on hearsay grounds to use of client's prior record and there was no showing that he intended to sandbag the prosecution, evidence of other crimes admitted without justification and without limiting instruction was plain error. U.S. v. Escobar, C.A.5th, 1982, 674 F.2d 469, 475. If defense counsel believes ruling admitting evidence of other crimes was error, he should have objected or moved to strike; failure to do so is a waiver of the objection. U.S. v. Allain, C.A.7th, 1982, 671 F.2d 248, 252. Given the complexity of a decision to admit or exclude evidence under Rule **404(b),** neither court nor counsel should rely upon a continuing objection as a method of dealing with issue. U.S. v. Mangiameli, C.A.10th, 1982, 668 F.2d 1172, 1177. Where defendant did not object to use of other crimes evidence at trial, standard of review was that of plain error. U.S. v. Gonzalez, C.A.5th, 1981, 661 F.2d 488, 493. Where the defendant did not object to hints he was keeping company with loose women on grounds it was character evidence, appellate court did not need to consider admissibility under Rule **404(b).** U.S. v. Bruner, C.A.1981, 657 F.2d 1278, 1292, 212 U.S.App.D.C. 36. One court has based the obligation to object on Criminal Rule 51 rather than Evidence Rule 103. U.S. v. Foote, C.A.8th, 1980, 635 F.2d 671, 672. Where both defendant and his counsel said they had no objection to exhibit offered to show that defendant was in custody of Attorney General at time of charged escape, it was not error to admit it with statement that the defendant had been convicted of first degree murder underlined in red ink. U.S. v. Caldwell, C.A.7th, 1980, 625 F.2d 144, 148. In absence of objection at trial, receipt of evidence of other crimes could only be reviewed on appeal under plain error standard. U.S. v. Licavoli, C.A.9th, 1979, 604 F.2d 613, 623. Where objection that evidence was

proof of "other crimes" was not raised below, this ground was not available on appeal. U.S. v. Viserto, C.A.2d, 1979, 596 F.2d 531, 537. Defendant must object to the sufficiency of the government's foundation for admissibility in order to raise the issue on appeal. U.S. v. Cobb, C.A.8th, 1978, 588 F.2d 607, 611. Where the defendant charged with firearms offenses did not object at trial to evidence that he had been dealing in drugs, reversal was not required where admission did not amount to plain error. U.S. v. Garrett, C.A.5th, 1978, 583 F.2d 1381, 1386. Where defense counsel made no objection to the admission into evidence of mug shots, even though specifically asked by the trial judge if he had any objections, review on appeal was limited by the plain error rule. U.S. v. Bohr, C.A.8th, 1978, 581 F.2d 1294, 1299. Defendant waived objection to admission of evidence of prior crimes when he failed to make a timely objection on this specific ground in the trial court. U.S. v. Cepeda Penes, C.A.1st, 1978, 577 F.2d 754, 760. Objections to evidence of other crimes as being overly prejudicial, irrelevant, and lacking sufficient probative worth was enough to preserve for appeal the question of admissibility under Rule **404(b).** U.S. v. Gubelman, C.A.2d, 1978, 571 F.2d 1252, 1256 n. 13. If the evidence comes in as part of a non-responsive answer, the trial court may grant a motion to strike rather than declare a mistrial. U.S. v. Aaron, C.A.8th, 1977, 553 F.2d 43, 45. Where the trial court referred to the proffered evidence as "evidence of prior bad acts," the objection was "apparent from the context" within the meaning of Rule 103(a)(1) and the defendant's failure to make a specific objection did not bar appellate review. U.S. v. Barrett, C.A.1st, 1976, 539 F.2d 244, 247 n. 5. Objection to evidence that defendants in a prostitution case offered a Lincoln Continental to a witness as a bribe could not be raised on appeal where no objection was made below. Garibay v. State, Alaska App.1983, 658 P.2d 1350, 1357. Where no objection was made to evidence of other crimes and defense counsel even consented to its admission, there was no error in admission of evidence. State v. Jahns, App.1982, 653 P.2d 19, 133 Ariz. 562. It was enough that defendant objected first time other crime was mentioned; he did not need to object to every subsequent mention of incident to save point for appeal. State v. Featherman, C.A.1982, 651 P.2d 868, 133 Ariz. 340. Claim that trial should have excluded details of other crimes could not be asserted on appeal where no objection on this ground was made at trial. People v. Allen, 1986, 232 Cal.Rptr. 849, 869, 42 Cal.3d 1222, 729 P.2d 115. Where objection to other crimes was generic, appellate court would not consider whether narrower objection to specific parts of the testimony might have been sound. People v. Barney, 1983, 192 Cal.Rptr. 172, 143 Cal.App.3d 490. Failure to object to evidence of other crime waived any error in admitting evidence. Nelson v. Gaunt, 1981, 178 Cal.Rptr. 167, 125 Cal.App.3d 623. In prosecution of pickets for making false report to police officer, failure to object to evidence that pickets struck a delivery truck with their signs was a waiver of the objection. People v. Lawson, 1979, 161 Cal.Rptr. 7, 100 Cal.App.3d 60. Defendant waived objection to use of other crimes evidence by failure to object when it was offered. People v. Jackson, 1978, 151 Cal.Rptr. 688, 88 Cal.App.3d 490. Generally Admissibility of evidence of other crimes will not be reviewed on appeal without a timely objection at trial urging the grounds to be used on appeal. People v. Crume, 1976, 132 Cal.Rptr. 577, 61 Cal.App.3d 803. In absence of a timely objection under Kan.Stats.Ann. s 60-404, defendant could not raise admissibility of evidence of other crimes on appeal. State v. Whitehead, 1979, 602 P.2d 1263, 226 Kan. 719. Where defendant made a motion in limine to exclude evidence of other crimes that was overruled, objection made in chambers after evidence was admitted was sufficient to preserve issue; it was not necessary to object in presence of jury and thus emphasize the evidence. People v. Hernandez, 1985, 377 N.W.2d 729 n. 1, 736 n. 3, 423 Mich. 340. Appellate review of admission of other crimes evidence was precluded where the defendant failed to object. People v. Duenaz, 1986, 384 N.W.2d 79, 82, 148 Mich.App. 60. Where defendant did not move to strike testimony that defendant and companion were passing bad checks, issue of propriety of this evidence was not preserved for appeal. People v. Chappelle, 1982, 319 N.W.2d 584, 114 Mich.App. 364. Where defendant did not object to evidence of other crimes in trial court, he forfeited his right to have issue considered on appeal. State v. Stutelberg, Minn.1983, 328 N.W.2d 735. Where there was no objection and no plain error, defendant was not entitled to raise claim of error in admission of other crimes evidence on appeal. State v. Brown, Minn.1984, 348 N.W.2d 743, 746. Failure to object to prosecutor's questions about defendant's prior possession of gun similar to that used to commit charged robbery precluded raising this issue on appeal. State v. Marquetti, Minn.1982, 322 N.W.2d 316. Where defendant failed to object to other crimes evidence at trial, he could not do so on appeal. State v. Weinberger, 1983, 204 Mont. 278, 665 P.2d 202, 210. Review on appeal was foreclosed where there was no evidence of crime admitted, no objection was made, and insinuation of crime in question was not plain error. State v. Warnick, Mont.1982, 656 P.2d 190. Objection under N.M.R.Ev. **404(b)** could not be entertained on appeal where it was not raised below; objection under Rule 609 was not sufficient. State v. Doe, App.1981, 639 P.2d 72, 97 N.M. 263. Where no objection was made at trial, motion in limine did suffice to preserve objection to evidence of other insurance claims filed by the plaintiff. Caserta v. Allstate Insurance Co., 1983, 470 N.E.2d 430, 436, 14 Ohio App.3d 167. Even if testimony that defendant was

"pilfering more or less" was an accusation of another crime, defendant failed to object and thus cannot complain. Peters v. State, Okla.Crim., 1986, 727 P.2d 1386. Where trial judge sustained objection to questions about other crimes, issue was not preserved for appeal where no request that jury be admonished was made. Ross v. State, Okla.Crim.1986, 717 P.2d 117, 121. Error in admission of other crimes was not preserved for appeal where no objection was made at trial. Thompson v. State, Okla.Crim.1985, 705 P.2d 188, 191. Objection to evidence of possession of stolen gun under Rule **404(b)** was waived where no objection on this ground was made at trial. Jones v. State, Okla.Crim.1985, 695 P.2d 13, 15. Defendant waived any error in the admission of other crimes evidence when he failed to object to its admission at trial. Huddleston v. State, Okla.Crim.1985, 695 P.2d 8, 10. Issue of introduction of other crimes evidence was not properly before the appellate court for review where no objection was made below. Pegg v. State, Okl.Crim.1983, 659 P.2d 370, 373. Since no proper objection was made at trial, issue of admissibility of other crimes was not preserved for review. Hack v. State, Okl.Crim.1982, 654 P.2d 629. In absence of objection, admission of evidence of other crimes could not be raised as error on appeal. Miller v. State, Okl.Crim.1982, 642 P.2d 276. Claimed error in admission of other crimes was waived when defendant failed to object below. King v. State, Okl.Cr.1982, 640 P.2d 983. Where objection to other crime was not made till conference in chambers after it was admitted, objection would not preserve error. State v. Dirk, S.D.1985, 364 N.W.2d 117, 123. Where defense failed to object to proof of other crime, reversal was possible only if admission was plain error. State v. Sonnenberg, 1984, 344 N.W.2d 95, 103, 117 Wis.2d 159. Failure to interpose a timely objection to evidence of other crimes constitutes a waiver unless evidence is so flagrant as to be plain error. Hopkinson v. State, Wyo.1981, 632 P.2d 79, 124.

But see Improper admission of evidence of a prior crime constitutes plain error impinging upon the fundamental fairness of the trial itself. U.S. v. Biswell, C.A.10th, 1983, 700 F.2d 1310, 1319.

FN21. Irrelevant Objection that evidence was "completely inadmissible" did not suffice to raise issue of Rule **404(b).** U.S. v. Penson, C.A.7th, 1990, 896 F.2d 1087, 1092. Objection that evidence of other crime was "not relevant" and "highly prejudicial" was sufficient where judge treated it as an objection under Rule **404(b).** U.S. v. Nolan, C.A.7th, 1990, 910 F.2d 1553, 1559. Objection that evidence was irrelevant was sufficient to preserve objection to admission of other crimes evidence. U.S. v. Afjehei, C.A.2d, 1989, 869 F.2d 670, 673. "I object" is not sufficient to raise objection under Rule **404(b)** but appellate court would assume that the ground of objection was apparent from the context. U.S. v. Gilmore, C.A.8th, 1984, 730 F.2d 550, 554 n. 1. Where defendant made no objection to proof of other crime on grounds of hearsay or opinion, these objections could only be reviewed for plain error. U.S. v. Wormick, C.A.7th, 1983, 709 F.2d 454, 460. Objection that evidence was "an effort to prove that defendants did something by showing that they did the same alleged activities to someone else" was sufficient to raise objection under Rule **404(b).** Jay Edwards, Inc. v. New England Toyota Distributor, C.A.1st, 1983, 708 F.2d 814, 824 n. 7. Hearsay objection to statement concerning other crime of defendant was not sufficient to preserve issue of admissibility under Rule 404. U.S. v. Montemayor, C.A.5th, 1982, 684 F.2d 1118, 1121. Where counsel's objection to admissibility of other crimes was limited to Rule 403, the objection did not adequately raise issue of compliance with Rule **404(b)** and issue could only be raised if it was plain error. U.S. v. Kloock, C.A.5th, 1981, 652 F.2d 492, 494. The Evidence Rules require that an objection to evidence of other crimes be specific; this requirement was not satisfied by the statement: "This is objected to. That is not a proper place in this trial." U.S. v. Long, C.A.3d, 1978, 574 F.2d 761, 765. Objection that evidence was "collateral" did not suffice to preserve claim that its admission violated Rule **404(b).** State v. Bissonette, 1985, 488 A.2d 1231, 1237, 145 Vt. 381. Objection to other crimes evidence under Wis.Stats.Ann. s 904.04(2) was sufficient despite fact it did not cite the section where defense counsel argued to trial judge that if the evidence that circumstantially showed drunk driving were admissible, so would a conviction for that offense. State v. Draize, 1979, 276 N.W.2d 784, 88 Wis.2d 445.

But see Courts hold that relevance objection does not suffice to preserve Rule **404(b)** objection, either alone or in conjunction with assertion of Rule 403. U.S. v. Chaidez, C.A.7th, 1990, 919 F.2d 1193, 1202-1203; U.S. v. Harris, C.A.10th, 1990, 903 F.2d 770, 776-777; U.S. v. Diaz, C.A.2d, 1989, 878 F.2d 608, 616; U.S. v. Carroll, C.A.7th, 1989, 871 F.2d 689, 691; U.S. v. Laughlin, C.A.7th, 1985, 772 F.2d 1382, 1391; Bryant v. Consolidated Rail Corp., C.A.1st, 1982, 672 F.2d 217, 220; U.S. v. Singh, C.A.2d, 1980, 628 F.2d 758, 762; State v. Casteneda, App.1982, 642 P.2d 1129, 1133, 97 N.M. 670; State v. Fredrick, 1986, 729 P.2d 56, 60 n. 3, 45 Wn.App. 916; State v. Platz, 1982, 655 P.2d 710, 33 Wn.App. 345.

FN22. Invoking discretion An objection on grounds of relevance is sufficient to also raise claim that evidence should have been excluded under Rule 403, given the close relationship between the two rules. U.S. v. Afjehei, C.A.2d, 1989, 869 F.2d 670, 673. Court rejects argument that because the balancing test of Rule 403 is virtually subsumed in Rule **404(b)** via the Advisory Committee's Note, an objection under Rule **404(b)** is sufficient to trigger duty to balance under Rule 403. U.S. v. Manso-Portes, C.A.7th, 1989, 867 F.2d 422, 426. This is especially important in the Third Circuit where one decision can be read as requiring the objector to add an invocation of Rule 403 to his objection if he intends to attack the court's exercise of discretion on appeal. U.S. v. Long, C.A.3d, 1978, 574 F.2d 761, 766. However, in that case the defendant failed to make an adequate objection and it is possible that the court's holding is limited to that situation. Defendant could not raise error in admission of evidence of other crimes where he neither objected under Cal.Evid.Code s 1101 nor invoked the court's discretion to exclude under Cal.Evid.Code s 352 and there was nothing in the record to suggest that judge understood that objection was being made on these grounds. People v. Salinas, 1982, 182 Cal.Rptr. 683, 131 Cal.App.3d 925. Objection that evidence of gang membership was so prejudicial as to outweigh any probative value was sufficient to invoke the discretion of the trial court under Cal.Evid.Code s 352. People v. Perez, 1981, 170 Cal.Rptr. 619, 114 Cal.App.3d 470. Objection of lack of foundation was not adequate to raise objections as to prejudicial effect of mug shots. State v. McCardell, Utah, 1982, 652 P.2d 942. Defendant cannot complain of trial judge's failure to balance prejudice against probative worth where he did not object or move to strike the evidence of a prior brawl. State v. Stawicki, 1979, 286 N.W.2d 612, 93 Wis.2d 63.

FN23. Must show relevance Trial court's failure to follow "rigorous criteria for admitting evidence of other crimes" by not showing an evidentiary hypothesis to justify admissibility is harmless error if the appellate court can construct one on its own. U.S. v. Doran, C.A.10th, 1989, 882 F.2d 1511, 1523-1524. "In the Rule **404(b)** context, similar act evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor." Huddleston v. U.S., 1988, 108 S.Ct. 1496, 1501, 485 U.S. 681, 99 L.Ed.2d 771. In drug prosecution, evidence of murder of pilot to whom money was owed for past smuggling and who was withholding the use of plane needed for future smuggling was relevant to prove intent to continue the conspiracy. U.S. v. Meester C.A.11th, 1985, 762 F.2d 867, 874. Evidence of other crimes must meet the standard of relevancy set forth in Rule 401; this is a function of the similarity between the charged and uncharged crimes. U.S. v. Dothard, C.A.11th, 1982, 666 F.2d 498, 502. Caution and judgment are called for in receiving evidence of other crimes; trial judge should require the prosecution to explain why the evidence is relevant and necessary. U.S. v. Reed, C.A.6th, 1981, 647 F.2d 678, 687. Unless the relevance of proof of prior crime to some issue in criminal trial can be shown, it must be excluded. U.S. v. Foskey, C.A., 1980, 636 F.2d 517, 523, 204 U.S.App.D.C. 245. As a predicate to the determination that the extrinsic offense is relevant, the prosecution must offer proof demonstrating that the defendant committed the offense. U.S. v. Brown, C.A.5th, 1979, 608 F.2d 551, 555. There is no presumption that other crimes evidence is relevant. U.S. v. Mohel, C.A.2d, 1979, 604 F.2d 748, 751. There is no presumption that other crimes evidence is relevant. U.S. v. Manafzadeh, C.A.2d, 1979, 592 F.2d 81, 86. Government has the burden of showing that evidence offered under Rule **404(b)** is relevant to prove one of the excepted facts and that it is more probative than prejudicial to the defendant. U.S. v. Hernandez-Miranda, C.A.9th, 1979, 601 F.2d 1104, 1108. A trial judge faced with an other-crimes evidence problem should require the government to explain why such evidence is relevant and necessary. U.S. v. DeVaughn, C.A.2d, 1979, 601 F.2d 42, 45. Evidence that defendant was in company of a man who was arrested in airport with cocaine in his suitcase was not relevant to show that he hired woman to travel with him with cocaine in her girdle. U.S. v. Mann, C.A.1st, 1978, 590 F.2d 361, 370. Evidence of subsequent rape was not relevant to prove charged rape. U.S. v. Aims Back, C.A.9th, 1979, 588 F.2d 1283, 1286. Relevancy of evidence of other crimes must be examined with care and if connection with the crime charged is not clearly perceived, doubts should be resolved in favor of the accused. People v. Guerrero, 1976, 129 Cal.Rptr. 166, 16 Cal.3d 719, 548 P.2d 366. Evidence of co-defendant's prior trademark infringements had no relevance against defendant in prosecution for passing fraudulent traveler's checks. People v. Jones, 1983, 336 N.W.2d 889, 126 Mich.App. 191. Evidence that four days before handgun robbery of a drug store the defendant pulled a knife on a clerk who tried to apprehend him for stealing a bottle of perfume was relevant to show defendant was in area at the time of the charged crime, that he had a mustache, and was willing to use weapon. State v. Kumpula, Minn.1984, 355 N.W.2d 697, 703. The first two facts could have been proved without showing the crime; the last looks like an inference as to character. For a case in which the court does not state the grounds for supposing the evidence to be relevant and relevance is not obvious, see State v. Thomas, Minn.App.1985, 360 N.W.2d 458 (in rape-burglary where defendant had first attempted to seduce victim by claiming to be football star, evidence of similar seduction attempt was admissible). In prosecution for arson, evidence that the

defendant had taken money from purse of victim a year earlier was irrelevant. Dorsey v. State, 1980, 620 P.2d 1261, 96 Nev. 951. In order to gain admission of evidence of other crime, counsel must identify the consequential fact and articulate precisely the evidential hypothesis by which it may be inferred from the commission of the other crime. State v. Ohnstad, No.Dak.1984, 359 N.W.2d 827, 838. Court should not jump into listed categories, but should begin by considering the basic relevancy of other crimes evidence. State v. Johns, 1986, 725 P.2d 312, 320, 301 Or. 535. Evidence offered under Rule **404(b)** must also satisfy Rule 401 and be relevant to prove some controverted fact other than propensity to commit crime. State v. Morgan, 1986, 340 S.E.2d 84, 91, 315 N.C. 626. The admissibility of evidence of other crimes under Utah R.Ev. 55 turns on whether it is relevant to prove some material fact. State v. Forsyth, Utah 1982, 641 P.2d 1172, 1175. In deciding whether or not to admit evidence of other crimes, trial judge must first decide if it is relevant to issue on which it is offered, then balance probative worth against prejudice. State v. Saltarelli, 1982, 655 P.2d 697, 98 Wash.2d 358. Krivosha, Langsworth & Pirsch, Relevancy: The Necessary Element in Using Evidence of Other Crimes, Wrongs or Bad Acts to Convict, 1981, 60 Neb.L.Rev. 657.

But see It is defendant's burden to show that other crimes evidence was irrelevant. U.S. v. Culver, C.A.8th, 1991, 929 F.2d 389, 391 (but possible to read this as meaning this is a burden on appeal when evidence has been admitted at trial).

FN24. Burden of proof Evidence that defendant had once flown a plane to Colombia was not admissible to prove his intent in possessing cocaine where there was not a shred of evidence of his intent in making the Colombia flight. U.S. v. Chilcote, C.A.11th, 1984, 724 F.2d 1498, 1503. Rule **404(b)** does not require proof that defendant was aware of acts offered to show his motivation as jury could reject his contrary testimony and infer knowledge from acts proved. Bohannon v. Pegelow, C.A.7th, 1981, 652 F.2d 729, 733. It is the government's burden to show that other crimes evidence is relevant and that is more probative than prejudicial. U.S. Herrera-Medina, C.A.9th, 1979, 609 F.2d 376, 379.

FN25. Jury determines The Supreme Court so held in Huddleston v. U.S., 1988, 108 S.Ct. 1496, 485 U.S. 681, 99 L.Ed.2d 771, discussed at footnote 25.1 in this supplement. Evidence that defendant made large investments in real estate was relevant to prove narcotics transactions under Rule **404(b)** because jury could infer that defendant was laundering proceeds of crime. U.S. v. Towers, C.A.7th, 1985, 775 F.2d 184, 187. While Fifth and Eleventh Circuits believe that preliminary facts in proof of other crimes is for the jury, Seventh Circuit believes this is a function of the judge under Rule 104(b). U.S. v. Byrd, C.A.7th, 1985, 771 F.2d 215, 222 n. 4.

FN27. Determined by judge This view was emphatically rejected by the Supreme Court in Huddleston v. U.S., 1988, 108 S.Ct. 1496, 1500, 485 U.S. 681, 99 L.Ed.2d 771. Policy of Rule **404(b)** would not be served by giving the jury the function of determining the preliminary facts in the admission of the evidence of other crimes. U.S. v. Byrd, C.A.7th, 1985, 771 F.2d 215, 222 n.4. It was not necessary for judge to charge jury that it must find that other crimes were committed by "clear and convincing evidence"; preliminary fact could be decided against proponent under Rule 104(b) by judge only if jury could not reasonably find defendant committed crime. U.S. v. Pepe, C.A.11th, 1984, 747 F.2d 632, 670 n. 74. Determination of preliminary facts which are needed to make other crimes evidence admissible is to be made by the trial judge. U.S. v. Day, C.A.1979, 591 F.2d 861, 878, 192 U.S.App.D.C. 252. The contrary view is taken in U.S. v. Beechum, C.A.5th, 1978, 582 F.2d 898, 913. In determining whether prior crime has been proved by clear and convincing evidence, court can consider evidence of yet another uncharged crime that was not admitted in evidence. State v. Luna, Minn.1982, 320 N.W.2d 87. The question of whether the proof of a prior crime meets the "clear and convincing" standard is for the trial judge under Minn.R.Ev. 104(a), not the jury under Rule 104(b). State v. Matteson, Minn.1979, 287 N.W.2d 408. The Comment to Prop.N.Y.Evid.Code s **404(b)** says that preliminary facts regarding the admission of other crimes evidence are to be determined by the judge under the New York equivalent of F.R.Ev. 104(a). Evidence of other crimes was properly admitted after extensive pretrial hearing in which nine witnesses testified and trial judge made findings of fact and conclusions of law. State v. Wedemann, S.D.1983, 339 N.W.2d 112, 115. For a contrary opinion, see Kuhns, The Propensity to Misunderstand The Character of Specific Acts Evidence, 1981, 66 Iowa L.Rev. 777, 800.

FN28. Offer of proof Trial court is not required to hold hearing on admissibility of other crimes evidence; all that is required is that the judge be satisfied that there is enough evidence so that a jury could decide that defendant committed

the act. U.S. v. Carter, C.A.11th, 1985, 760 F.2d 1568, 1579. Rule 103 bars appellate reversal for exclusion of evidence of other crimes offered to support coercion defense where no adequate offer of proof was made in trial court. U.S. v. Morlan, C.A.9th, 1985, 756 F.2d 1442, 1447. Court was not required to hold hearing outside presence of jury on admissibility of other crimes evidence where adequate offer of proof was made, evidence was fully explained in the prosecutor's brief, and explained again at a bench conference at trial. U.S. v. Lavelle, C.A.D.C.1985, 751 F.2d 1266, 1279 n. 17. For a case enforcing a severe requirement for offers of proof by defendant seeking to prove other crimes of government witness, see U.S. v. Cutler, C.A.9th, 1982, 676 F.2d 1245, 1250. Where evidence of other crimes is offered, Rule 104(c) and prior decisions require that the trial judge hold a hearing out of the presence of the jury concerning its admissibility. U.S. v. Benton, C.A.5th, 1981, 637 F.2d 1052, 1055. The trial court was commended for hearing evidence of prior bad acts in camera before permitting them to be introduced into evidence before the jury in U.S. v. McPartlin, C.A.7th, 1979, 595 F.2d 1321, 1345. The failure of the trial court to conduct a preliminary hearing into the admissibility of other crimes evidence is not reversible error. U.S. v. Black, C.A.5th, 1979, 595 F.2d 1116, 1117. For a case in which the prosecutor made an offer of proof to avoid jeopardizing his case if the court thought the evidence inadmissible, a sort of "reverse motion in limine," see U.S. v. McFadyen-Snider, C.A.6th, 1977, 552 F.2d 1178, 1181. This procedure was employed in U.S. v. Brunson, C.A.5th, 1977, 549 F.2d 348, 358. Questions as to the admissibility of other crimes evidence must be determined out of the presence or hearing of the jury. People v. Campbell, 1976, 133 Cal.Rptr. 815, 63 Cal.App.3d 599. Witnesses need not testify at hearing on the admissibility of other crimes evidence; it is enough that prosecutor state the substance of the expected evidence. State v. Breazeale, 1986, 714 P.2d 1356, 1360, 238 Kan. 714. Trial court properly determined admissibility of other crimes evidence out of the presence of the jury. State v. Shepherd, 1983, 657 P.2d 1112, 232 Kan. 614. While it would be preferable for the prosecutor to make an offer of proof showing details of other offense, this was not required where the defense did not insist on one and evidence was never offered because defense to which it was relevant was not made. People v. Johnson, 1983, 333 N.W.2d 585, 124 Mich.App. 80. In ruling on admissibility of evidence of other crimes, trial court can rely on avowal of prosecutor as offer of proof without requiring a question-and-answer offer from witness. State v. McAdoo, Minn.1983, 330 N.W.2d 104. Trial judge followed correct procedure in requiring state to make case for admission of evidence of prior crime in a hearing outside presence of jury in which judge was apprised of quantum and quality of proof that defendant had committed the crime and then balanced probative value and prejudice. Petrocelli v. State, Nev.1985, 692 P.2d 503, 507. Better practice is for proponent of evidence of other crimes to obtain a ruling on the admissibility of the evidence out of the presence of the jury before offering it in evidence. State v. Morgan, 1986, 340 S.E.2d 84, 92, 315 N.C. 626. When other crimes evidence is tendered, it is desirable for the court to require a proffer out of the presence of the jury and make a record of its finding under Rule 403. Elliot v. State, Wyo.1979, 600 P.2d 1044, 1049 n. 1.

FN29. Must specify issue Prosecution must show why other crimes evidence is relevant and necessary to prove a specific element of the charged crime. U.S. v. Yeagin, C.A.5th, 1991, 927 F.2d 798, 803; U.S. v. Porter, C.A.10th, 1989, 881 F.2d 878, 884; U.S. v. Kendall, C.A.10th, 1985, 766 F.2d 1426, 1436; U.S. v. Shackleford, C.A.7th, 1984, 738 F.2d 776, 780; U.S. v. Biswell, C.A.10th, 1983, 700 F.2d 1310, 1317; U.S. v. Figueroa, C.A.2d, 1980, 618 F.2d 934, 939 n. 2. Judge who admits evidence of other crimes must specify under which provision of Rule **404(b)** it is being admitted. U.S. v. Westbrook, C.A.8th, 1990, 896 F.2d 330, 334. Failure of prosecution to specify the purpose of introduction of other crimes evidence and attempt to justify this on all the grounds listed in **404(b)** warrants inference that purpose was simply to prejudice defendant rather than prove some specific element of the charged crime. U.S. v. Fortenberry, C.A.5th, 1988, 860 F.2d 628, 633. Where instructions limited use of other crimes evidence to one purpose, court could not justify its admissibility on some other ground. U.S. v. Rappaport, Ct.Mil.App.1986, 22 M.J. 445, 447. Testimony of other crimes should not have been admitted where offeror stated baldly that the purpose was to show penchant for violence. Lataille v. Ponte, C.A.1st, 1985, 754 F.2d 33, 36. One court, while criticizing prosecution for refusal to do this either at trial or on appeal, went on to justify admissibility on concededly weak grounds. U.S. v. Mehrmanesh, C.A.9th, 1982, 689 F.2d 822, 831. Evidence of other crimes was not admissible when the prosecution stated that the purpose of the evidence was to show the defendant's propensity to lie and thus show guilt of the charge of making false statement to enlistment officer. U.S. v. Dothard, C.A.11th, 1982, 666 F.2d 498, 504. On appeal, decision admitting evidence of other crimes will be upheld if it is admissible on any ground; it is not necessary that the ground relied upon have been specified in the trial court. U.S. v. Green, C.A.9th, 1981, 648 F.2d 587, 592. Although preferred procedure would have been for defendant to invoke Rule **404(b)** instead of Rule 609(a), he is not barred from asserting error in excluding evidence of violent acts of victim to show his fear in

support of claim of self-defense where his theory of admissibility was clearly outlined to the trial court. Government of Virgin Islands v. Carino, C.A.3d, 1980, 631 F.2d 226, 230. Although the prosecution did not attempt to justify introduction of evidence of other crimes under Rule **404(b)** and the trial court did not give any reasons for admitting the evidence, no such specification is necessary as long as the evidence was in fact admissible under the rule. U.S. v. Provenzano, C.A.3d, 1980, 620 F.2d 985, 993. Although evidence of other crimes might have been relevant to prove state of mind of defendants, appellate court could not use that theory to salvage case where evidence was admitted on an erroneous theory and under erroneous instructions; potential unfairness of permitting the assertion of new theory on appeal is substantial. U.S. v. Pantone, C.A.3d, 1979, 609 F.2d 675, 681. One appellate court has thought it proper to justify the admission of the evidence on other grounds despite the fact that the trial judge admitted it on the issue of "intent", because the instruction given at the end of the trial listed all of the other grounds in Rule 104(b). U.S. v. Albert, C.A.5th, 1979, 595 F.2d 283, 288 n. 11. When evidence of other crimes is offered, the prosecutor's first duty is to identify with specificity the purpose for which the evidence is admissible; this duty is not satisfied by reciting litany of all the purposes listed in Rule 404. People v. Golochowicz, 1982, 319 N.W.2d 518, 413 Mich. 298. In determining relevance of evidence of other crimes, trial court must first identify the purpose for which the evidence is offered. State v. Saltarelli, 1982, 655 P.2d 697, 98 Wash.2d 358.

FN30. Point to element Defendant's plea of not guilty puts in issue every element of crime charged. U.S. v. Mothershed, C.A.8th, 1988, 859 F.2d 585, 589. The Ninth Circuit has accused other circuits of accepting the view that a plea of not guilty puts in issue all of the elements of the offense and justifies use of other crimes without any inquiry into what issues were actively contested at trial. U.S. v. McKoy, C.A.9th, 1985, 771 F.2d 1207, 1214 n. 4. By pleading not guilty, the defendant puts in issue all elements of the charged crime; the prosecution is not required to wait until the defense puts in evidence asserting a lack of one of the elements but may prove other crimes in anticipation of defense. U.S. v. Gilmore, C.A.8th, 1984, 730 F.2d 550, 554. Since plea of not guilty placed in issue the defendant's membership in charged conspiracy, it was not necessary for prosecution to wait for defense case before introducing other crimes on this issue. U.S. v. Wagoner, C.A.8th 1983, 713 F.2d 1371, 1375. In conspiracy case in 11th Circuit, the mere entry of plea of not guilty puts issue of intent in issue even though defendant denies commission of acts. U.S. v. Kopituk, C.A.11th, 1982, 690 F.2d 1289, 1334.

FN31. "Fancy defenses" The Thompson argument was adopted by the court in State v. Harris, App.1985, 365 N.W.2d 922, 926, 123 Wis.2d 231. For an example of an appellate court engaged in just this sort of game, see U.S. v. Lewis, C.A.1983, 701 F.2d 972, 226 U.S.App.D.C. 236 (after prosecution elicited on cross-examination that car in which he was riding had a valid sticker, it was proper to permit prosecution to prove that defendant had been arrested on outstanding assault warrant to rebut possible inference that arrest which turned up blackjack defendant was charged with possessing was illegal and high-handed even though defense counsel indicated he had no intent to raise any such claim; no attempt to explore possible alternatives to the introduction of evidence suggesting that defendant was of assaultive character and thus likely to use blackjack for violent purposes).

FN33. Read into codes Where co-defendants did not dispute that they were together at time of charged crime and the only issue was which was the triggerman, there was no disputed issue to which evidence that they had committed five prior robberies together was relevant. People v. Holt, 1984, 208 Cal.Rptr. 547, 555, 37 Cal.3d 436, 690 P.2d 1207. Evidence of other crimes must be relevant to an ultimate fact actually in dispute. People v. Dellinger, 1984, 209 Cal.Rptr. 503, 511, 163 Cal.App.3d 284. Evidence of other crimes must be offered upon an issue which will ultimately prove to be material to the prosecution's case. People v. Gerrero, 1976, 129 Cal.Rptr. 166, 16 Cal.3d 719, 548 P.2d 366. Before receiving evidence of other crimes, the court should require a showing of materiality and necessity. People v. Eastmon, 1976, 132 Cal.Rptr. 510, 61 Cal.App.3d 646. Under Wis.Stats.Ann. s 904.01, evidence is not relevant unless it proves a material fact; it was therefore error to admit evidence of a prior rape where the defense in charged rape was consent because such evidence is not relevant to the issue of consent. State v. Alsteen, 1982, 324 N.W.2d 426, 108 Wis.2d 723.

FN34. "Nearly every court" Defendant placed identity in issue by denying any participation in charged robbery. U.S. v. Connelly, C.A.7th, 1989, 874 F.2d 412, 418. It was error to admit other crime to prove motive and opportunity where defense conceded both of these. U.S. v. Fortenberry, C.A.5th, 1988, 860 F.2d 628, 634. Before evidence of other crimes is admissible, the trial court must find that it is relevant to some material issue. U.S. v. McKoy, C.A.9th,

1985, 771 F.2d 1207, 1214. Evidence of other crimes may not be admitted unless relevant to an actual issue in the case. U.S. v. Hodges, C.A.9th, 1985, 770 F.2d 1475, 1479. Where trial court instructed jury that identity was "the most important issue in the case", it is obvious that identity is in issue. U.S. v. DiGeronimo, C.A.2d, 1979, 598 F.2d 746, 753. Evidence of other crime was not admissible to show identity where defendant was admittedly the person present in auto in which drugs were found and the disputed issue was his possession of drugs; prior crimes evidence may not be introduced on issues that are not contested. U.S. v. Foskey, C.A., 1980, 636 F.2d 517, 524, 204 U.S.App.D.C. 245. Other crimes evidence is never admissible unless it is necessary to prove a material fact such as those listed in Rule **404(b).** U.S. v. Shelton, C.A.1980, 628 F.2d 54, 56, 202 U.S.App.D.C. 54. To be admissible under F.R.Ev. **404(b),** evidence of other crimes must be relevant to some disputed issue in the trial and its probative value must not be substantially outweighed by the rise of unfair prejudice. U.S. v. Figueroa, C.A.2d, 1980, 618 F.2d 934, 939. The Seventh Circuit appears to be retreating from Frierson though without overruling it. In U.S. v. Miroff, C.A.7th, 1979, 606 F.2d 777, 780, the court said that the government could introduce evidence of other crimes to show the defendant's knowledge that certain property was stolen even without any contention by the defense that such knowledge was lacking inasmuch as knowledge was an element of the crime. Evidence of other crimes must be relevant to an actual issue in the case in order to be admissible under Rule **404(b).** U.S. v. Mohel, C.A.2d, 1979, 604 F.2d 748, 751. If defendant concedes the issue to which other crimes evidence is relevant, the evidence may be inadmissible not only under Rule 403 but also Rule **404(b).** U.S. v. Danzey, C.A.2d, 1979, 594 F.2d 905, 914 n. 9. Under Rule **404(b),** an issue on which the other crimes evidence is admissible must be raised at trial before the evidence can be introduced. U.S. v. Peltier, C.A.8th, 1978, 585 F.2d 314, 321. In prosecution for distribution of heroin, the government is required to prove that the distribution was intentional; defendant's general denial of acts did not remove issue of intent from the case and the government was entitled to anticipate defense of lack of intent. U.S. v. Jardan, C.A.8th, 1977, 552 F.2d 216, 219. Evidence of prior extortionate transactions was admissible to prove intent where intent was in issue in the trial. U.S. v. Largent, C.A.6th, 1976, 545 F.2d 1039, 1043. Where the government concedes that no mental element was in issue, evidence of other crimes is not admissible to show motive, intent, or the like. U.S. v. Park, C.A.5th, 1976, 525 F.2d 1279, 1284 n. 6. Evidence of other crimes is inadmissible if the issue to which it is relevant is not expressly in dispute. People v. Alcala, 1984, 205 Cal.Rptr. 775, 790, 36 Cal.3d 604, 685 P.2d 1126. Where neither identity or intent was in issue, evidence was inadmissible because all other crimes could prove was the defendant's disposition to act in the way he was accused of acting. People v. Gordon, 1985, 212 Cal.Rptr. 174, 189, 165 Cal.App.3d 839. Where defense was that charged rape of daughter did not take place, there was no issue of intent or identity on which evidence of rape of other daughter would be admissible. State v. Goodrich, Me.1981, 432 A.2d 413, 417. Materiality requires that there must be a genuine controversy about the fact that other crimes evidence is offered to prove; where the defendant denied delivering anything to informant, there was no issue concerning her knowledge of the nature of cocaine. People v. Rosen, 1984, 358 N.W.2d 584, 136 Mich.App. 745. Where defense was that acts were never committed, intent was not in issue and it was error to admit evidence of other crimes to prove it. People v. Key, 1982, 328 N.W.2d 609, 121 Mich.App. 168. Evidence of other crimes under Mich.R.Ev. **404(b)** must be offered on a factor that is material to the determination of defendant's guilt of charged offense. People v. Golochowicz, 1982, 319 N.W.2d 518, 413 Mich. 298. Before evidence can be admitted under Mich.R.Ev. **404(b)** it must be offered for some "material" purpose; issue is material when defendant disputes it in opening argument, by cross-examination of prosecution witnesses, or presenting affirmative evidence. People v. Hawley, 1982, 317 N.W.2d 564, 112 Mich.App. 784, judgment reversed on other grounds 332 N.W.2d 398, 417 Mich. 975. In order to be admissible under Mich.R.Ev. **404(b),** evidence must not only be directed at one of the specified purposes but that purpose must be one that is "in issue" in the case. People v. Major, 1979, 285 N.W.2d 660, 407 Mich. 394. Since motive for soliciting act of prosecution is obvious, it was not a material issue in case and prior acts of prostitution were not admissible to prove motive. State v. Matthews, 1984, 471 N.E.2d 849, 14 Ohio App.3d 440. If the fact for which evidence of other crimes is offered is of no consequence to the outcome of the action, the evidence should be excluded. State v. Saltarelli, 1982, 655 P.2d 697, 98 Wash.2d 358. Evidence is not admissible under Rule **404(b)** even if it fits within an exception thereto if the point it is offered to prove is not at issue. State v. Harris, App.1985, 365 N.W.2d 922, 925, 123 Wis.2d 231. Where the defendant denied that he had touched the child, his intent to molest was not an issue in the case. State v. Sonnenberg, 1984, 344 N.W.2d 95, 101, 117 Wis.2d 159.

FN35. Contrary opinions Seventh Circuit does not permit defendant to remove issue of specific intent from case by relying on some defense that does not contest the issue of intent. U.S. v. Chaimson, C.A.7th, 1985, 760 F.2d 798,

808. In every conspiracy case, a not guilty plea renders the defendant's intent a material issue and other crimes evidence is admissible unless the defendant affirmatively takes the issue of intent out of the case. U.S. v. Roberts, C.A.5th, 1980, 619 F.2d 379, 383. Whether a mere plea of not guilty justifies the prosecution in introducing extrinsic evidence in its case in chief is an open question in this circuit. U.S. v. Beechum, C.A.5th, 1978, 582 F.2d 898, 915. For the sorry state of the precedents in California, see the scholarly opinion of Kaus, J., for the court in People v. Tassell, 1984, 201 Cal.Rptr. 567, 36 Cal.3d 77, 679 P.2d 1. Conlon & O'Connor, Evidence: Recent Developments in the Seventh Circuit, 1982, 58 Chi.-Kent L.Rev. 417, 428.

FN36. Deleted provision Because Rule 401 makes evidence relevant even when offered on an uncontested issue, evidence of other crimes is admissible to prove intent even when the issue of intent is not contested. U.S. v. Roberts, C.A.5th, 1980, 619 F.2d 379, 382 n. 1. The Fifth Circuit has read this deletion as having repealed the requirement that the issue be in dispute except in cases in which intent is not an element of the crime. U.S. v. Beechum, C.A.5th, 1978, 582 F.2d 898, 914 n. 19. However, the court reads the requirement back into the balancing test. See s 5250 n. 29.

FN37. Consider under Rule 403 Where the defendant does not contest intent, evidence of other crimes offered on that issue is inadmissible because the incremental probative value of the evidence is inconsequential when compared to its prejudice. U.S. v. Roberts, C.A.5th, 1980, 619 F.2d 379, 382. Comment, Federal Rules of Evidence--Rule **404(b)** Limits The Admission Of Other Crimes Evidence, Under An Inclusionary Approach, To Cases Where It Is Relevant To An Issue In Dispute, 1980, 55 Notre Dame L. 574, 586-587.

FN38. Stipulation If the defense had conceded intent, court would have been obliged to remove issue from case and foreclose the use of other crimes evidence to prove it. U.S. v. Ortiz, C.A.2d, 1988, 857 F.2d 900, 905. The court ducked the issue in U.S. v. Dynalectric Co., C.A.11th, 1988, 859 F.2d 1559, 1581 n. 31. But other courts have accepted the controlling effect of an offer to stipulate: U.S. v. Yeagin, C.A.5th, 1991, 927 F.2d 798, 801 (offer to stipulate to intent to distribute drugs and to prior felony on weapons count); Wierstak v. Heffernan, C.A.1st, 1986, 789 F.2d 968, 972 (stipulation to probable cause bars evidence of crime plaintiff was accused of committing); U.S. v. McDowell, C.A.D.C., 1985, 762 F.2d 1072, 1076 n. 4 (offer to stipulate to intent will exclude other acts under Rule 403); U.S. v. Franklin, C.A.10th, 1983, 704 F.2d 1183 (refusal to stipulate to racial intent justifies admission of other racial crimes); U.S. v. Reed, C.A.2d, 1981, 639 F.2d 896, 906 (refusal to stipulate to knowledge and intent justifies use of other crimes to prove); U.S. v. DeJohn, C.A.7th, 1981, 638 F.2d 1048, 1053 (prosecution refusal to stipulate to be taken into account in Rule 403 balancing); U.S. v. Mohel, C.A.2d, 1979, 604 F.2d 748, 753 (unequivocal offer to stipulate removes issues in drug prosecution); U.S. v. DeVaughn, C.A.2d, 1979, 601 F.2d 42, 46 (evidence of identity inadmissible where prosecution refused to accept stipulation of identity). The principle seems to be accepted by cases that find the stipulation inadequate to justify exclusion: U.S. v. Davis, C.A.5th, 1986, 792 F.2d 1299, 1305 (stipulation to fact A does not exclude when relevant to fact B); U.S. v. Martin, C.A.4th, 1985, 773 F.2d 579, 583 (stipulation of amount of unreported income did not bar evidence of crimes to show source); U.S. v. Sliker, C.A.2d, 1984, 751 F.2d 477, 487 (offer to stipulate lacked sufficient clarity to remove issue); U.S. v. Pedroza, C.A.2d, 1984, 750 F.2d 187, 201 (offer to stipulate drugs were ransom demand did not suffice to show motive for kidnapping this particular victim and thus intent); U.S. v. Rubio, C.A.9th, 1983, 727 F.2d 786, 797 (stipulation of conviction did not bar proof of details thereof); U.S. v. Wilkes, C.A.5th, 1982, 685 F.2d 135, 137 (stipulation of intent that denied intent did not bar proof of intent); U.S. v. Provenzano, C.A.3d, 1980, 620 F.2d 985, 1004 (offer to stipulate to mediate fact that imprisonment was relevant to prove did not bar evidence where it left ultimate fact in dispute). District court properly refused to accept defense stipulation of intent that was inconsistent with proffered defense but it erred in not doing so after defense altered theory to make it consistent with stipulation. U.S. v. Colon, C.A.2d, 1989, 880 F.2d 650, 658-659.

State cases The better course would be to require acceptance of defense stipulation that would have avoided any necessity to show that defendant was a suspect in another case in order to authenticate a mug shot. Braaten v. State, Alaska App.1985, 705 P.2d 1311, 1317. If a defendant offers to admit the existence of an element of the crime, the prosecutor must accept that offer and refrain from introducing evidence of other crimes to prove that element. People v. Hall, 1980, 167 Cal.Rptr. 844, 28 Cal.3d 143, 616 P.2d 826. Although knowledge of nature of narcotic is an essential element of crime of selling drugs, this element may be established by stipulation to avoid prejudice to accused by use of prior conviction to prove knowledge; where it is possible to meet issue by

stipulation, it is error to refuse to do so. People v. Washington, 1979, 157 Cal.Rptr. 58, 95 Cal.App.3d 488. Where the defense offered to stipulate to elements of charged crime and this would not unjustly impair the prosecution's case, it was error to permit the prosecution to prove prejudicial details of other crime. People v. Perry, 1985, 212 Cal.Rptr. 793, 798, 166 Cal.App.3d 924. In prosecution for being a felon in possession of weapon, defendant should be permitted to stipulate to felon status in cases where prior conviction is not relevant to other issues in the case. State v. Davidson, Minn.1984, 351 N.W.2d 8, 11. So long as defendant does not stipulate to identity, it is an issue that can be proved by other crimes. State v. Shaffer, Utah 1986, 725 P.2d 1301, 1308.

But see Prosecution need not accept defense stipulation but can insist on proving fact by other crimes evidence despite offer to stipulate. U.S. v. Zalman, C.A.6th, 1989, 870 F.2d 1047, 1056; U.S. v. Booker, C.A.8th, 1983, 706 F.2d 860, 862; U.S. v. Campbell, C.A.9th, 1985, 774 F.2d 354, 356.

FN39. Control order of proof A similar view is taken in A.B.A. Section of Litigation, Emerging Problems Under The Federal Rules of Evidence, 1983, pp. 66-67. If the court does not do this, it may have to give the jury a futile instruction to the jury to disregard the evidence when it later turns out the evidence should be excluded. See, e.g., U.S. v. Curcio, C.A.2d, 1985, 759 F.2d 237, 240. The safer course in offering similar act evidence is for the prosecution to rest, reserving out of the presence of the jury the right to reopen to present such evidence in the event the defendant rests without introducing evidence. U.S. v. Figueroa, C.A.2d, 1980, 618 F.2d 934, 939 n. 1. While the cases suggest that it is wise for the government to wait to see how the case develops before offering other crimes evidence so that it can show need, at least where prejudice is substantial and probative worth slight, there is no rule prohibiting the use of such evidence during the prosecution's case-in-chief. U.S. v. Herrera-Medina, C.A.9th, 1979, 609 F.2d 376, 379 n. 1. Where the defendant relied on defense of duress and other crime was relevant to that defense, it was proper to permit the prosecution to prove the other crime during its case-in-chief. U.S. v. Hearst, C.A.9th, 1978, 573 F.2d 579. Trial judge properly deferred ruling on admission of evidence that defendant possessed a gun similar to one used in bank robbery until all of the other proof had been introduced so that he better weigh probative worth against prejudice. U.S. v. Robinson, C.A.2d, 1977, 560 F.2d 507, 515.

FN40. Other evidence first While it is usually better for judge to wait to admit other crimes evidence until rebuttal, when it was clear that the defendant would rely on intent as defense, it was proper to admit the evidence during the prosecution's case-in-chief. U.S. v. Lavelle, C.A.D.C.1985, 751 F.2d 1266, 1278 n. 16. Where defendant never did affirmatively take his intent out of the case, it was not error to permit the prosecution to prove other crimes as part of its case-in-chief. U.S. v. Mergist, C.A.5th, 1984, 738 F.2d 645, 650. It was eminently reasonable for trial judge to exclude evidence of other crimes until the close of the prosecution's case. U.S. v. Hadaway, C.A.4th, 1982, 681 F.2d 214, 217. Where it was abundantly obvious before case began that identity of robbers would be the only major issue, it was proper to permit proof of 15 other robberies during the prosecution's case since otherwise there might be no evidence on crucial issue. U.S. v. Danzey, C.A.2d, 1979, 594 F.2d 905, 912. Trial court properly exercised his discretion by waiting until the close of the government's case to permit the introduction of evidence of a prior conviction on the issue of intent. U.S. v. Williams, C.A.2d, 1978, 577 F.2d 188, 193. Ordinarily it is preferable to wait until the end of the defense case to decide upon the admissibility of other crimes evidence because at that time the court is in a better position to see what are the issues in the case and the need for the evidence; but where government could reasonably anticipate defense as a result of confession of defendant, it was not error to admit evidence during case-in-chief. U.S. v. Brunson, C.A.5th, 1977, 549 F.2d 348, 361 n. 20. Where intent had been in dispute in prior trial, prosecution was justified in introducing evidence of prior crimes on that issue as part of its case-in-chief. U.S. v. Adderly, C.A.5th, 1976, 529 F.2d 1178, 1182. Before evidence of other crimes can be admitted, there must be proof of the commission of the charged crime. State v. Ohnstad, No.Dak.1984, 359 N.W.2d 827, 837.

FN41. Rebuttal Trial court should have excluded evidence of other crimes until after the defense case to see if intent would be an admission; if the defense puts on no defense, the prosecution should then be allowed to reopen to introduce the evidence if it is then admissible. U.S. v. Colon, C.A.2d, 1989, 880 F.2d 650, 660 n. 2. One court, for reasons that are obscure, thought it was better for the government to offer the evidence during its case in chief rather than on rebuttal. U.S. v. Smith Grading and Paving, Inc., C.A.4th, 1985, 760 F.2d 527, 531. Though it is preferable to delay the admission of **404(b)** evidence until after the defense rests so the court can see what issues are in dispute,

where defense is made clear at outset of trial and defense did not object to timing, it was not error to admit evidence earlier. U.S. v. Estabrook, C.A.8th, 1985, 774 F.2d 284, 289. Judge did not err in not deferring ruling on the admissibility of evidence of other crimes until after defense case where no request for this was made and key government witness was an accomplice with a blemished record. U.S. v. Wagoner, C.A.8th, 1983, 713 F.2d 1371, 1376. Trial court has discretion to admit evidence of other crimes that would have been admissible in case-in-chief during prosecution's rebuttal. U.S. v. Bulman, C.A.11th, 1982, 667 F.2d 1374, 1382 n. 12. Although normally the government may not introduce evidence of defendant's propensity to engage in crime as part of its case-in-chief, it may do so once a defendant submits some evidence which raises the possibility that he was induced to commit the crime. U.S. v. Salisbury, C.A.5th, 1981, 662 F.2d 738, 740. Where it was obvious from defendant's refusal to accept a stipulation that intent was going to be disputed, policy reasons for postponing admissibility of other crimes evidence until after the defense has presented its case did not apply and it was proper to permit the government to put in the evidence during its case in chief. U.S. v. Reed, C.A.2d, 1981, 639 F.2d 896, 907. Normally evidence of prior crime offered to show knowledge or intent of defendant should not be admitted until the conclusion of the defendant's case since the judge is in a better position to engage in required balancing under Rule 403 at that time; however, it was not reversible error to admit it at the conclusion of the government case when no objection to time of admission was made. U.S. v. Alessi, C.A.2d, 1980, 638 F.2d 466, 477. Where evidence of another crime is offered to show that defendant did the act charged, it is admissible as part of the prosecution's case-in-chief, but when offered to show knowledge or intent it should not be admitted until the conclusion of the defendant's case; this enables the trial judge to determine if intent is really disputed. U.S. v. Figueroa, C.A.2d 1980, 618 F.2d 934, 939. The admission of other crimes evidence should normally await the conclusion of the defendant's case; the court will then be in the best position to balance the probative worth of, and the government's need for, such evidence against the prejudice to the defendant. U.S. v. Benedetto, C.A.2d, 1978, 571 F.2d 1246, 1249. Government should wait until issue is sharpened by defense evidence before introducing evidence of other crimes on rebuttal. U.S. v. Feinberg, C.A.7th, 1976, 535 F.2d 1004, 1010. It would have been wiser for the trial judge to have excluded evidence of other crime until the conclusion of the defendant's case when there would have been a better opportunity to appraise the prosecution's need for it. U.S. v. Leonard, C.A.2d, 1975, 524 F.2d 1076, 1092. To avoid bringing in other crimes evidence to prove an issue that will not be disputed, the trial judge should instruct the prosecutor not to refer to such evidence until judge rules it admissible in rebuttal. People v. Perkins, 1984, 205 Cal.Rptr. 625, 628-629, 159 Cal.App.3d 646. Trial court did not err in not ruling on defense motion to exclude evidence of prior conviction for child abuse until after defense testimony; until that time, the judge had no assurance that the defense would not raise accident or some other issue to which the evidence could be relevant on rebuttal. State v. Chapman, Me.1985, 496 A.2d 297, 303. Prosecutor can prove evidence of other crimes in rebuttal because he cannot use the evidence until the matter it tends to disprove, repel, or contradict is in issue. People v. Johnson, 1983, 333 N.W.2d 585, 124 Mich.App. 80. Court cites with approval the view of some courts that admission of other crimes evidence should be restricted to rebuttal where the availability of other proof and the disputed issues are clearer. State v. Harris, App.1985, 365 N.W.2d 922, 926, 123 Wis.2d 231. It was error to admit other crimes evidence to rebut testimony of the defendant during the prosecution's case-in-chief when defendant had not yet testified and, had evidence not been introduced, might well have chosen not to give testimony supposed to be rebutted by the evidence. State v. Holder, Utah 1984, 694 P.2d 583, 584.

FN43. Must satisfy other rules Without any explanation, the Fifth Circuit has held that the best evidence rule is inapplicable to the proof of other crimes. U.S. v. Byers, CA.5th, 1979, 600 F.2d 1130, 1132. Adoption of the inclusionary form of the rule does not mean that the government can use any means it chooses to prove the other crime. U.S. v. Lyles, C.A.2d, 1979, 593 F.2d 182, 195. Rule **404(b)** does not make evidence of other crimes admissible when the evidence is barred by the hearsay rule. People v. Raffaelli, Colo.App.1985, 701 P.2d 881, 885. Witness to other crime must have personal knowledge of that crime and cannot relay hearsay accounts of modus operandi. State v. Jones, Utah 1982, 656 P.2d 1012.

FN44. Proof by conviction Fact that prior conviction was on a plea of nolo contendere does not affect its admissibility as proof of prior crimes. U.S. v. Frederickson, C.A.8th, 1979, 601 F.2d 1358, 1365 n. 10. U.S. v. Sigal, C.A.9th, 1978, 572 F.2d 1320, 1323. Proof of other crime need not be a constitutionally valid criminal conviction; hence, proof of a conviction in a foreign court is admissible for this purpose. U.S. v. Nolan, C.A.10th, 1977, 551 F.2d 266, 270. Conviction of defendant who testifies as a witness may be used both for impeachment and as substantive evidence if requirements of Rule **404(b)** are met. U.S. v. Wilkerson, C.A., 1976, 548 F.2d 970, 179 U.S.App.D.C. 15. There

may, however, be hearsay problems if the other crime is one not punishable by death or more than a year in prison. See Rule 803(22).

FN47. "Beyond reasonable doubt" In a case in which an uncharged bribe was used to show motive for accumulation of slush fund, court seems to think that fact that bribe was paid from slush fund must be proved beyond a reasonable doubt. U.S. v. Siegel, C.A.2d, 1983, 717 F.2d 9, 17. The lower standard of proof has been advanced as a justification for admission of evidence of other acts which have been the subject of a previous acquittal. U.S. v. Etley, C.A.5th, 1978, 574 F.2d 850, 853. Cf. Smith v. Wainwright, C.A.5th, 1978, 568 F.2d 362, 364 (holding that subsequent acquittal of other crime does not invalidate conviction based upon it on grounds that this would be tantamount to requiring that proof of other crime be beyond a reasonable doubt). Testimony in record sufficed to provide clear evidence of defendant's participation in prior murder offered to show cover-up motive for the charged crime. State v. Williams, Iowa 1985, 360 N.W.2d 782, 786. Proof of prior crimes need not be beyond a reasonable doubt but must convince the jury of the probability that defendant did the act; the testimony of three witnesses was sufficient for this purpose. People v. Worden, 1979, 284 N.W.2d 159, 91 Mich.App. 666.

FN48. Admissibility generally For a case which conveniently overlooks this, see U.S. v. Murphy, C.A.7th, 1985, 768 F.2d 1518, 1535 (invoking Rule **404(b)** in bribery case to permit testimony by witness that he had paid numerous bribes to judge over a five year period but could not remember names or details of cases). Undisputed testimony of witnesses was sufficient to permit jury to conclude that corporation had committed prior crime. U.S. v. Bi-Co Pavers, Inc., C.A.5th, 1984, 741 F.2d 730, 737. One court has found a hearsay statement to be sufficient proof of another crime offered to show knowledge of illicit drugs. U.S. v. Pirolli, C.A.11th, 1982, 673 F.2d 1200, 1203. Evidence of other crimes, wrongs, or acts that is vague and speculative is not admissible under Rule **404(b).** U.S. v. Peltier, C.A.8th, 1978, 585 F.2d 314, 321. Evidence of bad act requires showing of sufficient indicia of reliability; it was sufficient that hearsay accusations of murder victim were corroborated by physical evidence of assaults committed on her. State v. Jeffers, Sup.Ct.1983, 661 P.2d 1105, 135 Ariz. 404. In child abuse prosecution, evidence that victim had suffered a spiral fracture of leg two weeks earlier was improperly admitted where there was no evidence that defendant was responsible for the injury. People v. Dellinger, 1984, 209 Cal.Rptr. 503, 512, 163 Cal.App.3d 284. It is not enough to prove commission of other crimes by plain, clear, and convincing evidence if there is not at least a prima facie case that the defendant was the perpetrator. Bishop v. State, Wyo.1984, 687 P.2d 242, 246. Boyce, Evidence of Other Crimes or Wrongdoing, 1977, 5 Utah B.J. 31, 60 (reporting little consideration of issues in Utah cases). One writer has proposed a variable standard. See Sharpe, Two-Step Balancing and the Admissibility of Other Crimes Evidence: A Sliding Scale of Proof, 1984, 59 Notre Dame L.Rev. 556.

But see The Second Circuit has, however, rejected this view as based on a "misconception," holding that the prosecution need prove the other crime only by a preponderance of the evidence so long as the entire record supports finding of guilt of charged crime beyond a reasonable doubt. U.S. v. Leonard, C.A.2d, 1975, 524 F.2d 1076, 1090-1091. Evidence of other crimes need only be proved by a preponderance of the evidence. U.S. v. Kahan, C.A.2d, 1978, 572 F.2d 923, 932. Prima facie proof of an uncharged offense is all that is required. People v. DeRango, 1981, 171 Cal.Rptr. 429, 115 Cal.App.3d 583. For California cases holding that the prior crime need only be proved by a preponderance of the evidence, see Roth, Understanding Admissibility of Prior Bad Acts: A Diagrammatic Approach, 1982, 9 Pepp.L.Rev. 297, 310 n. 48.

FN49. "Substantial evidence" Defendant's confession of crime was substantial evidence sufficient to justify its use as other crime evidence. People v. Doyle, 1983, 342 N.W.2d 560, 563, 129 Mich.App. 145. Before evidence of bad acts can be admitted, there must substantial evidence that the defendant actually committed the acts. People v. Jones, 1983, 336 N.W.2d 889, 126 Mich.App. 191. Before evidence of other crime can be admitted under Mich.R.Ev. **404(b),** there must be substantial evidence that defendant was the perpetrator of the crime. People v. Golochowicz, 1982, 319 N.W.2d 518, 413 Mich. 298. Fact the defendant's palmprint was found at site of burglary was sufficient proof of his participation to permit it to be used to identify him as perpetrator of charged burglary. Pedford v. State, Tex.App.1986, 720 S.W.2d 267, 268.

FN51. "Satisfactory proof" Fact that witness could not recall details of the defendant's boasts about his pedophile conquests did not violate rule requiring "clear proof" of other crimes. State v. Spargo, Iowa 1985, 364 N.W.2d 203,

209.

FN52. "Clear and convincing" Evidence of other crime is admissible only if there is clear and convincing evidence that the defendant committed the other crime. State v. Doughman, Minn.1986, 384 N.W.2d 450, 454. Evidence of other crimes satisfied requirement that defendant's commission of those crimes be proved by clear and convincing evidence. State v. Halverson, Minn.App.1986, 381 N.W.2d 40, 43. Circumstantial evidence of bid-rigging satisfied requirement of proof that was clear and convincing. State v. Rupp, Minn.App.1986, 393 N.W.2d 496, 499. A consent decree signed by defendant is clear and convincing evidence that he committed the violations alleged. State v. Stagg, Minn.1984, 342 N.W.2d 124, 127. Fact that witness was not able to make a positive identification of defendant as perpetrator of other crime and charges based thereon had been dismissed by the state did not mean that the evidence could not meet the clear and convincing standard. State v. McAdoo, Minn.1983, 330 N.W.2d 104. Testimony of accomplice and victim of robbery who had identified defendant from a photo display was clear and convincing evidence of other crime. State v. Johnson, Minn.1982, 322 N.W.2d 220. Positive nature of victim's testimony satisfied the clear and convincing evidence test; fact that other crime is against the same victim as the charged crime does not make it inadmissible. State v. Luna, Minn.1982, 320 N.W.2d 87, 89. In prosecution for complicity in murder of witness against the defendant's paramour, evidence that she had attempted to bail out a person who was involved in another attempt by the paramour to murder a witness should have been excluded under Minn.R.Ev. **404(b)** as it did not show her participation prior crime by clear and convincing evidence. State v. Link, Minn.1979, 289 N.W.2d 102.

FN54. "Plain, clear, and conclusive" Before state can introduce evidence of a prior act, it must be shown by plain, clear and convincing evidence that the defendant committed it. Petrocelli v. State, Nev.1985, 692 P.2d 503, 508. Fact that proof of crime was plain, clear and convincing did not make it admissible where the crime was offered to show identity and there was not a prima facie case that defendant was the perpetrator. Bishop v. State, Wyo.1984, 687 P.2d 242, 246.

FN55. Continue to apply The Supreme Court has rendered obsolete all the federal caselaw previously appearing in this and adjacent footnotes by holding that Rule 104(b) applies and only requires proof by a mere preponderance. Huddleston v. U.S., 1988, 108 S.Ct. 1496, 485 U.S. 681, 99 L.Ed.2d 771. In discarding these obsolete precedents, we have preserved those that either show the prior federal common law or those that hold that the higher standard was satisfied. The latter remain useful since evidence that satisfies the higher standard should suffice as proof by a preponderance. Where evidence of offer to fix traffic ticket was recorded on tape, it was clear and convincing evidence of the crime. U.S. v. Tuchow, C.A.7th, 1985, 768 F.2d 855, 863. Testimony concerning hearsay statement of defendant admitting it is clear and convincing evidence of other crime. U.S. v. Nabors, C.A.8th, 1985, 761 F.2d 465, 471. Where defendant's admission concerning bribes had been admitted, it was reasonable and clear and convincing evidence that what was in envelope delivered for defendant was bribe money. U.S. v. Chaimson, C.A.7th, 1985, 760 F.2d 798, 807. In civil action, prior crime need not be proved by clear and convincing evidence. Bowden v. McKenna, C.A.1st, 1979, 600 F.2d 282, 284. Where defendant was demoted for filing false report after a police investigation of the charge was clear and convincing evidence of the crime. U.S. v. Wormick, C.A.7th, 1983, 709 F.2d 454. The Reporter for the Advisory Committee has criticized this practice as contrary to the intent of the rule and as defeating the desired uniformity in application of the rules. Cleary, Preliminary Notes on Reading the Rules of Evidence, 1978, 57 Neb.L.Rev. 908, 917. Testimony of two witnesses to defendant's admissions of other crime that were corroborated by other evidence satisfied the clear and convincing evidence standard. U.S. v. Engleman, C.A.8th, 1981, 648 F.2d 473, 479. Pre-existing requirements for the use of other crimes have survived the adoption of the Evidence Rules even though not expressly incorporated into Rule **404(b).** U.S. v. Bowman, C.A.8th, 1979, 602 F.2d 160, 163 n. 3 (collecting similar holdings). Defendant's own admission on prior crime was proof on sufficient clarity and certainty to permit the use of the evidence under Rule **404(b).** U.S. v. Cobb, C.A.8th, 1978, 588 F.2d 607, 611. In Arizona it is not necessary to prove other crime beyond reasonable doubt, but evidence of guilt must be sufficient to take it to jury; i.e., there must be evidence substantial enough to warrant a conviction. State v. LaGrand, App.1983, 674 P.2d 338, 138 Ariz. 275. Evidence of other crimes could meet clear and convincing standard despite fact that the identifications of defendant were somewhat uncertain and one was initially in error. State v. Coleman, Minn.1985, 373 N.W.2d 777, 781. Defendant's own admission is clear and convincing evidence of prior act. State v. Ohnstad, No.Dak.1984, 359 N.W.2d 827, 837. Note, Proof of Prior Act Evidence, 1980, 49 U.Cinci.L.Rev. 613.

FN57. South Dakota Other crimes evidence must be clear and convincing. State v. Micko, N.D.1986, 393 N.W.2d 741.

FN58. Repeals restrictions Standard of proof of preliminary fact that the defendant committed uncharged crime is relatively low; court can find against the prosecutor only where the jury could not reasonably find the preliminary fact to exist. U.S. v. Guerrero, C.A.5th, 1981, 650 F.2d 728, 734. Standard of proof for admissibility of other crimes evidence permits exclusion only where the jury could not reasonably find that the defendant committed other crime. U.S. v. Guerrero, C.A.5th, 1981, 650 F.2d 728, 734. Under Rule **404(b),** prior crimes need not be proved by evidence that is clear and convincing or beyond a reasonable doubt so long as probative worth outweighs prejudice. U.S. v. Ricardo, C.A.5th, 1980, 619 F.2d 1124, 1131. Under Rule **404(b),** the government need only produce proof that the defendant committed the extrinsic offense sufficient to withstand a directed verdict on that offense. U.S. v. Jimenez, C.A.5th, 1980, 613 F.2d 1373, 1376. This possibility was again adverted to in U.S. v. Aaron, C.A.8th, 1977, 553 F.2d 43, 46. Iwinkelried, The Need to Amend Federal Rule of Evidence **404(b):** The Threat to the Future of the Federal Rules of Evidence, 1985, 30 Vill.L.Rev. 1465 (urging amendment to restore the old rules).

FN59. Force into Rule 403 Introduction of vague innuendo concerning the criminal defendant was prejudicial because it could not be met by specific denial but would require defendant to put on evidence of a general good character. U.S. v. Biswell, C.A.10th, 1983, 700 F.2d 1310, 1318. If other act is of doubtful similarity to event in issue and there is substantial doubt as to whether the defendant was the perpetrator, probative value will necessarily be diminished in application of Rule 403 balancing. Smith v. State Farm Fire and Casualty Co., C.A.5th, 1980, 633 F.2d 401, 403. The requirement that other crimes evidence must be clear and convincing is not an independent rule but a principle crystallized from repeated applications of the doctrine in Rule 403 that probative worth must outweigh prejudice. U.S. v. Dolliole, C.A.7th, 1979, 597 F.2d 102, 107.

FN61. Prior standards intact Admission of defendant contained in reports of government agent are clear and convincing evidence of prior violations. U.S. v. Marshall, C.A.8th, 1982, 683 F.2d 1212, 1215. Under Rule **404(b),** evidence of a prior crime is admissible to prove intent if it is similar and close enough in time to be relevant, it is proved by clear and convincing evidence, and the trial court determines that probative worth outweighs prejudice. U.S. v. Ford, C.A.9th, 1980, 632 F.2d 1354, 1375. The requirement that other crimes must be proved by "clear and convincing" evidence continues to apply under Rule **404(b).** U.S. v. Frederickson, C.A.8th, 1979, 601 F.2d 1358, 1365. The position of the panel dissenter was adopted by the majority of the Fifth Circuit in an en banc rehearing. U.S. v. Beechum, C.A.5th, 1978, 582 F.2d 898, 913.

FN62. Who applies In U.S. v. Dolliole, C.A.7th, 1979, 597 F.2d 102, 107, without indicating that this was required, noted that the trial judge first found that proof of other crimes was clear and convincing and then instructed the jury that they could not use the evidence unless they also found the evidence to be clear and convincing. The reasoning in Wingate v. Wainwright was approved by the Second Circuit in holding that where the defendant had previously been acquitted on a charge of possession of cocaine, evidence of that possession could not be used to convict the defendant of conspiracy to distribute cocaine. U.S. v. Mespoulede, C.A.2d, 1979, 597 F.2d 329. The issue appears to have been left to the jury in State v. Hudson, Minn.1979, 281 N.W.2d 870.

FN63. Preliminary question In a dictum, it is seemingly suggested that the existence of a plan is a preliminary fact with respect to evidence of other crime that is to be determined by the jury, not the judge. State v. Hoffman, 1982, 316 N.W.2d 143, 106 Wis.2d 185.

FN64. Jury determines Before admitting evidence of other crime, judge must be satisfied that reasonable jury could find defendant committed it; evidence that defendant had same name as person convicted of prior crime and had told undercover agent he was on probation at time of offense sufficed for this. U.S. v. Hernandez, C.A.11th, 1990, 896 F.2d 513, 521. It has now been decided that the jury is to determine the preliminary facts by a preponderance of the evidence. Huddleston v. U.S., 1988, 108 S.Ct. 1496, 485 U.S. 681, 99 L.Ed.2d 771. Whether defendant committed other crime is a jury question unless the judge is convinced that no reasonable jury could so find. U.S. v. Wyatt, C.A.11th, 1985, 762 F.2d 908, 910. For a case which seems to assume that a preliminary fact necessary to the relevance of proof of an uncharged bribe is to be decided by the jury, see U.S. v. Siegel, C.A.2d, 1983, 717 F.2d 9,

17. Whether or not the defendant committed an uncharged crime offered under Rule **404(b)** is a 104(b) preliminary fact and can be decided against the prosecution only if a jury could not reasonably find that the defendant committed the uncharged crime. U.S. v. Mitchell, C.A.11th, 1982, 666 F.2d 1385, 1389. For a decision apparently approving the submission of this issue to the jury, see U.S. v. Testa, C.A.9th, 1977, 548 F.2d 847, 851 n. 1. Evidence of other crime need not be beyond a reasonable doubt; it is sufficient if it convinces the trier of fact of the probability of defendant's actions. People v. Sorscher, 1986, 391 N.W.2d 365, 371, 151 Mich.App. 122.

FN65. Cases and commentators The Supreme Court has rejected the views of these cases and commentators. See Huddleston v. U.S., 1988, 108 S.Ct. 1496, 1500, 485 U.S. 681, 687, 99 L.Ed.2d 771. Clear and convincing evidence standard for proof of prior crimes is to be applied by the judge under Rule 104(a), not by the jury. U.S. v. Byrd, C.A.7th, 1985, 771 F.2d 215, 222. One writer endorses the view that determination of the relevance of other crimes evidence is a question for the jury under Rule 104(b), a view he erroneously attributes to this Treatise as well. Sharpe, Two-Step Balancing and The Admissibility of Other Crimes Evidence: A Sliding Scale of Proof, 1984, 59 Notre Dame L.Rev. 556, 568.

FN67. How much Where other crimes are offered to show intent, it is enough if the government proves that the intent was similar in both crimes. U.S. v. Oshatz, C.A.2d, 1990, 912 F.2d 534, 541. In Hobbs Act prosecution, cross-examination concerning acts of violence directed at others who had used competitors gambling machines was admissible without any evidence that defendants were responsible for those acts. U.S. v. Curcio, C.A.2d 1985, 759 F.2d 237, 241. For a case in which the court seems to have inferred that the defendant committed the uncharged crime from proof that he committed the charged crime, see U.S. v. Harris, C.A.10th, 1981, 661 F.2d 138, 142. One court, perhaps inadvertently, seems to have applied the "clear and convincing" standard to proof of the charged crime rather than crime offered under Rule **404(b).** U.S. v. Two Eagle, C.A.8th, 1980, 633 F.2d 93, 96. See U.S. v. Jones, C.A.8th, 1978, 570 F.2d 765, 768 (apparently holding that in prosecution for dispensing drugs without a legitimate medical purpose, proof that other similar prescriptions were also without legitimate purpose must be clear and convincing). Where evidence of defendant's presence at two other raids on PCP laboratories was offered to show her knowledge of nature of operation at charged lab, it was not necessary that the evidence of the uncharged crimes be sufficient to show her guilty of some crime. People v. Goodall, 1982, 182 Cal.Rptr. 243, 131 Cal.App.3d 129.

FN68. "Physical elements" The panel decision in Beechum was reversed by an en banc decision. U.S. v. Beechum, C.A.5th, 1978, 582 F.2d 898, 910.

FN72. Effect of acquittal For a case which raises but does not seem to answer the intriguing question of whether in a multiple offense trial, the judge can acquit the defendant of some crimes but use the evidence of those crimes as evidence of guilt on remaining counts, see U.S. v. Green, C.A.7th, 1984, 735 F.2d 1018, 1027. Double jeopardy does not invalidate a state conviction based in part upon evidence of another crime when the defendant is subsequently acquitted of the other crime. Smith v. Wainwright, C.A.5th, 1978, 568 F.2d 362. Boyce, Evidence of Other Crimes or Wrongdoing, 1977, 5 Utah B.J. 31, 59. One student argues that an acquittal, at least where it appears to be based on failure of proof, ought to bar use of proof of the crime but not necessarily some part of the crime that was not the basis of the acquittal. Comment, Other Crimes: Relevance Reexamined, 1983, 16 J.Marsh.L.Rev. 371, 386. Note, Evidentiary Use of Prior Acquitted Crimes: The "Relative Burdens of Proof" Rationale, 1986, 64 Wash.U.L.Q. 189. Note, Collateral Estoppel Effect of Prior Acquittals, 1980, 46 Brook.L.Rev. 781. Note, Admissibility of Evidence of Other Crimes--Emphasis on Use In Prosecution of Sex Crimes--For Which Defendant Had Been Acquitted under Similar Crimes Rules, at Subsequent Trial, 1980, 7 North Ky.L.Rev. 133. Annot., Admissibility of Evidence As To Other Offense As Affected By Defendant's Acquittal of That Offense, 1983, 25 A.L.R.4th 934.

FN73. Contrary authority Evidence of other offense for which defendant was subsequently acquitted would be admissible in trial for another offense that was held prior to the acquittal. U.S. v. Wyatt, C.A.11th, 1985, 762 F.2d 908, 911 (dictum). It is a violation of collateral estoppel aspect of double jeopardy for a state to use evidence of a crime of which defendant has been acquitted as evidence of other crimes in a later prosecution. Albert v. Montgomery, C.A.11th, 1984, 732 F.2d 865, 869 (collecting other similar decisions). Case would be remanded to give defendants an opportunity to show that in using acts of which they had previously been acquitted under Rule **404(b),** government was attempting to relitigate an issue that should be barred by collateral estoppel. U.S. v. Johnson, C.A.6th, 1983, 697

F.2d 735, 741. It was not error to admit evidence of prior crime in trial that preceded defendant's acquittal of that crime. State v. Johnson, Minn.1982, 322 N.W.2d 220, 222 n. 1. It was reversible error to permit prosecution to introduce evidence of other charges of which defendant had been acquitted. State v. Reich, 1984, 676 P.2d 363, 66 Or.App. 862. Under no circumstances is evidence of a crime other than that for which the defendant is on trial admissible when the defendant has been acquitted of that other offense. State v. Wakefield, Minn.1979, 278 N.W.2d 307. The Florida Supreme Court has adopted the Wingate doctrine, excluding evidence of prior crimes that result in acquittals, as the law in that state. State v. Perkins, Fla.1977, 349 So.2d 161, noted, 1978, 9 Cum.L.Rev. 299. Note, Criminal Law--Excluding Evidence of Prior Crimes When Trial Resulted in Acquittal, 1980, 6 Wm.Mitch.L.Rev. 455, 456, n. 12.

FN74. Double jeopardy Collateral estoppel prevents use of crimes of which defendant has previously been acquitted as other crimes evidence. U.S. v. Day, C.A.1979, 591 F.2d 861, 869, 192 U.S.App.D.C. 252. Where defendant raised claim of entrapment by a government agent, evidence of other sales to the same agent could not be used to show his predisposition where he had been acquitted of those sales on grounds of entrapment as such use is barred by the doctrine of collateral estoppel. U.S. v. Keller, C.A.3d, 1980, 624 F.2d 1154, 1157. For a collection of conflicting federal cases, see U.S. v. Keller, C.A.3d, 1980, 624 F.2d 1154, 1157 n. 3. State was not collaterally estopped from using prior assault because case had been dismissed with prejudice. People v. Hampton, Colo.App.1986, 728 P.2d 345, 349. Better reasoned cases are those that hold that doctrine of collateral estoppel prevents the prosecution from using as other crimes evidence acts of which the defendant has been found to be not guilty. People v. Arrington, Colo.App.1983, 682 P.2d 490, 492 (adopting this rule). Comment, Extension of Collateral Estoppel To Evidence From Prior Acquitted Crime, 1984, 35 Mercer L.Rev. 1419. Note, The Double Jeopardy Clause As a Bar to Reintroducing Evidence, 1980, 89 Yale L.J. 962. Note, Expanding Double Jeopardy: Collateral Estoppel and the Evidentiary Use of Prior Crimes of Which Defendant Has Been Acquitted, 1974, 2 Fla.St.U.L.Rev. 511.

FN75. State courts Evidence of other crimes is admissible despite the fact that defendant has previously been acquitted of the charges. People v. Coy, 1981, 173 Cal.Rptr. 889, 119 Cal.App.3d 254 (collecting other California cases). For a collection of cases pro and con, see People v. Arrington, Colo.App.1983, 682 P.2d 490, 491. Note, Criminal Law--Excluding Evidence of Prior Crimes When Trial Resulted in Acquittal, 1980, 6 Wm.Mitch.L.Rev. 455, 456.

FN76. Federal cases U.S. v. DeVincent, C.A.1st, 1980, 632 F.2d 147; Crooker v. U.S., C.A.1st, 1980, 620 F.2d 313; Pacelli v. U.S., C.A.2d, 1978, 588 F.2d 360, 367 (dictum); King v. Brewer, C.A.8th, 1978, 577 F.2d 435, 441; U.S. v. Riley, C.A.8th 1982, 684 F.2d 542, 546; U.S. v. Moore, C.A.9th, 1975, 522 F.2d 1068, 1078-1079; U.S. v. Gutierrez, C.A.10th, 1982, 696 F.2d 753, 755 n. 2; U.S. v. Van Cleave, C.A.10th, 1979, 599 F.2d 954, 957; U.S. v. Hicks, Ct.Mil.App.1987, 24 M.J. 3, 7-9. Evidence of prior offense of which plaintiff was acquitted was admissible in civil rights action to show her bias against defendant who had been involved in prior prosecution. Pittsley v. Warish, C.A.1st, 1991, 927 F.2d 3, 9. Since jurors could have concluded that the defendant was innocent of prior rape charges because women consented, collateral estoppel did not bar proof of those rapes to prove issues other than consent in present rape trial. Oliphant v. Koehler, C.A.6th, 1979, 594 F.2d 547, 555. The fact that a co-conspirator has been found not guilty of attempting to pass a counterfeit bill does not make that act inadmissible as an overt act of the charged conspiracy; even if the evidence was of a "prior crime" the determination of innocence would be irrelevant. U.S. v. Etley, C.A.5th, 1978, 574 F.2d 850, 853.

FN77. Dismissal After judge has dismissed counts of an indictment the prosecution can use evidence of crimes in those counts under Rule **404(b).** U.S. v. Billups, C.A.4th, 1982, 692 F.2d 320, 328. One court has gone so far as to hold that the use of other crimes is not barred when a prosecution for those crimes was dismissed because delays in bringing defendant to trial had prejudiced her ability to defend against the charges. U.S. v. Birney, C.A.2d, 1982, 686 F.2d 102, 106. But see, U.S. v. Taglione, C.A.5th, 1977, 546 F.2d 194, 199 (improper to admit evidence of prior charges of theft that were subsequently dismissed as this requires the jury to try the defendant for two crimes, for one of which he was never indicted). It was reversible error to admit proof of crime when charges had been dismissed and so proof had little probative value and much prejudice. Evans v. State, 1985, 697 S.W.2d 879, 882, 287 Ark. 136. Other crime may be proved despite fact that same evidence was held insufficient to hold the defendant to answer for the crime; court may have dismissed the action for failure to show some element of the offense that was not needed to make offense relevant to prove charged crime. People v. James, 1976, 132 Cal.Rptr. 888, 62 Cal.App.3d 399. Fact that

charges had been dismissed in Wisconsin did not bar use of crime as evidence of charged crime in Minnesota. State v. Lande, Minn.1984, 350 N.W.2d 355, 358.

FN79. Discretionary exclusion In a case rife with prosecutorial misconduct, court did not abuse discretion in excluding evidence of prior crimes that had been subject of mistrial and acquittal. U.S. v. Martinez, C.A.10th, 1984, 744 F.2d 76.

FN80. Prove acquittal Where prosecution was permitted to produce proof of prior sex crime in rape prosecution, it was error to reject defense evidence that the defendant had been acquitted of that charge in a prior trial. State v. Evans, 1982, 323 N.W.2d 106, 212 Neb. 476.

FN81. Not applicable Rule 410 does not bar use of other crime to which defendant pleaded nolo contendere as proof of charged crime if otherwise admissible under Rule **404(b).** U.S. v. Wyatt, C.A.11th, 1985, 762 F.2d 908, 911. In suit for misappropriation of trade secrets, evidence of events or transactions barred by the statute of limitations are admissible to show nature of transactions in issue. Whittaker Corp. v. Execuair Corp., C.A.9th, 1984, 736 F.2d 1341, 1347. In prosecution for failure to file income tax returns, evidence of failure to file in seven earlier years was admissible to prove intent even though prosecution for those years was barred by the statute of limitations. U.S. v. Ming, C.A.7th, 1972, 466 F.2d 1000, 1008-1009. Fourth Amendment exclusionary rule does not apply when illegally seized marijuana is used under Rule **404(b)** as an uncharged crime to prove knowledge. U.S. v. Lopez-Martinez, C.A.9th, 1984, 725 F.2d 471, 476. Acts and transactions barred by the statute of limitations are admissible under Rule **404(b)** to prove preparation and plan. U.S. v. DeFiore, C.A.2d, 1983, 720 F.2d 757, 764. In prosecution for political bribes and kickbacks, court properly admitted evidence of acts beyond the statute of limitations as proof of plan under Rule **404(b).** U.S. v. Primrose, C.A.10th, 1983, 718 F.2d 1484, 1487 n. 2. In conspiracy case, evidence of acts beyond the statute of limitations is admissible to establish a continuing course of conduct or to cast light on the character of an existing conspiracy. Reid Bros. Logging Co. v. Ketchikan Pulp Co., C.A.9th, 1983, 699 F.2d 1292, 1305. Statute of limitations does not apply to the use of other crimes evidence. U.S. v. Means, C.A.5th, 1983, 695 F.2d 811, 816. Fact that incidents took place prior to the limitations period does not bar their use to show intent. U.S. v. Scott, C.A.8th, 1981, 668 F.2d 384, 387. Statute of limitations did not bar use of evidence of prior instances of police abuse in a civil rights action. Commonwealth of Pennsylvania v. Porter, C.A.3d, 1981, 659 F.2d 306, 320. One court has hinted that the rule excluding evidence procured by an illegal search does not apply when the evidence is offered to prove an uncharged crime under Rule **404(b).** U.S. v. Batts, C.A.9th, 1978, 573 F.2d 599, 602 n. 7. Where indictment charged a continuous conspiracy to accept bribes, it was proper to permit the government to prove bribes that were beyond the statute of limitations to show the nature and continuity of the conspiracy. U.S. v. Seuss, C.A.1st, 1973, 474 F.2d 385, 391. Fact that prosecution of prior crimes was barred by statute of limitations did not make evidence inadmissible. People v. Creighton, 1976, 129 Cal.Rptr. 249, 57 Cal.App.3d 314. Requirement that testimony of accomplice must be corroborated did not apply to proof of other crimes. State v. Sanford, 1985, 699 P.2d 506, 509, 237 Kan. 312. In libel action, evidence of defamatory statements made beyond the statute of limitations was properly admitted on the issue of punitive damages. Advanced Training Systems v. Caswell Equipment Co., Minn.1984, 352 N.W.2d 1, 10. Proof of other crime was not barred by the fact that conviction had been expunged following a successful completion of probation. Driskell v. State, Okl.Crim.1983, 659 P.2d 343, 349.

But see A few courts have assumed that illegally seized evidence cannot be used as other crimes evidence. U.S. v. Hill, C.A.7th, 1990, 898 F.2d 72, 74; U.S. v. Espinoza, C.A.9th, 1978, 578 F.2d 224, 228.

FN88. Labeling In admitting evidence of other crimes, the trial court must specifically identify the purpose for which it is to be used; it is enough to make a broad statement invoking or restating Rule **404(b).** U.S. v. Kendall, C.A.10th, 1985, 766 F.2d 1426, 1436.

FN89. Appellate opinions

But see The Fifth Circuit has attempted to lay down a per se rule governing application of Rule 403 when the government offers evidence of the good faith of officers accused of entrapping the defendant. U.S. v. Webster, C.A.5th, 1981, 649 F.2d 346, 351. For examples of federal courts looking to the precedents rather than analysis

of the present case in determining admissibility of other crimes, see U.S. v. Rubio-Estrada, C.A.1st, 1988, 857 F.2d 845, 848; Warner v. Transamerica Ins. Co., C.A.8th, 1984, 739 F.2d 1347, 1351; U.S. v. Miller, C.A.7th, 1978, 573 F.2d 388, 393. See also, U.S. v. Webster, C.A.5th, 1981, 649 F.2d 346, 351 (attempting to create a per se rule to be followed in other cases). Some states have made the same error. See, e.g., State v. Nelson, Minn.1982, 326 N.W.2d 917; State v. Keithley, 1984, 358 N.W.2d 761, 218 Neb. 707 (court so preoccupied with precedent it fails to note fact evidence was offered to prove was not in issue); State v. Thomas, S.D.1986, 381 N.W.2d 232, 236 (relying on cases from states that had not yet adopted Rule **404(b));** State v. LeFever, 1984, 690 P.2d 574, 577, 102 Wn.2d 77; State v. Rutchik, 1984, 341 N.W.2d 639, 643, 116 Wis.2d 61; Sanville v. State, Wyo.1979, 593 P.2d 1340, 1345.

FN90. Discretion to admit Court rejects claim that Rule **404(b)** requires judge to balance prejudice against probative worth as asserted in the Advisory Committee's Note and holds that there is no duty to consider Rule 403 unless this has been explicitly requested. U.S. v. Manso-Portes, C.A.7th, 1989, 867 F.2d 422, 427. For an illustration of a less than optimum expression of this balancing, see U.S. v. Long, C.A.9th, 1983, 706 F.2d 1044, 1052 n. 5. Where it is clear from the record that the trial court performed the necessary balancing of probative worth and prejudice, failure to use "magic words" in reaching decision is not reversible error. U.S. v. Evans, C.A.8th, 1983, 697 F.2d 240, 249. One court has said that "the practice of entering a finding as to this balance should definitely be encouraged"; but the failure to do so is not a ground for reversal. U.S. v. Dolliole, C.A.7th, 1979, 597 F.2d 102, 106. Admissibility of evidence of other crimes is a two-step process; first, relevance must be determined under Rule **404(b)** and, second, the court must apply the balancing test in Rule 403. U.S. v. Williams, C.A.5th, 1979, 596 F.2d 44, 50. Even though the trial judge did not explicitly state that probative worth outweighed prejudice of evidence of other crimes, appellate court would infer that he performed the required balancing from his awareness of the rule and the arguments made to him. U.S. v. Sangrey, C.A.9th, 1978, 586 F.2d 1312, 1315. Task of determining admissibility of other crimes evidence does not end with determination that requirements of Rule **404(b)** are met; court must apply the balancing test in Rule 403 as well. U.S. v. Bohr, C.A.8th, 1978, 581 F.2d 1294, 1298. Under Rule **404(b),** the trial judge must first find that evidence of other crimes is relevant to some issue at trial other than to show that the defendant is a bad man; he must then determine that the probative worth and need for the evidence is not substantially outweighed by prejudice to the defendant. U.S. v. Williams, C.A.2d, 1978, 577 F.2d 188, 191. An opinion in the Third Circuit takes the wholly erroneous view that unless Rule 403 is invoked with sufficient specificity to satisfy Rule 103, the trial judge is not required to balance the probative worth of the evidence against its prejudicial qualities. U.S. v. Long, C.A.3d, 1978, 574 F.2d 761, 766. This is directly contrary to the last two sentences of the Advisory Committee's Note and to the overwhelming weight of authority. It is possible that the language of the opinion was meant only to apply to the case before the courts; i.e., a case in which no adequate objection was made under Rule **404(b).** The inclusionary approach to other crimes evidence does not mean that other crimes evidence is automatically admissible; the judge must first determine that the evidence is relevant for some purpose other than proof of disposition, then weigh the probative value of the evidence against its harmful consequences. U.S. v. Benedetto, C.A.2d, 1978, 571 F.2d 1246, 1248. Judge is not required to rule on prejudice of other crimes if no objection is made on the basis of Rule 403. State v. Cannon, 1985, 713 P.2d 273, 277, 148 Ariz. 72. Where record did not **disclose** that trial judge had engaged in the required balancing and that such balancing would have excluded evidence of prior crime as too prejudicial, appellate court would reverse. People v. De La Cruz, 1983, 192 Cal.Rptr. 701, 144 Cal.App.3d 497. It is not enough that evidence of other crimes satisfy the statutory requirements for admission; trial court must balance probative worth against prejudice and may admit only if the former predominates. People v. Worden, 1979, 284 N.W.2d 159, 91 Mich.App. 666. It was error, though harmless, for court to admit evidence of other crime without balancing probative worth and prejudice on the record. State v. Monk, 1985, 711 P.2d 365, 367, 42 Wash.App. 320.

FN93. Limit use In U.S. v. King, C.A.4th, 1985, 768 F.2d 586, the trial judge barred reference to the other crime in the opening statements, excluded evidence of the details of the criminal conduct, and gave clear instructions on the use to which the evidence could be put. Note, Evidence--A Limit to Limiting Instructions Concerning Other Crimes Evidence in Joint Trials--Multiple Juries as a Viable Alternative, 1981, 47 Brook.L.Rev. 1021.

FN94. Only relevant details Minute details of criminal investigation of murder defendant's drug dealing, including the name of the drug-sniffing dog used to apprehend him, were irrelevant but also not prejudicial. U.S. v. Chaverra-Cardona, C.A.7th, 1989, 879 F.2d 1551, 1554. Admitting evidence that defendant dealt in stolen chickens to prove

that defendant had unreported income did not prejudice where the trial court excluded any evidence that the chickens had been stolen. U.S. v. Martin, C.A.4th, 1985, 773 F.2d 579, 583. For an example of a case in which a state trial court admitted gory details of an assault on a robbery victim that had not the slightest relevance to proof of the issue on which the evidence was supposedly offered, see Porter v. Estelle, C.A.5th, 1983, 709 F.2d 944, 954-955. This was overlooked by court that held that evidence that defendant had boasted to prostitutes about his fraud was admissible to show knowledge of fraudulent scheme; obviously one could prove the boasts without any need to prove the occupation of the recipients. U.S. v. Mangiameli, C.A.10th, 1982, 668 F.2d 1172, 1177. Trial court properly limited evidence that defendant failed to return to halfway house after robbery to details relevant to show flight; there was no evidence that the house was a place only inhabited by persons with criminal records. U.S. v. Sims, C.A.9th, 1980, 617 F.2d 1371, 1378. In commending the trial court for the way in which proof of a prior crime was handled, the appellate court noted that the prosecution was cautioned not to go into details of prior crime not necessary for the purpose for which the evidence was admitted and this admonition was honored. U.S. v. Carleo, C.A.8th, 1978, 576 F.2d 846, 850. Prejudice arising from the use of letters from the defendant's homosexual lover to show motive for murder was reduced when the letters were not introduced into evidence, the jury was only told how the letters had been signed, and the letters were not used by the jury in deliberations. U.S. v. Free, C.A.5th, 1978, 574 F.2d 1221, 1223. For an egregious violation of this principle, see Carter v. U.S., C.A.8th, 1977, 549 F.2d 77 (prosecution of a convicted felon for possession of firearm; witness who saw the defendant drop the gun over a fence in the course of a chase permitted to testify that the chase began when defendant attempted to use a forged drug prescription). In prosecution for murder, evidence of a subsequent kidnapping was properly admitted to show relationship between defendant and kidnap victim so as to make meaningful certain admissions made to victim where court carefully limited the proof of the kidnapping to those details that were essential for this purpose. U.S. v. Kaiser, C.A.5th, 1977, 545 F.2d 467, 475-476. Where evidence of prior robbery was offered to impeach defendant's statement that he had not seen accomplice for years, trial court did not err in not restricting witness to testimony that she had seen the two together since the fact that this observation was made in course of being robbed was relevant to accuracy of identification of parties. People v. Benson, 1982, 180 Cal.Rptr. 921, 130 Cal.App.3d 1000. Where evidence that defendant was being held for prior crime would suffice to show motive for murder of witness, it was flagrant departure from order in limine for prosecution to attempt to prove guilt of prior crime. State v. Williams, Iowa 1985, 360 N.W.2d 782, 786. Evidence that the defendant had swapped a battery for the weapon used in a robbery would be relevant, but evidence that he had stolen the battery was not. State v. Boyd, Me.1979, 401 A.2d 157. It was not an abuse of discretion for court to exclude papers showing defendant was guilty of AWOL from collection of papers offered to prove defendant was living in home in which stolen property was found. State v. Zgodava, Minn.App.1986, 384 N.W.2d 522, 524. Trial judge properly excluded details of prior burglary, such as fact that one of the victims was sexually fondled. State v. Kennedy, Minn.App.1985, 363 N.W.2d 863, 866. In prosecution for arson and theft, it was not error to show that prior theft was committed shortly before someone burned down building as prosecution was entitled to prove all the facts surrounding prior crime even though it might lead jury to infer that defendant set other fire. State v. Richardson, Minn.App.1985, 363 N.W.2d 793, 797. Trial court did not err in excluding details of murder committed by prosecution witness. State v. Phelps, Minn.1982, 328 N.W.2d 136, 139. It was error, but harmless on the facts of the case, to permit witnesses to relate details of other crimes that were not relevant to the purpose for which the evidence was supposedly introduced. State v. Forsyth, Utah 1982, 641 P.2d 1172, 1177.

FN95. Impermissible argument For an illustration of a prosecutor getting evidence admitted on a non-character theory, then using it as a basis for character arguments to the jury, see U.S. v. Rodriguez-Cardona, C.A.1st, 1991, 924 F.2d 1148, 1153. Error in admission of other crimes evidence was not harmless where it was compounded by the prosecutor's improper argument that the defendant committed the crime because he was a thrill-killer. U.S. v. Brown, C.A.9th, 1989, 880 F.2d 1012, 1016. Where evidence is admitted under Rule **404(b)** on a non-character theory, trial court should not have permitted prosecutor to argue that it showed defendant's bad character. U.S. v. Fakhoury, C.A.7th, 1987, 819 F.2d 1415, 1423. It was error to admit evidence of other crimes where prosecution's use of evidence in closing argument shows that it was intended to prove the defendant's bad character to prove that he acted in conformity with that character; this is forbidden by Rule 405(b). U.S. v. Dothard, C.A.11th, 1982, 666 F.2d 498, 505. A careful reading of the entire text of the prosecutor's argument shows that it was designed to use other crimes evidence to provide a motive for the charged crime and not for the purpose of establishing that the defendants were "bad men" with a propensity to engage in crime. U.S. v. Greene, C.A.5th, 1978, 578 F.2d 648, 653. Error in admitting evidence of other crime was compounded by failure to give a limiting instruction and by the prosecutor's

argument which invited the jury to use evidence for impermissible purposes. People v. St. Andrew, 1980, 161 Cal.Rptr. 634, 101 Cal.App.3d 450. This was overlooked by court that approved the argument that repeatedly referred to the defendant as a "rapist" or "experienced rapist" or (sarcastically) "a reformed rapist" on the ground that argument was based on evidence showing that defendant had committed three prior rapes. State v. Hanks, 1985, 694 P.2d 407, 414, 236 Kan. 524. It was not improper for prosecutor to argue that evidence of other crime showed that the defendant was "accustomed to dealing in stolen property." State v. Richardson, Minn.App.1985, 363 N.W.2d 793, 797 Where evidence of other crimes was offered on issue of intent, it was error to permit the prosecutor to argue that it showed the defendant's depravity. Templin v. State, Tex.Crim.App.1986, 711 S.W.2d 30, 34.

FN96. Suggest other uses Appellate court frowns on prosecutor who got evidence of prior gun offense admitted on theory that it showed defendant was aware that it was unlawful to carry concealed weapon, then argues to jury that prior offense involved an attempted bank robbery. U.S. v. Gomez, C.A.11th, 1991, 927 F.2d 1530, 1534 n. 4. Reversal was compelled where evidence of other crimes tended to suggest that defendants should be convicted because they were bad men and prosecutor enhanced this effect by closing argument that defendants were dangerous, ruthless people who should not be left loose on the streets. U.S. v. Weir, C.A.8th, 1978, 575 F.2d 668, 671.

FN97. Principal device One court has erroneously supposed that the giving of a limiting instruction cures any error in the admission of other crimes evidence. U.S. v. Sanders, C.A.10th, 1991, 928 F.2d 940, 942. Since the defendant is entitled to a limiting instruction when the evidence is properly admitted, it cannot cure the improper admission of evidence. Failure to give a limiting instruction compounded error in admitting evidence of defendant's drug use that was irrelevant to prove intent. U.S. v. Monzon, C.A.7th, 1989, 869 F.2d 338, 344. Court's refusal to instruct on proper use of evidence of other crimes was harmless error. U.S. v. Davis, C.A.5th, 1986, 792 F.2d 1299, 1306. Failure of judge to give limiting instruction is a relevant factor in deciding if error in admitting evidence of other crimes was harmless. U.S. v. Green, C.A.9th, 1981, 648 F.2d 587, 593. A judge should carefully give instructions limiting use of extrinsic offense evidence wherever there is a possibility of prejudice, U.S. v. Jimenez, C.A.5th, 1980, 613 F.2d 1373, 1377. Where evidence of prior criminal conduct is admitted for a limited purpose, it must be accompanied by a limiting instruction if the defendant so requests. U.S. v. Washington, C.A.2d, 1979, 592 F.2d 680, 681. It has been suggested by way of dictum that erroneous admission of other crimes evidence can be cured by a limiting instruction. U.S. v. Evans, C.A.5th, 1978, 572 F.2d 455, 484. This seems to confuse an admonition to disregard inadmissible evidence with a limiting instruction. If the evidence is inadmissible for a limited purpose, the fact that a proper limiting instruction was given would seem to be irrelevant. Failure to give a requested limiting instruction concerning the use of evidence of other crimes admitted for impeachment purposes was reversible error. U.S. v. Whiteus, C.A.6th, 1978, 570 F.2d 616, 617. Defendant is not entitled to limiting instruction on use of other crimes evidence when both crimes are joined in single trial. People v. Thornton, 1979, 152 Cal.Rptr. 77, 88 Ca App.3d 795. Erroneous admission of other crimes evidence is not harmless because it would have been properly admitted for some other purpose that was not the subject of a jury instruction. State v. Perrigo, 1985, 708 P.2d 987, 989, 10 Kan.App.2d 651. Jury should be instructed that it must find that defendant committed charged crime before it can make use of evidence of other crimes. State v. Micko, N.D.1986, 393 N.W.2d 741 (holding unclear). Defendant could not complain of instruction on use of other crimes evidence where his objection at trial did not specify defect in the one proposed and no alternative instruction was tendered. State v. Reutter, So.Dak. 1985, 374 N.W.2d 617, 625. It was error, but not reversible error, for the trial judge to fail to give requested instruction on use of other crimes evidence at the time the evidence was admitted. State v. Smith, Utah 1985, 700 P.2d 1106, 1110.

FN98. Skeptical For a limiting instruction that may demonstrate why there is skepticism about their effectiveness, see People v. Carter, 1982, 330 N.W.2d 314, 334, 415 Mich. 558.

FN99. Prefer not to emphasize For a case that apparently holds that it is proper to give a cautionary instruction even over the objection of the defendant if there is such evidence in the record, see U.S. v. Mora, C.A.10th, 1985, 768 F.2d 1197. Counsel was not ineffective for failing to object to two bits of other crimes evidence where the objection might have highlighted the evidence and caused more harm than letting it quietly slip by. U.S. v. Brown, C.A.7th, 1984, 739 F.2d 1136, 1146. In assessing prejudice in admission of other crimes evidence, court would take into account prejudice that could have been eliminated by a limiting instruction where the judge did not give one only because defense counsel exercised their right to block it. U.S. v. Moore, C.A.1984, 732 F.2d 983, 990, 235

U.S.App.D.C. 381. Trial judge was not required to give a limiting instruction sua sponte where the prosecution conceded that it would be proper but defense counsel chose to stand or fall on issue of admissibility; though limiting instruction is desirable, the court is not required to override the wishes of defense counsel. U.S. v. Price, C.A.7th, 1980, 617 F.2d 455, 460. Where there was no request for a limiting instruction and the chief effect of an instruction would be to highlight evidence of other crimes, it was not plain error to fail to give an instruction. U.S. v. Childs, C.A.1979, 598 F.2d 169, 176, 194 U.S.App.D.C. 250. Counsel may refrain from requesting a limiting instruction on other crimes in order not to emphasize potentially damaging evidence or for other strategic reasons; trial court need not second guess this decision and instruct sua sponte. U.S. v. Barnes, C.A.5th, 1978, 586 F.2d 1052, 1059. Defendant's refusal of proffered limiting instruction forecloses raising on appeal the issue of whether admission without such instructions was error under Rule **404(b).** U.S. v. Levy, C.A.2d, 1978, 578 F.2d 896, 900. It was not error for trial judge to fail to give a limiting instruction on use of other crimes evidence where defense counsel had withdrawn a proposed instruction on the subject. State v. Reed, 1979, 604 P.2d 1330, 25 Wash.App. 46. Where defense counsel did not want an instruction because it might highlight the prior act, the trial judge was under no duty to give a limiting instruction without a request. Goodman v. State, Wyo.1979, 601 P.2d 178, 184.

FN2. No duty It was error to admit other crimes evidence against F.B.I. agent without an instruction that limited it to its proper purpose. U.S. v. Miller, C.A.9th, 1989, 874 F.2d 1255, 1270 (no mention of whether such instruction was requested). Huddleston does not require the trial judge to give a limiting instruction in the absence of a request by counsel. U.S. v. Record, C.A.10th, 1989, 873 F.2d 1363, 1376. It is well-settled that where no limiting instruction on use of other crimes is requested, the failure to give one sua sponte is not reversible error. U.S. v. Multi-Management, Inc., C.A.9th, 1984, 743 F.2d 1359, 1364. Under Rule 105, burden of requesting a limiting instruction on use of other crimes evidence is on the defendant; without such a request, he cannot complain on appeal that no such instruction was given. U.S. v. Gilmore, C.A.8th, 1984, 730 F.2d 550, 555. It was not plain error for judge to fail to give a limiting instruction on the use of other crimes evidence where there was no request for such instruction. U.S. v. Vincent, C.A.6th, 1982, 681 F.2d 462, 465. Trial court is not under duty to give a limiting instruction sua sponte at time evidence of other crimes is admitted where the evidence has no potential for substantially prejudicing defendant. U.S. v. Lewis, C.A.1982, 693 F.2d 189, 196-197, 224 U.S.App.D.C. 74. Where evidence of character was admissible and not unfairly prejudicial, the trial court was not obliged to give a limiting instruction sua sponte. U.S. v. Murzyn, C.A.7th, 1980, 631 F.2d 525, 531. If the defendant does not request a limiting instruction on the use of evidence of other crimes, it is not reversible error to fail to give one. U.S. v. Potter, C.A.9th, 1979, 616 F.2d 384, 389. Where the only issue in the case actually in dispute was the defendant's intent, it was not plain error to fail to give an instruction limiting other crimes evidence to the issue of intent since there was not other issue on which the jury could have used the evidence. U.S. v. Childs, C.A.1979, 598 F.2d 169, 175, 194 U.S.App.D.C. 250. It is not plain error for the trial court to fail to give an instruction sua sponte limiting the use of evidence of other crimes. U.S. v. Barnes, C.A.5th, 1978, 586 F.2d 1052, 1058. Ordinarily defense counsel must request a limiting instruction on the use of other crimes evidence; if he does not, the error can be considered on appeal only if it is plain error. U.S. v. Bridwell, C.A.10th, 1978, 583 F.2d 1135, 1140. Although it would have been better practice for the trial judge to sua sponte give a cautionary instruction limiting the use of other crimes evidence, it was not plain error for him to fail to do so on facts of instant case, though it might be in a case where conduct is more egregious and its relevance is less. U.S. v. Cooper, C.A.6th, 1978, 577 F.2d 1079, 1087-1089. Though it would have been preferable to give an instruction which carefully limited the jury's use of evidence of other crimes, failure to give such instruction sua sponte was not an abuse of discretion where counsel did not request such an instruction. U.S. v. Walls, C.A.9th, 1978, 577 F.2d 690, 697. The giving of a limiting instruction is simply one factor in determining whether there has been an abuse of discretion in admitting evidence of other crimes. U.S. v. Brown, C.A.9th, 1977, 562 F.2d 1144, 1148. Where after the court charged the jury, the defendant did not object to the omission of the single limiting objection which he requested, nor ask for any others, he waived any objection he might have had to the failure of the trial judge to give a limiting instruction on the use of other crimes evidence. U.S. v. Barrett, C.A.1st, 1976, 539 F.2d 244, 249. Where defense counsel objected to introduction of other crimes evidence but did not request a limiting instruction, failure to give an instruction could not be considered on appeal unless it was plain error. U.S. v. Semak, C.A.6th, 1976, 536 F.2d 1142, 1145. Failure to give limiting instruction in absence of request could meet requirements for plain error. U.S. v. Cox, C.A.5th, 1976, 536 F.2d 65, 69 n. 9. In the absence of a specific defense request, no limiting instruction is required here other crimes evidence is relevant to an issue in the case. U.S. v. Conley, C.A.8th, 1975, 523 F.2d 650, 654 n. 6. It has been argued that adoption of Rule 105 has repealed prior caselaw requiring a sua

sponte instruction. Green, The Military Rules of Evidence and The Military Judge, May 1980, Army Lawyer 47. Although judge has no duty to give an instruction on use of other crimes sua sponte, if he does give one it should correctly state the precise issues to which the evidence is relevant. People v. Key, 1984, 203 Cal.Rptr. 144, 153 Cal.App.3d 888. Where past offenses were not a dominate part of the evidence and were not highly prejudicial court had no duty to give sua sponte limiting instruction. People v. Tucciarone, 1982, 187 Cal.Rptr. 159, 137 Cal.App.3d 701. Trial court was under no obligation to sua sponte modify instructions on use of other crimes to include charge that jury must find other crimes by a preponderance of the evidence. People v. Goodall, 1982, 182 Cal.Rptr. 243, 131 Cal.App.3d 129. Although there may be exceptional cases in which evidence of other crimes is so dominant a part of the case against the accused that a sua sponte limiting instruction is required, the usual rule is that the trial judge has no duty to give such an instruction without a request. People v. Collie, 1981, 177 Cal.Rptr. 458, 30 Cal.3d 43, 634 P.2d 534. In the absence of a request, a court is not required to give a limiting instruction on the use of evidence of other crimes. People v. Marshall, 1981, 175 Cal.Rptr. 497, 121 Cal.App.3d 627. Trial court has no duty to instruct sua sponte on proper use of other crimes evidence. People v. Morrisson, 1979, 155 Cal.Rptr. 152, 92 Cal.App.3d 787. It is better practice, though not plain error, for the trial court to sua sponte give a limiting instruction on the use of other crimes evidence. People v. White, Colo.App.1984, 680 P.2d 1318, 1321. Failure to request a limiting instruction on use of other crimes evidence precludes raising failure to give instruction as error on appeal. People v. Freeman, 1985, 385 N.W.2d 617, 619, 149 Mich.App. 119. Trial judge was not required sua sponte to give a limiting instruction on the use of other crimes evidence. People v. Armentero, 1986, 384 N.W.2d 98, 105, 148 Mich.App. 120. Trial court has no duty to give sua sponte instruction on use of other crimes evidence. People v. Morris, 1984, 362 N.W.2d 830, 833, 139 Mich.App. 550. Trial judge has no duty to give a limiting instruction sua sponte when evidence of other crimes is admitted. People v. Flynn, 1979, 287 N.W.2d 329, 93 Mich.App. 713. Failure to request instruction on use of other crimes forfeits right to raise issue on appeal. State v. Starnes, Minn.App.1986, 396 N.W.2d 676, 681. Defendant waived objection to failure to give a limiting instruction on the use of other crimes evidence when he failed to object to instructions given. Thompson v. State, Okla.Crim.1985, 705 P.2d 188, 191. Statements of defendant to arresting officers that he had grown instant marijuana himself in his bedroom and that he could direct officers to a place where they could purchase an additional 15 pounds were such subtle references to other crimes that there was no duty to give a limiting instruction sua sponte. Cole v. State, Okl.Crim.1982, 645 P.2d 1025, 1027. The state need not request a limiting instruction when it introduces evidence of other crimes; it is up to the defendant to request the instruction. State v. Amundson, 1975, 230 N.W.2d 775, 69 Wis.2d 554. It was not error to fail to give a limiting instruction on use of other crimes evidence where no such instruction was requested. Evans v. State, Wyo.1982, 655 P.2d 1214.

But see Where evidence of other crimes is admitted for a limited purpose under Kan.Stats. Ann. s 60-455, the trial judge must give a limiting instruction even though there was no request for the instruction and no objection to the admission of the evidence. State v. Whitehead, 1979, 602 P.2d 1263, 226 Kan. 719.

FN3. Give twice Double shot of instructions approved as proof that issue was handled "with consummate care." U.S. v. Hadfield, C.A.1st, 1990, 918 F.2d 987, 995. It was not error to refuse to give limiting instruction at time that other crimes evidence was admitted where proper instruction was given as part of final instructions. U.S. v. Evans, C.A.4th, 1990, 917 F.2d 800, 809. Prejudice from evidence of other crimes is lessened when judge gives limiting instruction both at the time the evidence is introduced and at the close of the trial. U.S. v. Hernandez, C.A.11th, 1990, 896 F.2d 513, 523. Such a double warning was applauded in U.S. v. Harrod, C.A.7th, 1988, 856 F.2d 996, 998. One reason it is wise to give the instruction at the time the evidence is introduced is that the court may forget to give the instruction at the conclusion of the case. See, e.g., U.S. v. Yopp, C.A.6th, 1978, 577 F.2d 362, 366. See U.S. v. Brunson, C.A.5th, 1977, 549 F.2d 348, 359 n. 15 (apparently endorsing practice). In one case the jury was given three instructions on the limited purpose for which other crimes evidence was admitted. Carter v. U.S., C.A.8th, 1977, 549 F.2d 77, 78. Trial court properly gave limiting instruction both before admitting evidence of other crimes and at the close of the trial. U.S. v. Davis, C.A.5th, 1977, 546 F.2d 617, 619. Trial judge properly gave limiting instruction prior to introduction of other crimes evidence. State v. Breazeale, 1986, 714 P.2d 1356, 1360, 238 Kan. 714. Where trial judge gave admonition before first witness testified to other crime and when case was submitted to jury, it was not error not to give cautionary instructions at each intervening introduction of other crimes. State v. Tecca, 1986, 714 P.2d 136, 140, 220 Mont. 168. While court upon admitting evidence of other crimes should give an immediate cautionary instruction, failure to give one is not reversible error in the absence of request for one. State v. Stroud,

1984, 683 P.2d 459, 465, 210 Mont. 58. At the time evidence of other crimes is admitted, trial judge must explain to the jury the purpose of the evidence and admonish the jury to use it only for those purposes and give another limiting instruction at the time of its final charge. State v. Gray, 1982, 643 P.2d 233, 197 Mont. 348. When evidence of other crimes is admitted under Mont.R.Ev. **404(b)**, it is the duty of the trial judge to give an instruction at the time the evidence is admitted and again in the final charge admonishing the jury of the limited purposes for which the evidence may be used. State v. Just, 1979, 602 P.2d 957, 184 Mont. 262.

But see A number of courts have held that a single instruction is all that is required: U.S. v. Longbehn, C.A.8th, 1990, 898 F.2d 635, 639; U.S. v. Sliker, C.A.2d, 1984, 751 F.2d 477, 487; U.S. v. Soulard, C.A.9th, 1984, 730 F.2d 1292, 1303; Murray v. Superintendent, C.A.6th, 1981, 651 F.2d 451, 454; People v. Hawley, 1982, 317 N.W.2d 564, 112 Mich.App. 784, reversed on other grounds, 1983, 332 N.W.2d 398, 417 Mich. 975.

FN4. Criticisms For some evidence that bad instructions are the product of sloppy thinking about the admissibility of the evidence, see U.S. v. Rodriguez-Cardona, C.A.1st, 1991, 924 F.2d 1148, 1151. Instruction that was simply a laundry list of permitted uses under Rule **404(b)** was insufficient to limit evidence to proper uses. U.S. v. Cortijo-Diaz, C.A.1st, 1989, 875 F.2d 13, 15. Although instruction given by judge sua sponte on the use of evidence of defendant's sexual relations with his patients might have been more carefully drawn to indicate exactly how the evidence might be used by the jury, it was not so defective as to be plain error. U.S. v. Potter, C.A.9th, 1979, 616 F.2d 384, 390. Trial judge did not err in refusing to give a requested instruction on the use of other crimes evidence because it was internally inconsistent and misleading. U.S. v. Albert, C.A.5th, 1979, 595 F.2d 283, 289.

FN5. Little advice For a folksy, midtrial instruction judged good enough, see U.S. v. Cordell, C.A.5th, 1990, 912 F.2d 769, 775. Court seemingly approves smorgasbord instruction that simply paraphrases language of Rule **404(b)** without indicating why evidence might be relevant in instant case. U.S. v. Watford, C.A.4th, 1990, 894 F.2d 665, 671. For a limiting instruction that the appellate court seems to think is just fine, though it must have been incomprehensible to the jurors, see U.S. v. Serian, C.A.8th, 1990, 895 F.2d 432, 434 n. 2. Use of smorgasbord instruction on use of other crimes was not a denial of due process. Hopkinson v. Shillinger, C.A.10th, 1989, 866 F.2d 1185, 1199 n. 8. One court has approved an instruction in a multi-defendant conspiracy case despite the fact that it fails to state for what purposes the evidence may be used or which of the defendants it can be used against. U.S. v. Astling, C.A.11th, 1984, 733 F.2d 1446, 1457. For a fairly typical example of judicial handwringing over this issue, see U.S. v. Bradshaw, C.A.9th, 1982, 690 F.2d 704, 710 (court would have preferred a more carefully drafted instruction but apparently has no idea of how this might be done). Prejudice to defendant was reduced when trial court, sua sponte, eliminated the word "crime" from a jury instruction on the use of other crimes, wrongs, or acts. U.S. v. Mucci, C.A.10th, 1980, 630 F.2d 737, 743. Some appellate courts have endorsed instructions that seem woefully inadequate by any standard. See, e.g., U.S. v. Knowles, C.A.10th, 1979, 572 F.2d 267, 270. The trial judge should limit the use of other crimes evidence by specifying in his instructions just which issues the evidence has been admitted to prove. Slough, Other Vices, Other Crimes: Kansas Statutes Annotated Section 60-455 Revisited, 1978, 26 U.Kan.L.Rev. 161, 166. For a set of limiting instruction on the use of evidence of other crimes on the issue of intent judged to be adequate by the appellate court, see U.S. v. Beechum, C.A.5th, 1978, 582 F.2d 898, 917 n. 23. Judge properly instructed the jury that they could not consider a prior conviction offered on the issue of intent until they first found beyond a reasonable doubt that the defendant had actually done the acts charged in the indictment. U.S. v. Williams, C.A.2d, 1978, 577 F.2d, 188, 193. In U.S. v. Carleo, C.A.8th, 1978, 576 F.2d 846, 849, the jury was instructed at the time the evidence was admitted that: "Testimony is being received for the very limited purpose of shedding what light it may, if any, on the motive and intent of the defendant in your consideration of the charges made against him in this case." This seems somewhat less than adequate. One court, criticizing the instruction given by the trial judge as well as a pattern jury instruction, has suggested that it would be better to instruct the jury in the language of Rule **404(b)**. U.S. v. Miller, C.A.7th, 1978, 573 F.2d 388, 393-394. It is unlikely that such an instruction, while perhaps more accurate than those given, would be very helpful to the jurors. It was proper to instruct the jury that evidence of other crimes could not be used to prove the commission of the act charged in the indictment, but that if the jury found beyond a reasonable doubt that the charged act was committed it could, but was not required to, consider the other crimes as evidence of intent or state of mind. U.S. v. Evans, C.A.5th, 1978, 572 F.2d 455, 485. For a pattern jury instruction on the use of other crimes to show common scheme that is employed in the District of Columbia, see U.S. v. Wilkerson, C.A., 548 F.2d 970, 179 U.S.App.D.C. 15. In U.S. v. Testa, C.A.9th, 1977, 548 F.2d 847, 851 n. 1, the court approved instructions

in which the jury was told that they could not use evidence of other crime unless they were first satisfied beyond a reasonable doubt that the defendant did the act charged and only if the other crime were proved by clear and convincing evidence. For a good instruction requiring jury to first determine whether or not the defendant did the acts charged in the indictment before considering other crimes evidence offered to prove intent, see U.S. v. Davis, C.A.5th, 1977, 546 F.2d 617, 619. For an especially curt limiting instruction, see U.S. v. McMillian, C.A.8th, 1976, 535 F.2d 1035, 1038-1039. Where evidence of other crimes were offered on the issue of intent, trial court properly charged the jury that could consider the evidence only after they found that the defendant did the act charged in the indictment. U.S. v. Snow, C.A.9th, 1976, 529 F.2d 224, 225. For a vague and abstract limiting instruction given at the time of the admission of evidence, see U.S. v. Alejandro, C.A.5th, 1976, 527 F.2d 423, 429. Where evidence of other crimes is admitted, the court should give a limiting instruction, informing the jury of the narrow purpose for which it has been admitted. U.S. v. Calvert, C.A.8th, 1975, 523 F.2d 895, 907. Where evidence of other crimes was only relevant for a narrowly limited purpose, court should not have given the jury a boiler-plate instruction that listed all of the possible reasons why evidence might be admissible under statute. People v. Deeney, 1983, 193 Cal.Rptr. 608, 145 Cal.App.3d 647. Instructions on use of other crimes should refer to them as "transactions" or "acts", rather than "offenses." People v. Mason, Colo.1982, 643 P.2d 745. It is improper to give an instruction on other crimes evidence that simply includes all of the permissible reasons in Rule **404(b);** instruction should state the specific reasons for which the evidence has been admitted. State v. Fitzgerald, 1985, 694 P.2d 1117, 1124, 39 Wn.App. 652. Court approves instruction on use of other crimes evidence that is lucid but somewhat terse in State v. Brittain, 1984, 689 P.2d 1095, 1099 n. 4, 38 Wn.App. 740. For an elaborate instruction on the use of other crimes evidence which succeeds only in missing the point, see Federal Judicial Center Committee to Study Criminal Jury Instructions, Pattern Criminal Jury Instructions, 1982, p. 60. CALJIC 2.50 has at least been amended so as to discourage the smorgasbord form that simply invites the jury to pick whatever purpose they like for the evidence. L.A.Super.Ct., California Jury Instructions--Criminal, CALJIC 2.50 (1984 Revision). For a perfect example of an instruction so abstract as to be useless, see L.A.Super.Ct., California Jury Instructions--Criminal, 1977, CALJIC 2.27.

FN6. State proper purpose For a good instruction where evidence was admitted on issue of intent, see U.S. v. Scott, C.A.9th, 1985, 767 F.2d 1308, 1310. For a collection of mid-trial admonitions on the use of other crimes evidence that are of higher than average quality, see U.S. v. Bloom, C.A.5th, 1976, 538 F.2d 704, 705-707. For an instruction that is one of the better ones, see State v. Johns, 1986, 725 P.2d 312, 326, 301 Or. 535. It was error for court to give instruction that implied jury could use evidence of other crimes for improper purposes. People v. Key, 1984, 203 Cal.Rptr. 144, 153 Cal.App.3d 888. It was error to instruct jury that evidence of other crimes could be used to show common plan or scheme where the evidence was not admissible for that purpose, though it was admissible to show intent. People v. Garcia, 1981, 171 Cal.Rptr. 169, 115 Cal.App.3d 85. For a particularly slovenly set of instructions, see People v. Girtman, Colo.App.1984, 695 P.2d 759, 760 (court concerned because transcript suggests judge told jury that evidence could be used to prove guilt; more serious problem is that instruction did not tell jury what the evidence was offered to prove but only listed all the permissible elements in Rule **404(b)).** Limiting instruction which permitted evidence to be used for purposes for which it was irrelevant could not cure error in admitting proof of other crime. State v. Matthews, 1984, 471 N.E.2d 849, 14 Ohio App.3d 440. Where trial court properly admits evidence for several purposes, failure to instruct jury on use for one of those purposes does not preclude reliance on that purpose to uphold decision on appeal. State v. Johnson, S.D.1982, 316 N.W.2d 652.

FN7. Invite forbidden inference It was error, but harmless, to instruct the jury that they could use evidence of other crimes to infer the defendant's predisposition to commit crimes since this is the very inference that Rule **404(b)** prohibits. U.S. v. Nolan, C.A.7th, 1990, 910 F.2d 1553, 1562. For an instruction somewhat better than the usual, see State v. Tecca, 1986, 714 P.2d 136, 139-140, 220 Mont. 168. It was harmless error to instruct jurors that other crimes evidence could be used to prove the defendant's predisposition. U.S. v. Zapata, C.A.7th, 1989, 871 F.2d 616, 621. One court has seemingly approved a limiting instruction that simply listed all of the permissible grounds of admissibility in Rule **404(b).** U.S. v. Federbush, C.A.9th, 1980, 625 F.2d 246, 249, 254. Instruction that jury could use evidence of other crime for what it was worth was not adequate because it permitted the jury to infer that if defendant committed uncharged rape he must have committed the rape charged. U.S. v. Aims Back, C.A.9th 1979, 588 F.2d 1283, 1286. Instruction that act of defendant in using false name in filing lost baggage report was "circumstantial evidence of guilt" was erroneous because it misstates the relevance of an act whose ambiguity was for the jury to resolve. U.S. v. Morales, C.A.2d, 1978, 577 F.2d 769, 773. The court's description of the instruction

given in U.S. v. Jacobson, C.A.10th, 1978, 578 F.2d 863, 866, does not inspire confidence that it conveyed any understanding of the rule to the jury. For an example of an instruction that makes it plain what is forbidden, see Government of Virgin Islands v. Felix, C.A.3d, 1978, 569 F.2d 1274, 1281 n. 18. Court gave jury instruction that evidence of other crimes could be used only for all of the purposes listed in Rule **404(b).** U.S. v. Nolan, C.A.10th 1977, 551 F.2d 266, 271. Although statements in instructions concerning effect of evidence of other crimes in causing the jury to believe that the defendant was "inclined to deal in heroin" and his "willingness to deal in drugs generally" may have suggested inference to propensity, instructions as a whole made clear the proper uses to which the evidence could be put. U.S. v. Bloom, C.A.5th, 1976, 538 F.2d 704, 710. It was reversible error to give instructions on the use of other crimes evidence that failed to specify the proper purposes for which the evidence had been admitted and did not forbid the jury to infer that because the defendant had a propensity to commit such crimes, he must have committed this one. People v. Holder, Colo.App.1984, 687 P.2d 462, 463. For a case in which the court gave an instruction that simply rattled off all of the permissible uses listed in Rule **404(b)** but omitted the one for which the evidence had been supposedly admitted, see State v. Fitzgerald, 1985, 694 P.2d 1117, 1124, 39 Wn.App. 652.

FN8. Too refined One court seems to have approved an instruction to the jury that allowed evidence to be used on an entirely different theory from that which the appellate court used to justify its admission. U.S. v. Penson, C.A.7th, 1990, 896 F.2d 1087, 1093.

FN9. Role of discretion A trial court's ruling on the admissibility of evidence of other crimes, following a conscientious assessment of the Rule 403 factors, will not be overturned on appeal absent a clear showing of abuse of discretion. U.S. v. Martino, C.A.2d, 1985, 759 F.2d 998, 1005. Caselaw overwhelmingly affords the trial judge a broad discretion in the admission of evidence of other crimes. U.S. v. Vincent, C.A.6th, 1982, 681 F.2d 462, 465. In reviewing discretionary decision to admit evidence of other crimes under Rule 403, great deference is due the trial judge who saw and heard the evidence. U.S. v. Brown, C.A.8th, 1979, 605 F.2d 389, 394. Balancing of probative worth of other crimes evidence against its possible prejudice is generally a matter of discretion for the trial court and reversal is not required where that discretion is not abused. U.S. v. Young, C.A.9th, 1978, 573 F.2d 1137, 1140. Question of whether other crimes were sufficiently similar to constitute a plan was within the discretion of the trial court. Fazio v. Brotman, Iowa App.1985, 371 N.W.2d 842, 846. What the court really did in this case was to approve a sloppy definition of the word "plan" under the guise of honoring a discretion concerning facts. While generally a decision to admit evidence of other crimes is within discretion of trial court, trial court had no discretion to decide that the evidence was inadmissible as needless and prejudicial on a pre-trial motion. State v. Browder, 1984, 687 P.2d 168, 170, 69 Or.App. 564.

FN10. Only abuse of discretion The abuse of discretion standard has been endorsed by most federal courts. Second Circuit: U.S. v. Rucker, C.A.2d, 1978, 586 F.2d 899, 903 (reversal only if trial judge is "arbitrary or irrational"): U.S. v. Leonard, C.A.2d, 1975, 524 F.2d 1076, 1092 (explains rationale). Third Circuit: U.S. v. Long, C.A.3d, 1978, 574 F.2d 761, 767 (thoughtful but somewhat extravagant description of trial court discretion). Fifth Circuit: U.S. v. Robinson, C.A.5th, 1983, 713 F.2d 110. Sixth Circuit: U.S. v. Acosta-Cazeres, C.A.6th, 1989, 878 F.2d 945, 948; U.S. v. Hamilton, C.A.6th, 1982, 684 F.2d 380, 384. Seventh Circuit: U.S. v. Baskes, C.A.7th, 1980, 649 F.2d 471, 481. Eighth Circuit: U.S. v. Bohr, C.A.8th, 1978, 581 F.2d 1294, 1299; U.S. v. Conley, C.A.8th, 1975, 523 F.2d 650, 654. Ninth Circuit: Coursen v. A.H. Robins Co., Inc., C.A.9th, 1985, 764 F.2d 1329, 1335; U.S. v. Martin, C.A.9th, 1979, 599 F.2d 880, 889; U.S. v. Herrell, C.A.9th, 1978, 588 F.2d 711, 714; U.S. v. Sangrey, C.A.9th, 1978, 586 F.2d 1312, 1314; U.S. v. Espinoza, C.A.9th, 1978, 578 F.2d 224, 228. Tenth Circuit: U.S. v. Jacobson, C.A.10th, 1978, 578 F.2d 863, 867. Eleventh Circuit: U.S. v. Reed, C.A.11th, 1983, 700 F.2d 638, 646.

But see Courts, however, have found it easy to ignore the supposed rule in some cases: U.S. v. Green, C.A.9th, 1981, 648 F.2d 587, 593 (where no evidence trial judge performed Rule 403 balancing); U.S. v. Bejar-Matrecios, C.A.9th, 1980, 618 F.2d 81, 84; U.S. v. Bettencourt, C.A.9th, 1980, 614 F.2d 214, 218 (trial judge reversed for having "incorrectly struck [the] balance" under Rule 403).

State cases It was an abuse of discretion to admit all of the evidence of other crimes tendered by the prosecution without balancing probative worth and prejudice. People v. Carner, 1982, 324 N.W.2d 78, 117 Mich.App. 560. In murder prosecution, evidence of other murder supposedly committed by defendant was so prejudicial that its

admission denied the defendant a fair trial. People v. Golochowicz, 1982, 319 N.W.2d 518, 527, 413 Mich. 298. Admission of prior acts will be overturned as an abuse of discretion only when it is overtly inflammatory in comparison to alternative modes of proof. State v. Bouchard, 1982, 639 P.2d 761, 31 Wash.App. 381. Review of trial court's ruling admitting other crimes evidence is limited to whether the court exercised its discretion in accordance with the law and on the facts of record. State v. Harris, App.1985, 365 N.W.2d 922, 925, 123 Wis.2d 231.

FN11. Determining relevance For a case in which the court affirms convictions despite egregious prosecutorial abuse, but fires a warning shot across the bow, see U.S. v. Rodriguez-Cardona, C.A.1st, 1991, 924 F.2d 1148, 1153. One court seems to have resurrected the doctrine of "precedential relevance," see s 5162, stating that in light of prior decisions it could not hold that the trial court had abused its discretion in the instant case. U.S. v. Herrera-Medina, C.A.9th, 1979, 609 F.2d 376, 380. The court in U.S. v. Wilson, C.A.5th, 1978, 578 F.2d 67, 71-72, chastises the prosecutor for introducing in evidence unnecessary evidence of other crimes. Unfortunately the balance of the opinion appears to put the prosecutor in a "can't lose" situation; if the evidence was unnecessary, the prosecution's case was so strong that the error was harmless. And presumably, if the error was harmful, the evidence was not unnecessary. The court's rhetoric seems misdirected. Whatever the ethical obligations of the prosecutor, Rule **404(b)** puts the duty of determining the admissibility of evidence of other crimes evidence on the trial judge. No amount of exhortation of the prosecutor can do much to assist the trial judge in exercising his authority. Evidence of prior narcotics transaction that was close in time and similar in kind to those charged in the indictment was relevant to prove intent. U.S. v. Jardan, C.A.8th, 1977, 552 F.2d 216, 219. Where trial court's decision to admit evidence of prior acts of sex offender was based on a single ground, appellate court would limit its review to propriety of use of evidence for that purpose. People v. Thompson, 1979, 159 Cal.Rptr. 615, 98 Cal.App.3d 467. Where 1962 murder conviction was erroneously admitted at trial for purposes of impeachment, it could not be argued on appeal that the conviction was admissible as other crimes evidence under N.M.R.Ev. **404(b)**. Casaus v. State, 1980, 607 P.2d 596, 94 N.M. 58.

FN12. Not appropriate Without the slightest effort to engage in the balancing required by Rule 403, court holds that massive evidence of prior sexual abuse of students was admissible to prove intent despite fact that intent was obvious and defendant offered to stipulate that if he did the act he had the requisite intent. U.S. v. Hadley, C.A.9th, 1990, 918 F.2d 848, 852. Prejudice that arose from evidence that defendant was a cocaine user with lots of money was not unfair because it proved that he was a participant in the charged conspiracy to distribute drugs. U.S. v. Hargrove, C.A.7th, 1991, 929 F.2d 316, 320. For an incomprehensible opinion, see U.S. v. Auerbach, C.A.8th, 1982, 682 F.2d 735, 738. Evidence that black defendant was having relations with two white women was properly admitted to show that one of the women so trusted him that she could be used as part of charged insurance fraud, despite fact that this woman had testified in court that she trusted defendant. U.S. v. Boykin, C.A.8th, 1982, 679 F.2d 1240, 1244. For an almost incomprehensible opinion explaining why it was not error in prosecution for sale and transportation of stolen antique silver tea service to admit evidence that defendants were also ready to sell 500 pounds of marijuana, see U.S. v. Tisdale, C.A.10th, 1981, 647 F.2d 91. Does this mean "Tea for Two" will now be banned from airwaves as a surreptitious drug song? "District court did not abuse its discretion in concluding that the probative value, on the issue of appellant's knowledge and intent, of evidence that appellant had committed two similar robberies within a month prior to the offense charged outweighed any improper prejudicial effect of this evidence." U.S. v. Casanova, C.A.9th, 1981, 642 F.2d 300, 301. In U.S. v. Williams, C.A.5th, 1979, 596 F.2d 44, 51, the court warned prosecutors that they might jeopardize convictions by putting in evidence of other crimes "when the question of admissibility, as here, is a close one." However, the court neglects to explain why the issue was "a close one." For a diabolical application of the Catch 22 principle, see U.S. v. Underwood, C.A.5th, 1979, 588 F.2d 1073, 1076 (defendant's argument that the prosecution had so much other evidence that it had no need to use evidence of other crimes used to support a conclusion by the appellate court that the error was harmless). For a case in which the appellate court approves the admission of evidence of other crimes without describing the evidence or the purpose for which it was thought admissible, see U.S. v. Griffin, C.A.8th, 1978, 579 F.2d 1104, 1109. For a case which seems to treat the admissibility of evidence of other crimes to be a matter of comparing precedents, see U.S. v. Espinoza, C.A.9th, 1978, 578 F.2d 224, 227-228. For a particularly egregious example of appellate cynicism, see U.S. v. Weidman, C.A.7th, 1978, 572 F.2d 1199, 1201-1203 (court approves admission of other crimes to prove intent and plan, though the latter ground was never raised in the trial court and the jury was explicitly instructed that the evidence could not be used to prove intent). One does not know what to say about an opinion that admits evidence that defendant had raped one

woman with a butcher knife to identify him as the person who murdered another woman with a similar knife, then approves action of trial court in admitting conviction alone without any of the details supposed to make it relevant. State v. Churchill, 1982, 646 P.2d 1049, 231 Kan. 408. For a case in which the court gives no reasons at all for conclusion that trial court properly admitted evidence of prior instance of "contempt of cop" in prosecution for shooting in a nightclub brawl involving civilians, see State v. Taylor, Minn.App.1985, 369 N.W.2d 30, 31. In prosecution for terroristic threats against a Cuban immigrant, trial court did not abuse discretion in admitting evidence of gesture in court where defendant drew index finger across throat or similar gesture two years earlier made with knife; court offers no explanation of relevance of the evidence. State v. Lavastida, Minn.App.1985, 366 N.W.2d 677, 679. For an opinion so written as to make it all but impossible to know what the court has decided, see State v. Coles, Minn.1983, 328 N.W.2d 157 (statement of facts so skimpy that it is impossible to say what evidence was).

FN14. Erie doctrine In diversity action, Federal Rules of Evidence govern the admissibility of evidence of other crimes. Garcia v. Aetna Casualty & Surety Co., C.A.5th, 1981, 657 F.2d 652, 654. In suit for common law fraud in tampering with odometers on automobiles, evidence of prior odometer rollbacks was admissible under Oklahoma law to show intent. Edgar v. Fred Jones Lincoln-Mercury, C.A.10th, 1975, 524 F.2d 162, 167. Court assumes without discussion that admissibility of other acts in a libel case is governed by state law. Sharon v. Time, Inc., D.C.N.Y.1984, 103 F.R.D. 86, 91.

FPP s 5249 (R 404)

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Federal Rules of Evidence
Charles Alan Wright
Kenneth W. Graham, Jr.



Chapter 5 Relevancy and Its Limits

Rule 404. Character Evidence Not Admissible to Prove Conduct: Exceptions: Other Crimes

s 5249. ---- PROCEDURE

Rule **404(b)** recognizes the legitimate probative worth that evidence of other crimes, wrongs, or acts may have when offered to prove some fact other than the propensity of the accused to engage in criminal conduct. But the popularity of this form of proof with prosecutors is probably due as much to the tactical advantages it affords as to its probative worth. [FN1] Given its capacity for prejudice and abuse, the defense ought to have a reasonable opportunity to limit such proof to its legitimate probative impact. This means that the procedure for adjudicating admissibility is as important as the rules of admission and exclusion. [FN2] However, Rule **404(b)** makes no attempt to spell out such procedures. It is therefore the duty of the trial judge, with such aid as may be gleaned from appellate opinions, to devise appropriate techniques to prevent abuse.

The major tactical advantage accruing to the prosecution is surprise since there is no requirement that the other crime be alleged in the pleadings and often the existence of such evidence cannot be determined through the limited discovery available in criminal cases. The Minnesota Supreme Court, in an important pair of decisions, has required the prosecutor to give advance notice of intent to use other crimes evidence, [FN3] a procedure now covered by court rule in that state. [FN4] Louisiana followed suit shortly thereafter. [FN5] The Louisiana procedure has now been incorporated in the Florida Evidence Code, [FN6] but few other states have seen fit to adopt similar reforms. [FN7]

Although urged to do so, [FN8] Congress declined to add a notice requirement to Rule **404(b).** [FN9] Federal courts have held that notice of intent to use evidence of other crimes is not required, [FN10] explicitly refusing to adopt the Minnesota procedure. [FN11] Worse yet, some opinions seem to approve the denial of discovery designed to elicit evidence of other crimes. [FN12] However, some recent decisions may indicate a contrary trend. It has been held error to refuse discovery of other crimes evidence without good reason. [FN13] Another opinion suggests that notice is required where the prosecutor changes his mind after stating at an omnibus hearing that evidence of other crimes will not be offered. [FN14] Finally, a notice requirement has been imposed in cases in which the prosecutor intends to call the defendant's probation officer as a witness. [FN15]

Of course, even the precedents declining to require notice do not suggest that it is beyond the power of the trial judge to require **disclosure** of the intent to use evidence of other crimes at a pretrial conference, [FN16] or otherwise. Moreover, the absence of notice can be taken into account when the trial judge is determining prejudice to the defendant [FN17] as part of the exercise of his discretion to admit or exclude such evidence. [FN18]

If counsel knows or suspects that evidence of other crimes, wrongs, or acts may be offered against his client, the issue may be raised prior to a trial by a motion in limine. [FN19] Otherwise the issue is properly raised by a timely objection when the evidence is sought to be introduced. [FN20] Although the proper objection is that the evidence is irrelevant, [FN21] it is probably wise for counsel to add that even if the evidence is relevant he wishes to invoke the trial judge's discretion to exclude it nonetheless under Rule 403. [FN22]

Once the issue of admissibility has been properly raised it is up to the offeror to show that the evidence of other crimes is relevant. [FN23] He has the burden of proof with respect to any preliminary questions of fact. [FN24] Although relevance is generally a preliminary fact to be determined by the jury under Rule 104(b), [FN25] the importance of the trial judge's discretion [FN26] in the decision to admit or exclude under Rule **404(b)** suggests that preliminary questions concerning the admissibility of other crimes evidence should be determined by the trial judge under Rule 104(a). [FN27] It has been argued that the best procedure is to require the prosecution to make an offer of proof out of the presence of the jury. [FN28]

The offeror must specify the issue proposed to be proved by the evidence of other crimes. [FN29] Some federal courts have taken the position that since the plea of not guilty puts in issue every element of the offense, it is enough that the prosecution be able to point to some element of the crime as to which the evidence is relevant. [FN30] The contrary opinion was well put in the House of Lords over fifty years ago: Before an issue can be said to be raised, which would permit the introduction of evidence so obviously prejudicial to the accused, it must have been raised in substance if not in so many words * * *. The mere theory that a plea of not guilty puts everything material in issue is not enough for this purpose. The prosecution cannot credit the accused with fancy defenses in order to rebut them at the outset with some damning piece of prejudice. [FN31] This position has been applauded by most of the writers [FN32] and it has been read into some of the state codes. [FN33]

Although the requirement that other crimes evidence be offered on an issue that is actually in dispute has been said to have been "espoused by nearly every court of appeals," [FN34] there are enough contrary opinions to put the issue in doubt. [FN35] The Advisory Committee added to the confusion when it deleted a provision from prior codifications that would have made evidence irrelevant unless directed at a disputed issue. [FN36] Despite these contrary indications, it would seem that the trial court must consider whether the issue is actually disputed in exercising its discretion under Rule 403; [FN37] if the defendant does not contest the point, there is little need for the proof and its probative worth is therefore outweighed by the countervailing factors.

Since the pleadings in a criminal case are not designed to frame issues, it is not always easy to see what issues are disputed. Clearly if the defense is willing to enter into an adequate stipulation as to the fact or issue, there is nothing in dispute. [FN38] In other cases the issues may be clear from the arguments of counsel or the tenor of cross-examination of prosecution witnesses. One way for the trial court to get a clearer picture is through an exercise of its power to control the order of proof. [FN39] It has been suggested that the prosecution be required to put on all of its other evidence first [FN40] so that the court can accurately measure the need for other crimes evidence. Another method is to postpone the admissibility of such evidence until rebuttal [FN41] or the conclusion of the case. [FN42]

After the offeror designates the disputed issue it is designed to prove, he must then reveal the evidence of other crimes, wrongs, or acts he wishes to introduce. Such evidence must, of course, satisfy other rules of evidence; e.g., the hearsay rule. [FN43] A prior conviction [FN44] is obviously the most efficient method of proof since presumably under general principles of collateral estoppel the defendant would be precluded from disputing the ultimate facts necessary to the conviction. [FN45] Sometimes, however, the conviction will not reveal the facts concerning the prior crime that are relevant in the instant case; e.g., modus operandi when needed to identify the defendant. In such cases, and in cases in which the prior crime has not been the subject of prosecution, it may be proved by witnesses and other fact and the defendant is free to disprove it if she can. [FN46]

If the government undertakes to prove the other crime, wrong, or act by the introduction of evidence, an important question is the standard by which the sufficiency of that proof is to be measured. It is generally agreed that the other crime need not be proved "beyond a reasonable doubt." [FN47] But most courts have attempted to impose a somewhat higher standard than that imposed for the admissibility of evidence generally. [FN48] It has been said that there must be "substantial evidence," [FN49] "substantial proof" [FN50] or "satisfactory proof." [FN51] Some courts require that the evidence be "clear and convincing;" [FN52] this is the standard that appears to have been applied by most federal courts prior to the adoption of Rule **404(b)**, [FN53] though the Fifth Circuit favored a requirement that the evidence be "plain, clear, and conclusive." [FN54]

Rule **404(b)** does not explicitly deal with this issue. As a result, many courts have continued to apply pre-existing standards for the sufficiency of proof of other crimes. [FN55] The Florida [FN56] and South Dakota [FN57] codifiers have read Rule **404(b)** as incorporating, or at least not inconsistent with, a higher standard for proof of other crimes. However, at least one court has speculated that Rule **404(b)** may have been intended to repeal procedural restrictions on the use of other crimes evidence developed by the prior case law, including the requirement that other crimes be proved by a higher standard than that provided in Rule 104(b). [FN58] That court seems to argue that exclusion is justified only if the proof of the other crime is so uncertain that probative worth is outweighed by one or more of the countervailing factors in Rule 403. While it is possible to incorporate all of the pre-existing procedural safeguards into the formula of Rule 403, [FN59] one can also argue that Rule 403 is designed to deal with the strength of the inference from the other crime to the ultimate issue it is offered to prove, and thus assumes that the other crime has been proved; hence, the sufficiency of the proof of the other crime is an entirely different question. [FN60] The first opinion to deal explicitly with this issue holds, albeit over a strong dissent, that Rule **404(b)** leaves intact the prior standard for proof of other crimes. [FN61]

Whatever the standard of proof, there is also the question of who is to apply it. [FN62] If proof of the other crime were to be regarded as a preliminary fact involving relevance, [FN63] Rule 104(b) would suggest that the judge should admit the proof on a mere showing of sufficiency to support a finding of the commission of the other crime and instruct the jury that they cannot use it as evidence unless they find that it was proved by "clear and convincing evidence," or whatever the standard is to be. [FN64] But the cases and commentators [FN65] all appear to assume that the higher standard of proof is to be applied by the judge in determining the admissibility of the evidence. Given the important role assigned the trial judge in the Advisory Committee's Note, [FN66] it seems very doubtful that they intended the admissibility of other crimes evidence to be determined by the jury under Rule 104(b).

A related question is how much of the prior offense must be proved by the more exacting standard. [FN67] One case suggests that only "the congruent physical elements of the prior offense" need be shown. [FN68] However, that was a case in which the evidence was offered to prove intent on a theory of probability. [FN69] Under that theory there is, of course, no requirement that mental element of the prior offense be proved at all, much less by the higher standard. It would seem that the question in each case must turn on the underlying theory of relevance; for example, a prior arrest for possession of marijuana can prove the defendant's subsequent knowledge of the nature of the substance even if it is assumed the prior possession was innocent. Hence, the prosecution need not prove all of the elements of the prior crime by "clear and convincing proof" but only those elements that are essential under its theory of relevance.

The reasonable doubt standard is not the only rule of sufficiency that is inapplicable when a prior crime is being used for evidentiary purposes. It has been held that the two-witness rule does not apply to proof of an act of perjury not charged in the indictment. [FN70] By analogy, it would seem that other rules dealing with the sufficiency of evidence, such as those requiring corroboration of certain kinds of testimony, should be held to apply only when the defendant is charged with the crime and not when the crime is being used as evidence under Rule **404(b).** [FN71]

Is the use of a prior crime as evidence barred when the defendant has previously been prosecuted for that crime and acquitted? [FN72] Although there is contrary authority [FN73] and some commentators have argued that such use violates the doctrine of collateral estoppel and the prohibition against double jeopardy, [FN74] most state [FN75] and federal courts [FN76] have rejected these claims and held the evidence admissible. A fortiori, dismissal of the charges prior to trial is no bar. [FN77] Similar results have been reached under Rule **404(b).** [FN78] Some cases have suggested that the trial judge may take the fact of acquittal into account in balancing probative worth and prejudice for purposes of discretionary exclusion. [FN79] It can also be argued that an acquittal conclusively establishes that the higher standard for proof of other crimes has not been met. If the evidence is admitted, the defendant should be allowed to prove the acquittal as going to the weight of the evidence. [FN80]

It seems to be generally assumed that most of the rules that govern the prosecution of a crime are not applicable

when it is used under Rule **404(b);** [FN81] i.e., statutes of limitation, grand jury indictment, etc. For example, in a recent case it was held that an agreement not to prosecute an extradited person for certain crimes did not preclude the introduction of evidence of those crimes in a trial of different charges. [FN82] But in some cases the evidentiary use of the prior crime seems unfair; e.g., proving a crime where charges based on that crime were dismissed because government delay made it impossible to obtain defense evidence. [FN83] One court has held that evidence of another crime obtained under a grant of immunity to the defendant cannot be used against him. [FN84] It would seem appropriate for a court to consider these matters in assessing the prejudice to the defendant in the use of the other crime. [FN85]

Once the material issue has been identified and the other crimes evidence has been presented out of the presence of the jury, [FN86] the trial judge is in a position to rule on its admissibility. As will be explained in the next section, [FN87] this decision is not to be made simply by labeling the evidence [FN88] or by comparing it with evidence held properly admitted in appellate opinions; [FN89] rather the trial judge must consider both the probative worth of the evidence and its prejudice to the defendant in exercising a discretion to admit or exclude. [FN90] If there is no jury, the standard for admission is said to be less stringent, [FN91] partially because the judge will have necessarily heard the evidence in making his ruling and partially because the judge is assumed to be capable of ignoring the prejudicial aspects and giving the evidence no more than its proper probative value. [FN92]

If the court's decision is to admit the evidence, steps must be taken to insure that the evidence is only used for the purpose or purposes for which it was admitted. [FN93] One such step is to admit only those details of the prior crime that are relevant to legitimate use of the evidence. [FN94] For example, if the other crime is to be offered to show defendant's knowledge of karate techniques in order to identify him as the attacker of the present victim, there is no need to show the injuries to the victim of the prior crime. In addition, the court must prohibit counsel from arguing impermissible inferences from the evidence [FN95] and must not suggest to the jury that the evidence can be used for purposes beyond those for which it was admitted. [FN96]

The principal device for controlling the use of other crimes, wrongs, or acts is the limiting instruction. [FN97] Critics have been skeptical regarding the utility of instructions [FN98] and attorneys often prefer not to have the evidence emphasized by such futile exhortations. [FN99] Perhaps for these reasons, [FN1] the trial judge is under no duty to give a cautionary instruction sua sponte; [FN2] it must be requested by counsel. If instructions are to be given, it would be wise to give them twice; [FN3] once when the evidence is about to be heard and again when the case is submitted to the jury. As to the form of the instructions, trial judges will find criticisms of those usually given, [FN4] but little advice on how to improve them from either the writers or the appellate courts. [FN5] A good instruction should explain to the jury the proper use of the evidence [FN6] in terms that are not so vague as to invite the forbidden inference to propensity [FN7] and not so refined that they cannot be applied. [FN8]

Appellate review of decisions admitting evidence of other crimes, wrongs, or acts is an important, but sometimes misunderstood, part of the procedure for administering Rule **404(b).** A few opinions seem to suggest that because of the role of discretion in the trial court, [FN9] appellate review is confined to cases involving abuses of discretion. [FN10] But the trial judge's discretion does not arise unless the evidence is relevant for some purpose other than to prove the defendant's propensity to commit crimes. The appellate court has an important role to play in developing standards for the relevance of other crimes evidence that go beyond the collection of labels in Rule **404(b).** [FN11] There are a number of recent opinions that do offer guidance to trial judges in distinguishing the legitimate uses of this form of proof from the ersatz justifications sometimes offered by counsel. But some appellate opinions do not provide an appropriate model for trial judges to follow in the conscientious application of the rule. [FN12]

Federal courts are not required to follow state rulings on the use of other crimes evidence in criminal cases. [FN13] Since other crimes evidence has seldom been offered in civil cases, the application of the Erie doctrine when such evidence is offered in diversity cases is not clear. [FN14] It can be argued that a state rule admitting or excluding such evidence is so intertwined with the state substantive law that a federal court would be bound to

follow it. [FN15] Now that Rule **404(b)** expands the rule to include other acts and wrongs [FN16] the possibility for conflict with state law is increased and some more definitive rulings may soon appear. Of course, rulings construing state versions of Rule **404(b)** can be quite helpful in applying the rule even though not binding precedents.

FN1. Tactical advantages As noted below, the principal advantage is that of surprise. The defendant may be unprepared to meet evidence offered during the case-in-chief or may be dramatically destroyed by evidence of other crimes offered in rebuttal of a defense that might not have been made had the existence of the evidence been known. Even with notice, the defense may lack the resources to defend against several crimes. Moreover, the defense may be placed in the dilemma of choosing between fighting the other crimes evidence, and thus enhancing its importance in the eyes of the jury, or disparaging its probative worth, thus seeming to concede the truth of the charges.

FN2. Procedure important Lacy, Admissibility of Evidence of Crimes Not Charged in the Indictment, 1952, 31 Ore.L.Rev. 267, 284; Note, Developments in Evidence of Other Crimes, 1974, 7 U.Mich.J.L.Ref. 535, 546.

FN3. Minnesota decisions State v. Billstrom, 1967, 149 N.W.2d 281, 276 Minn. 174; State v. Spreigl, 1965, 139 N.W.2d 167, 272 Minn. 488.

FN4. Court rule See Minn.R.Crim.P. 7.02.

FN5. Louisiana followed State v. Prieur, La.1973, 277 So.2d 126. See generally, Comment, Other Crimes Evidence in Louisiana--To Show Knowledge, Intent, System, Etc. in the Case in Chief, 1973, 33 La.L.Rev. 614, 628.

FN6. Florida incorporation See Fla.Evid.Code s 90.404(2)(b), quoted in s 5231 n. 39. See also, Ehrhardt, Florida Evidence, 1977, s 404.12.

FN7. Other states Note, Development in Evidence of Other Crimes, 1974, 7 U.Mich.J.L.Ref. 535, 550.

FN8. Urged to do so 2 House Hearings, p. 203.

FN9. Declined to add It may be that Congress thought such a procedural regulation was out of place in the Evidence Rules. But cf. F.R.Ev. 803(24), 804(5) imposing a requirement of notice of intent to use wildcard exceptions to hearsay rule.

FN10. Notice not required U.S. v. Miller, C.A.9th, 1975, 520 F.2d 1208, 1211. The Government is under no obligation to tell defendant's attorney that it plans to introduce evidence of prior crime that took place 16 years ago. U.S. v. Corey, C.A.2d, 1977, 566 F.2d 429, 431 n. 5.

FN11. Refuse to adopt McConkey v. U.S., C.A.8th, 1971, 444 F.2d 788 (stating such rule should be imposed only as part of rulemaking process).

FN12. Denial of discovery U.S. v. Nakaladski, C.A.5th, 1973, 481 F.2d 289, 297 n. 5. It is not clear whether uncharged prior crimes are discoverable as part of the defendant's "prior criminal record" under Criminal Rule 16(a)(1)(B), added in 1975. See vol. 1, s 253.

FN13. Without good reason It was reversible error for prosecution to refuse to **disclose** the identity of a witness to prior crimes so as to enable the defense to prepare to meet his testimony where the witness was in custody and was hoping to receive sentence considerations for his testimony; advance **disclosure** presented no danger to witness and there were no valid considerations to justify concealment. U.S. v. Baum, C.A.2d, 1973, 482 F.2d 1325, 1331-1332.

FN14. Notice of change U.S. v. Scanland, C.A.5th, 1974, 495 F.2d 1104.

FN15. Probation officer notice U.S. v. Pavon, C.A.9th, 1977, 561 F.2d 799, 802.

FN16. Pretrial conference See vol. 1, s 292.

FN17. Prejudice to defendant Cf. U.S. v. Scanland, C.A.5th, 1974, 495 F.2d 1104, 1106.

FN18. Discretion to admit See s 5250.

FN19. Motion in limine The desirability of an advance ruling has been recognized by some commentators. See 2 Weinstein & Berger, Weinstein's Evidence, 1975, p. 404-29; Ehrhardt, Florida Evidence, 1977, p. 78. For cases in which the procedure has been invoked, see U.S. v. Wiggins, C.A.1975, 509 F.2d 454, 166 U.S.App.D.C. 121; U.S. v. Leon, C.A.5th, 1975, 441 F.2d 175, 178 (advance ruling at behest of prosecutor). For general discussion of the motion in limine, see vol. 21, s 5037. For example of use of motion in limine to suppress other crimes evidence, see U.S. v. Stover, C.A.8th, 1977, 565 F.2d 1010.

FN20. Objection The requirements for making an objection are set out in Rule 103. See generally vol. 21, ss 5036-5038. Defendant must object in trial court to use of other crimes evidence; the issue cannot be raised for the first time on appeal and admission of tape recording in which defendant made reference to a prior prosecution for similar offense was not plain error. U.S. v. Rowe, C.A.10th, 1977, 565 F.2d 635. It was not error for the trial judge to admit evidence of other acts where the objection made to such evidence was too vague to permit an informed decision to be made on the legal issue involved. U.S. v. Greenfield, C.A.5th, 1977, 554 F.2d 179, 186. Objection that evidence "serves no purpose whatsoever in this case" and "is not admissible as original evidence" is too loosely formulated and imprecise to preserve for appeal improper admission of other crimes evidence. U.S. v. Arteaga-Limones, C.A.5th, 1976, 529 F.2d 1183, 1190. General objection was insufficient to preserve for appeal failure of trial court to exclude inflammatory details not necessary for purpose for which other crime was admitted. Holmes v. State, 1977, 251 N.W.2d 56, 76 Wis.2d 259.

FN21. Irrelevant Ehrhardt, Florida Evidence, 1977, p. 72.

FN22. Invoking discretion See s 5224.

FN23. Must show relevance Ehrhardt, Florida Evidence, 1977, p. 72; Lacy, Admissibility of Evidence of Crimes Not Charged in the Indictment, 1952, 31 Ore.L.Rev. 267, 284; Comment, Other Crimes Evidence in Louisiana--To Show Knowledge, Intent, System, Etc. in the Case in Chief, 1973, 33 La.L.Rev. 614, 628. It was not reversible error in bank robbery prosecution to admit evidence that defendant and accomplice robbed another business during the prior week using the same gun as in the charged robbery since appellate court could not say that the evidence has no bearing on the issues. U.S. v. McMillian, C.A.8th, 1976, 535 F.2d 1035, 1038-39.

FN24. Burden of proof Ehrhardt, Florida Evidence, 1977, p. 72. In prosecution of a tax preparer for counselling filing of false returns, testimony that an audit of 160 returns prepared by the defendant showed that 90-95% contained overstated deductions should not have been admitted without evidence showing why deductions were thought to be overstated; such evidence insinuated other crimes by the defendant without any proof of them. U.S. v. Brown, C.A.5th, 1977, 548 F.2d 1194, 1206.

FN25. Jury determines See vol. 21, s 5054.

FN26. Judge's discretion See s 5250.

FN27. Determined by judge In addition, the standard for proof of other crimes, discussed below at notes 47-54, is inconsistent with the standard for proof of preliminary facts established in Rule 104(b) for jury determined facts. It was not error for the trial court to refuse to hold a preliminary inquiry into the admissibility of other crimes evidence, though it would have been wise to have done so since such a hearing would have revealed that the evidence was redundant and remote. U.S. v. DeVincent, C.A.1st, 1976, 546 F.2d 452, 457.

FN28. Offer of proof Comment, A Proposed Analytical Method for the Determination of the Admissibility of Evidence

of Other Offenses in California, 1960, 7 U.C.L.A.L.Rev. 463, 483.

FN29. Must specify issue Comment, A Proposed Analytical Method for the Determination of the Admissibility of Other Offenses in California, 1960, 7 U.C.L.A.L.Rev. 463, 483.

FN30. Point to element U.S. v. DiZenzo, C.A.4th, 1974, 500 F.2d 263, 265. But see discussion in s 5242 at notes 20-25.

FN31. "Fancy defenses" Thompson v. The King, H.L., [1918] A.C. 221, 232 (Lord Sumner).

FN32. Writers Herbert & Mount, Ohio's "Similar Acts Statute": Its Uses and Abuses, 1975, 9 Akron L.Rev. 301, 307, 308, 326; Slough, Other Vices, Other Crimes: An Evidentiary Dilemma, 1972, 20 U.Kans.L.Rev. 411, 430; Comment, The Admissibility of Other Crimes in Texas, 1972, 50 Texas L.Rev. 1409, 1411-1412; Comment, Other Crimes Evidence at Trial: Of Balancing and Other Matters, 1961, 70 Yale L.J. 763, 770; Note, Admissibility in Criminal Prosecutions of Proof of Other Offenses As Substantive Evidence, 1950, 3 Vand.L.Rev. 779, 783.

FN33. Read into codes N.J.Sup.Ct., Committee on Evidence, Report, 1963, p. 103; People v. Swearington, 1977, 140 Cal.Rptr. 5, 71 Cal.App.3d 935; People v. Reyes, 1976, 132 Cal.Rptr. 848, 62 Cal.App.3d 53. See also, Judicial Council Committee's Note, Wisc.R.Ev. 904.04: "Evidence of other crimes, wrongs or acts which tend to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, is not automatically admissible. It should be excluded if motive, opportunity, intent, etc. is not substantially disputed. * * *"

FN34. "Nearly every court" U.S. v. James, C.A.1977, 555 F.2d 992, 1000 n. 46, 181 U.S.App.D.C. 55 (citing many cases). In order for evidence of other crimes to be admissible on the issue of intent, it is essential that intent be more than a formal issue as a result of defendant's plea of not guilty; where the defendant denied having done the act but made no contention that it was not done with the requisite intent, it was reversible error to permit the government to introduce evidence that the defendant engaged in a similar act on a prior occasion. U.S. v. Frierson, C.A.7th, 1969, 419 F.2d 1020. See also, U.S. v. Myers, C.A.5th, 1977, 550 F.2d 1036, 1044 (element sought to be proved must be "a material issue in the case"); U.S. v. McCord, C.A.7th, 1975, 509 F.2d 891, 895 (other crimes evidence should not be admitted on entrapment theory until defense "demonstrates clearly that the entrapment defense will ultimately be raised"); U.S. v. Miller, C.A.7th, 1974, 508 F.2d 444, 450 (evidence of other crimes not admissible on issue of intent until defendant "affirmatively contested" intent); U.S. v. Goodwin, C.A.5th, 1974, 492 F.2d 1141, 1152 (error to admit evidence on issue of intent where "that issue was never seriously disputed at trial").

FN35. Contrary opinions U.S. v. Adcock, C.A.8th, 1977, 558 F.2d 397, 402; U.S. v. Brettholz, C.A.2d, 1973, 485 F.2d 483, 487; U.S. v. Castro, C.A.9th, 1973, 476 F.2d 750, 753 (explicitly rejecting Frierson, note 34 above.)

FN36. Deleted provision See s 5164.

FN37. Consider under Rule 403 See ss 5214, 5220, 5222.

FN38. Stipulation Where the defendant was willing to stipulate to substance of probation officer's testimony, it was error to permit the officer to testify as a witness. U.S. v. Pavon, C.A.9th, 1977, 561 F.2d 799. "Furthermore, it stands to reason that the other torts or crimes evidence must be offered as bearing on a fact that is actually in issue * * *. If the defendant concedes a fact, or an issue to which it relates, the prosecutor should not be permitted to prove the fact by the use of 'other crimes' evidence." N.J.Sup.Ct., Committee on Evidence, Report, 1963, p. 103. See also, Lacy, Admissibility of Evidence of Other Crimes Not Charged in the Indictment, 1952, 31 Ore.L.Rev. 267, 275-277 (arguing that there would be greater use of stipulations in criminal cases if courts would bar other crimes evidence on stipulated facts). On the effect of stipulations generally, see s 5194 and 9 Wigmore, 3d ed. 1940, s 2591.

FN39. Control order of proof See Rule 611(a). Where other crimes evidence is offered on the issue of identity, it is proper to admit evidence during Government's case-in-chief because identity is unquestionably in issue unless the defendant admits to commission of the act but denies the requisite intent. U.S. v. Baldarrama, C.A.5th, 1978, 566 F.2d

560, 568 n. 9. In first degree murder prosecution it was error for prosecutor to state in his opening statement that when the defendant was arrested three days after the crime he was driving a stolen car. Theriault v. State, 1976, 547 P.2d 668, ___ Nev. ___ .

FN40. Other evidence first Comment, Other Crimes Evidence at Trial: Of Balancing and Other Matters, 1961, 70 Yale L.J. 763, 773. But see, U.S. v. Austin, C.A.10th, 1972, 462 F.2d 724, 734-735 (trial court could permit prosecution to prove uncharged offenses before evidence of charged crime was introduced). Before evidence of prior crimes can be used, there must be proof of the commission of the charged crime. State v. Stevens, N.D.1975, 238 N.W.2d 251.

FN41. Rebuttal E.g., U.S. v. Chrzanowski, C.A.3d, 1974, 502 F.2d 573, 576. Although the better practice would be to wait to admit evidence of other crimes offered to show intent until the end of the defense case, it was not plain error to admit the evidence during the government's case-in-chief when the issue of intent was foreshadowed by the defendant's confession. U.S. v. Brunson, C.A.5th, 1977, 549 F.2d 348, 361 n. 20.

FN42. Conclusion E.g., U.S. v. Dossey, C.A.8th, 1977, 558 F.2d 1336, 1338.

FN43. Must satisfy other rules See s 5192; Herbert & Mount, Ohio's "Similar Acts Statute": Its Uses and Abuses, 1975, 9 Akron L.Rev. 301, 320.

FN44. Proof by conviction E.g., U.S. v. Payne, C.A.9th, 1973, 474 F.2d 603; U.S. v. Clayton, C.A.10th, 459 F.2d 572.

FN45. Most efficient The defendant could, of course, attack the validity of the conviction on grounds normally available on collateral attack, but otherwise it is presumed valid. U.S. v. Beechum, C.A.5th, 1977, 555 F.2d 487, 498.

FN46. Proof by other means See vol. 2, s 410, p. 133.

FN47. "Beyond reasonable doubt" U.S. v. Beechum, C.A.5th, 1977, 555 F.2d 487, 498; Cunha v. Brewer, C.A.8th, 1975, 511 F.2d 894, 901. See also, McCormick, Evidence, Cleary ed. 1972, s 190, p. 451; Herbert & Mount, Ohio's "Similar Acts Statute": Its Uses and Abuses, 1975, 9 Akron L.Rev. 301, 327; Payne, The Law Whose Life is Not Logic: Evidence of Other Crimes in Criminal Cases, 1968, 3 U.Rich.L.Rev. 62, 78; Note, Admissibility in Criminal Prosecutions of Proof of Other Offenses as Substantive Evidence, 1950, 3 Vand.L.Rev. 779, 788.

FN48. Admissibility generally If other crimes evidence is treated as an aspect of relevance, the standard would be that it was "sufficient to support a finding" that the crime was committed by the defendant. See Rule 104(b). Trial court properly admitted evidence of defendant's escape from nearby prison to prove motive for theft of car where evidence of escape was clear and convincing, testimony was limited to bare fact of incarceration, and no details of prior conviction or escape were put before the jury; probative value substantially outweighed danger of unfair prejudice. U.S. v. Stover, C.A.8th, 1977, 565 F.2d 1010.

FN49. "Substantial evidence" Comment, Other Crimes Evidence in Louisiana--To Show Knowledge, Intent, System, Etc. in the Case in Chief, 1973, 33 La.L.Rev. 614, 620 (collecting cases).

FN50. "Substantial proof" Note, Evidence of Criminal History in Ohio Criminal Prosecutions, 1964, 15 West.Res.L.Rev. 772, 778.

FN51. "Satisfactory proof" Cunha v. Brewer, C.A.8th, 1975, 511 F.2d 894, 901 (applying Iowa law).

FN52. "Clear and convincing" McCormick, Evidence, Cleary ed. 1972, s 190 p. 452; Comment, Admissibility of Prior Criminal Acts as Substantive Evidence in Criminal Prosecutions, 1969, 36 Tenn.L.Rev. 515, 516. Uncorroborated testimony of accomplice was sufficient to constitute "clear and convincing" evidence of other crime. U.S. v. Trevino, C.A.5th, 1978, 565 F.2d 1317, 1319. The defendant's own confession of a prior crime is clear and convincing evidence of the crime. U.S. v. Davis, C.A.8th, 1977, 551 F.2d 233. There must be substantial evidence of

prior acts, what some courts call "clear and convincing evidence." State v. Stevens, N.D.1975, 238 N.W.2d 251.

FN53. Federal courts E.g., U.S. v. Cummings, C.A.8th, 1974, 507 F.2d 324, 331; U.S. v. Clemons, C.A.8th, 1974, 503 F.2d 486, 489; U.S. v. Ostrowsky, C.A.7th, 1974, 501 F.2d 318, 321.

FN54. "Plain, clear, and conclusive" E.g., U.S. v. Pollard, C.A.5th, 1975, 509 F.2d 601, 604; U.S. v. Shadletsky, C.A.5th, 1974, 491 F.2d 677, 678; U.S. v. Broadway, C.A.5th, 1973, 477 F.2d 991, 995.

FN55. Continue to apply E.g., U.S. v. Scholle, C.A.8th, 1977, 553 F.2d 1109, 1121 ("clear and convincing" standard); U.S. v. Cyphers, C.A.7th, 1977, 553 F.2d 1064, 1070 (same); U.S. v. Myers, C.A.5th, 1977, 550 F.2d 1036, 1044 ("plain, clear, and convincing" proof required).

FN56. Florida Ehrhardt, Florida Evidence, 1977, p. 72.

FN57. South Dakota The Commentary to No.Dak.R.Ev. **404(b)** says that the opinion of the North Dakota Supreme Court in State v. Stevens, N.D.1975, 238 N.W.2d 251, 257, set forth "criteria that should be considered whenever section (b) of this rule is invoked" noting that that opinion requires "clear and convincing" evidence of the other crime.

FN58. Repeals restrictions U.S. v. Maestas, C.A.8th, 1977, 554 F.2d 834, 836 n. 2, 837-838.

FN59. Force into Rule 403 See, e.g., U.S. v. Beechum, C.A.5th, 1977, 555 F.2d 487, 507-508.

FN60. Different question Courts in setting out the procedural prerequisites to the use of other crimes evidence have generally treated the balancing required by Rule 403 as separate from the issue of the sufficiency of the proof of the other crime. See, e.g., U.S. v. Ostrowsky, C.A.7th, 1974, 501 F.2d 318, 321. McCormick also treats the two as distinct questions. McCormick, Evidence, Cleary ed., 1972, s 190, pp. 451-453.

FN61. Prior standards intact U.S. v. Beechum, C.A.5th, 1977, 555 F.2d 487, 504-507.

FN62. Who applies It is, of course, possible that both the judge and the jury are to apply the higher standard of proof. Nothing in the caselaw suggests this, but some pattern jury instructions suggest that trial courts may be handling the issue this way. See 1 Devitt & Blackmar, Federal Jury Practice and Instructions, 3d ed. 1977, s 14.15.

FN63. Preliminary question See vol. 21, s 5052.

FN64. Jury determines See vol. 21 s 5054.

FN65. Cases and commentators "Before evidence of a prior offense is given to the jury, the trial judge should conduct an independent examination of the proffered evidence to determine whether it satisfies this standard." U.S. v. Beechum, C.A.5th, 1977, 555 F.2d 487, 497. See also, U.S. v. Scholle, C.A.8th, 1977, 553 F.2d 1109, 1121 (trial judge "will base his decision" to admit or exclude evidence of other crimes on, inter alia, clear and convincing proof that the acts were committed). McCormick, Evidence, Cleary ed. 1972, s 190, p. 452 ("before the evidence is admitted * * * the substantial or unconvincing quality of the proof should be weighed. * * *"); Ehrhardt, Florida Evidence, 1977, s 404.5, p. 72 ("the court must consider whether there is clear and convincing proof").

FN66. Trial judge role Advisory Committee's Note, F.R.Ev. **404(b).**

FN67. How much Another question that does not appear to have been considered extensively in the literature is whether the higher standard applies to prior wrongs or acts that do not amount to a crime. The answer to this question would seem to turn on the policy basis for the higher standard of proof; but that policy is seldom enunciated. Since the higher standard is often spoken of as a substitute for proof "beyond a reasonable doubt," one might infer that the purpose is to insure that if the defendant is to be convicted of a crime not charged in the indictment, at least the jury should be held to something higher than the civil standard. On this theory, the higher standard should not be applied to

other acts not amounting to a crime. Strict requirements for proof of other crimes do not apply to proof of other acts not amounting to a crime. U.S. v. Greenfield, C.A.5th, 1977, 554 F.2d 179, 185. Strict standards of proof of other crimes are applicable to the government; they do not apply when the defendant offers evidence of other wrongs of government agent. U.S. v. McClure, C.A.5th, 1977, 546 F.2d 670, 676.

FN68. "Physical elements" U.S. v. Beechum, C.A.5th, 1977, 555 F.2d 487, 497.

FN69. Probability theory See s 5242.

FN70. Two-witness rule U.S. v. Freedman, C.A.2d, 1971, 445 F.2d 1220, 1224.

FN71. Corroboration, sufficiency See 7 Wigmore, Evidence, 3d ed. 1940, ss 2032-2075.

FN72. Effect of acquittal 2 Wigmore, Evidence, 3d ed. 1940, s 317; Note, Evidence of Defendant's Other Crimes: Admissibility in Minnesota, 1953, 37 Minn.L.Rev. 608, 613.

FN73. Contrary authority It is a violation of defendant's right to be free from double jeopardy for a state to use evidence of prior crimes for which defendant has been previously acquitted in a subsequent trial for a similar offense; the doctrine of collateral estoppel prevents the state from relitigating an issue that has once been determined adversely to the state. Wingate v. Wainwright, C.A.5th, 1972, 464 F.2d 209. Where the defendant has been previously tried and acquitted of a crime, the subsequent evidentiary use of that crime is an abuse of discretion because the fact of acquittal diminishes the probative worth of the evidence and increases the prejudice to the defendant to such a degree that it is inadmissible as a matter of law. State v. Little, 1960, 350 P.2d 756, 87 Ariz. 295.

FN74. Double jeopardy Bray, Evidence of Prior Uncharged Offenses and the Growth of Constitutional Restrictions, 1974, 28 U.Miami L.Rev. 489, 506; Comment, Exclusion of Prior Acquittals: An Attack on the "Prosecutor's Delight", 1974, 21 U.C.L.A.L.Rev. 892, 914, 921 n. 148. In the early case of U.S. v. Randenbush, 1834, 8 Pet. (33 U.S.) 288, 8 L.Ed. 948, the Court held it was not a violation of the prohibition against double jeopardy to admit evidence of another crime for which defendant had never been prosecuted but which had been used as evidence in a prior prosecution in which defendant had been acquitted. The nature of the double jeopardy argument under the Court's recent cases is illustrated by the dissent in U.S. v. Castro-Castro, C.A.9th, 1972, 464 F.2d 336, note 76 below. However, in that case it can be argued that the evidentiary use of the prior incident is perfectly consistent with the jury's finding of innocence in the prior case; i.e., that even an innocent defendant should have been suspicious when placed in the role of a dupe the second time and that even if defendant did not realize that he was transporting contraband the first time, the prior trial makes it unlikely that he could have been ignorant of what was happening in the second incident.

FN75. State courts E.g., People v. Griffin, 1967, 426 P.2d 507, 66 Cal.2d 459, 58 Cal.Rptr. 107 (collecting cases); State v. Darling, 1966, 419 P.2d 836, 197 Kan. 471 (under provisions of K.S.A. 60-455).

FN76. Federal courts The fact that the defendant was previously acquitted of charge of illegal importation of marijuana on testimony that he was unaware that contraband was concealed in vehicles does not make evidence of that incident inadmissible in subsequent prosecution for same offense in which the marijuana was also concealed in vehicle and defendant disclaimed knowledge of its presence. U.S. v. Castro-Castro, C.A.9th, 1972, 464 F.2d 336. Evidence of prior crime of which defendant was acquitted in state court was admissible in federal prosecution since the federal government was not a party or a privy to the state action and collateral estoppel is therefore not applicable. U.S. v. Smith, C.A.4th, 1971, 446 F.2d 200. The fact that in trial for prior crime a verdict was directed in favor of the defendant does not bar the use of evidence of that crime in a subsequent trial for another offense. Holt v. U.S., C.A.10th, 1968, 404 F.2d 914, 920. Doctrine of res judicata does not make inadmissible evidence of a prior offense of which defendant has been acquitted and which is offered to prove knowledge that heroin was concealed in his vehicle where general verdict makes it impossible to determine basis of decision in prior case. Hernandez v. U.S., C.A.9th, 1966, 370 F.2d 171. Prior acquittal does not bar evidentiary use of other crime. Himmelfarb v. U.S., C.A.9th, 1945, 175 F.2d 924, 941.

FN77. Dismissal Evidence of another narcotics transaction is admissible despite the fact that charges based on that transaction had been dismissed because the unjustified delay and neglect of the government had prejudiced the defendant's ability to defend himself. U.S. v. Jones, C.A.1973, 476 F.2d 533, 155 U.S.App.D.C. 88.

FN78. Similar results U.S. v. Juarez, C.A.7th, 1977, 561 F.2d 65 (dismissal); U.S. v. Rocha, C.A.9th, 1977, 553 F.2d 614 (acquittal). The Florida codifiers seem to suggest that their version of Rule **404(b)** leaves the question open. Sponsors' Note, Fla.Evid.Code s 90.404.

FN79. Discretionary exclusion U.S. v. Smith, C.A.4th, 1971, 446 F.2d 200, 204. See generally, Comment, Exclusion of Prior Acquittals: An Attack on the "Prosecutor's Delight", 1974, 21 U.C.L.A.L.Rev. 892, 903-905.

FN80. Prove acquittal People v. Griffin, 1967, 426 P.2d 507, 66 Cal.2d 459, 58 Cal.Rptr. 107.

FN81. Not applicable In many cases these other restrictions are, by their own terms, applicable only to prosecution for the crime. Often, however, it is difficult to see why the underlying policy is not equally applicable to the evidentiary use of the crime.

FN82. Extradition restriction U.S. v. Flores, C.A.2d, 1976, 538 F.2d 939.

FN83. Unfair U.S. v. Jones, C.A.1973, 476 F.2d 533, 155 U.S.App.D.C. 88.

FN84. Immunity U.S. v. Hockenberry, C.A.3d, 1973, 474 F.2d 247.

FN85. Prejudice See s 5250.

FN86. Out of presence U.S. v. Bailey, C.A.1974, 505 F.2d 417, 420, 164 U.S.App.D.C. 310; U.S. v. Demetre, C.A.8th, 1972, 464 F.2d 1105, 1108.

FN87. Explained See s 5250.

FN88. Labeling "But the mere labeling of such evidence does not automatically bring admission." Committee Commentary, No.Dak.R.Ev. **404(b).**

FN89. Appellate opinions Slough, Other Vices, Other Crimes: An Evidentiary Dilemma, 1972, 20 U.Kan.L.Rev. 411, 417; Stone, The Rule of Exclusion of Similar Fact Evidence: America, 1938, 51 Harv.L.Rev. 988, 1020.

FN90. Discretion to admit McCormick, Evidence, Cleary ed., 1972, s 190, p. 453.

FN91. Less stringent U.S. v. McCarthy, C.A.6th, 1972, 470 F.2d 222, 224; U.S. v. Turner C.A.4th, 1971, 441 F.2d 1161.

FN92. Capable of ignoring Havelock v. U.S., C.A.10th, 1970, 427 F.2d 987, 991.

FN93. Limit use See vol. 21, s 5067.

FN94. Only relevant details U.S. v. Ostrowsky, C.A.7th, 1974, 501 F.2d 318, 323 (abuse of discretion to admit gory details of murder in auto theft case); U.S. v. Ferrone, C.A.3d, 1971, 438 F.2d 381, 386 (need not show details of defendant's gambling operations to prove that agents he interfered with were engaged in official duties while searching defendant's home). Prejudice from proof of prior crime was reduced when trial judge excluded details of prior crime. U.S. v. Dansker, C.A.3d, 1976, 537 F.2d 40, 58. In prosecution for receiving stolen property, evidence of possession of other stolen property was admissible but trial court should have excluded evidence that property was taken in burglary. State v. Spraggin, 1976, 239 N.W.2d 297, 71 Wis.2d 604.

FN95. Impermissible argument E.g., Bellows v. Dainack, C.A.2d, 1977, 555 F.2d 1105, 1107.

FN96. Suggest other uses U.S. v. Araujo, C.A.2d, 1976, 539 F.2d 287, 290.

FN97. Principal device One writer has suggested that use of the judge's power to comment on the evidence could be a more effective method of explaining the proper use of other crimes. Lacy, Admissibility of Evidence of Crimes Not Charged in the Indictment, 1952, 31 Ore.L.Rev. 267, 285. Instruction that evidence of other crime could be considered to show that defendant was inclined to deal in heroin violated Rule **404(b).** U.S. v. Bloom, C.A.5th, 1976, 538 F.2d 704. Error in admission of other crimes evidence was not cured by an instruction to jury to disregard it. U.S. v. Wiley, C.A.6th, 1976, 534 F.2d 659.

FN98. Skeptical E.g., Note, Rule **404(b)** Other Crimes Evidence: The Need for a Two-Step Analysis, 1977, 71 Nw.U.L.Rev. 635, 643; Comment, Exclusion of Prior Acquittals: An Attack on the "Prosecutor's Delight", 1974, 21 U.C.L.A.L.Rev. 892, 907-909.

FN99. Prefer not to emphasize See, e.g., U.S. v. Hayes, C.A.2d, 1977, 553 F.2d 824, 829; U.S. v. Tramaglino, C.A.2d, 1952, 197 F.2d 928, 932.

FN1. Reasons U.S. v. Bobbitt, C.A.1971, 450 F.2d 685, 689, 146 U.S.App.D.C. 224, 228.

FN2. No duty U.S. v. Davis, C.A.8th, 1977, 557 F.2d 1239, 1247; U.S. v. Drebin, C.A.9th, 1977, 557 F.2d 1316, 1325; U.S. v. Blount, C.A.6th, 1973, 479 F.2d 650, 651; U.S. v. Van Poyck, C.A.5th, 1972, 464 F.2d 575. See also, Note, Evidence of Criminal History in Ohio Criminal Prosecutions, 1964, 15 West.Res.L.Rev. 772, 779.

FN3. Give twice This is required, on request, by Fla.Evid.Code s 90.404(2)(b)(2), quoted above, s 5231 n. 39. See also, Comment, Other Crimes Evidence in Louisiana--To Show Knowledge, Intent, System, Etc. in the Case in Chief, 1973, 33 La.L.Rev. 614, 628. For a sample cautionary instruction given at the time of introduction of other crimes evidence, see U.S. v. Weaver, C.A.8th, 1977, 565 F.2d 129, 134.

FN4. Criticisms Slough, Other Vices, Other Crimes: An Evidentiary Dilemma, 1972, 20 U.Kan.L.Rev. 411, 428.

FN5. Little advice The pattern jury instructions offer few guides. See 1 Devitt & Blackmar, Federal Jury Practice and Instructions, 3d ed. 1977, ss 14.14, 14.15. For samples of instructions given, see U.S. v. Hayes, C.A.2d, 1977, 553 F.2d 824, 829 n. 11; U.S. v. Hampton, C.A.10th, 1972, 452 F.2d 29, 30.

FN6. State proper purpose U.S. v. Ridley, C.A.6th, 1975, 519 F.2d 791, 793. Appellate court could affirm the admission of evidence of other crimes to prove identity even though the trial court did not instruct the jury that it could be used for this purpose. U.S. v. Baldarrama, C.A.5th, 1978, 566 F.2d 560, 567.

FN7. Invite forbidden inference People v. Hunt, 1977, 72 Cal.App.3d 190, 139 Cal.Rptr. 675.

FN8. Too refined U.S. v. Bobbitt, C.A.1971, 450 F.2d 685, 690, 146 U.S.App.D.C. 224.

FN9. Role of discretion See s 5250.

FN10. Only abuse of discretion In prosecution for falsely stating that he had never been convicted of a felony in order to purchase a firearm where the defense was that the defendant did not understand the question, it was an abuse of discretion to permit the government to introduce into evidence the defendant's rap sheet that showed two felony convictions, numerous arrests, and items of unfavorable personal history. U.S. v. Bledsoe, C.A.8th, 1976, 531 F.2d 888, 891.

FN11. Determining relevance See s 5166.

FN12. Not appropriate Though many could be cited, two recent cases are at hand to illustrate the point. In U.S. v. Tibbets, C.A.4th, 1977, 565 F.2d 867 the per curiam opinion says the evidence of a prior bomb threat was admissible in a prosecution for a subsequent threat. Since the defendant was observed in the act of making the charged threat, which was monitored by the phone company, there does not seem to be any question of identification and the court does not mention any issue of intent as to which the evidence would be relevant. It simply says that under Rule **404(b)** evidence is admissible for other purposes, without specifying what those purposes might be. The trial court apparently admitted the evidence to show how the defendant came to be under surveillance when he made the charged threat but the relevance of that is difficult to discern. In U.S. v. Herbst, C.A.10th, 1977, 565 F.2d 638, 641, the defendant raised a number of arguments against the admissibility of other crimes evidence. The opinion disposes of these by simply listing all of the potential grounds for admissibility, then stating that admissibility was "consistent with our prior opinions."

FN13. Criminal cases U.S. v. Hines, C.A.3d, 1972, 470 F.2d 225, 227-228.

FN14. Erie doctrine See s 5201.

FN15. Intertwined Wellborn, The Federal Rules of Evidence and the Application of State Law in Federal Courts, 1977, 55 Texas L.Rev. 371, 410-411.

FN16. Expands See s 5239.

FPP s 5249 (R 404)

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UNITED STATES of America, Appellee,
v.
Michael Lee MATTHEWS and Robert G. Prater, Defendants-Appellants.
Nos. 509, 228, Dockets 93-1158, 93-1172.
United States Court of Appeals,
Second Circuit.
Argued Dec. 1, 1993.
Decided March 30, 1994.

Defendants were convicted in the United States District Court for the Northern District of New York, Howard G. Munson, J., of bank robbery and conspiracy to commit bank robbery, and they appealed. The Court of Appeals, Kearse, Circuit Judge, held that: (1) first defendant's rights under confrontation clause were not violated by admission of second defendant's out-of-court inculpatory statement; (2) in-court identifications of first defendant did not violate due process; (3) evidence was sufficient to support second defendant's conviction; (4) prosecution had obligation to disclose letter written by second defendant, but late disclosure was not so prejudicial as to require reversal; (5) evidence that second defendant tried to stab girlfriend was admissible, and did not violate notice requirement for other-crimes evidence;





that he would have nothing to do with her because she wouldn't give up her prostitution. You asked her that. She wouldn't give up her drug habit; you asked her that. She wouldn't give up her alcoholism; you asked her that, and because she didn't treat her children in the manner in which your client thought they ought to be treated.

(Tr. 746-47.)

On redirect examination, the government asked Dunbar what had happened on Christmas ***551** Day to cause her to call the police. Over the objection of Prater's attorney stating, "we are getting into things that may be characterized as 404(B) material," Dunbar was allowed to testify that during the Christmas Day argument, Prater had threatened Dunbar and the father of her children with an ice pick. Prater contends that this testimony was inadmissible under Fed.R.Evid. 404(b) because it was introduced in order to show Prater's propensity for violence and because Prater was not given advance notice that the government would introduce such testimony. We disagree.

Rule 404(b) of the Federal Rules of Evidence provides as follows:

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the

accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Notwithstanding the language of the provision for notice, which applies whether the government wishes to use the other-act evidence in its direct case, on rebuttal, or as impeachment, see Fed.R.Evid. 404(b) Advisory Committee Note, the notice requirement was "not intend[ed to] ... require the prosecution to disclose directly or indirectly the names and addresses of its witnesses," id. We are unpersuaded that either the substantive reach or the notice provision of the Rule was violated.

First, it does not appear that the ice-pick testimony was offered or admitted to show that Prater committed any other act "in conformity [ ]with" this threat of violence. Given the "rather strenuous[ ]" attack on Dunbar's character during Prater's cross-examination, which sought to show that Dunbar had created a fiction in a fit of jealous anger, the government sought to provide a more objective reason for Dunbar's decision to pass on to the police Prater's statement that he had committed bank robbery. Plainly Rule 404(b) permitted the use of testimony that Prater attempted to stab Dunbar and the father of her children to show Dunbar's motive for turning Prater in to the police.





[28] We note that it would have been appropriate for the trial court to give the jury a cautionary instruction that the ice-pick evidence was admitted only for this limited purpose. However, given the degree to which Prater's cross-examination of Dunbar had attacked her motives, we think it highly improbable that the jury would have used the evidence for any other purpose. In any event, Prater did not request such an instruction and cannot now complain that none was delivered.

[29] Second, we are unpersuaded that the Rule required the government to give notice in advance of trial that Dunbar would testify about the ice-pick attack. Dunbar was designated as a confidential informant and the court denied Prater's pretrial motion for disclosure of her identity. Since the notice provision of Rule 404(b) was not intended to require the government to disclose the identity of its witnesses, either directly or indirectly, and it is difficult to believe that even general notice of an ice-pick attack would not have indicated that the informant was Dunbar, we conclude that the government did not violate the notice requirement by not notifying Prater that it might use evidence that he had attacked someone with an ice pick.

4. The Prosecutor's Summation

[30] Prater also contends that comments by the AUSA during summation denied him a fair trial. He focuses principally on the following reference to a polygraph test:

UNITED STATES of America, Appellee,
v.
Abdul-Rahma ADEDIRAN, also known as Adediran Babatumte, also known as Francis Machante, also known as David K. Bolade, Appellant.

No. 93-3821.

United States Court of Appeals, Eighth Circuit.

Submitted April 12, 1994.

Decided June 8, 1994.

Defendant was convicted in the United States District Court for the Eastern District of Missouri, George F. Gunn, Jr., J., of falsely misrepresenting social security account number (SSAN). Defendant appealed. The Court of Appeals, Henley, Senior Circuit Judge, held that: (1) other wrongs evidence was admissible, and (2) defendant's failure to appear for state court proceedings warranted two-level enhancement for obstruction of justice.

Affirmed.

[1] CRIMINAL LAW ⇐ 374
110k374
Preponderance of the evidence linked defendant to other similar wrongs admitted to show intent in prosecution for falsely misrepresenting social security account number (SSAN), even though no witness could identify defendant as being involved in the other wrongs; both schemes involved person opening checking accounts with minimal cash and fictitious Wisconsin identification, false SSANs at different banks all began with same five digits, defendant fit description of person posing as customer in connection with the other wrongs, and handwriting samples connected to both schemes were similar. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[2] CRIMINAL LAW ⇐ 371(3)
110k371(3)
Danger of unfair prejudice from other wrongs evidence that defendant opened checking accounts with minimal cash amounts and fictitious Wisconsin identification did not outweigh probative value to show intent in prosecution for falsely misrepresenting social security account number (SSAN) in connection with similar scheme.

[3] CRIMINAL LAW ⇐ 338(7)
110k338(7)
Balancing of probative value and danger of unfair prejudice from evidence is peculiarly within discretion of district court and should not be disturbed absent clear showing of abuse.

[3] CRIMINAL LAW ⇐ 1153(1)
110k1153(1)
Balancing of probative value and danger of unfair prejudice from evidence is peculiarly within discretion of district court and should not be disturbed absent clear showing of abuse.

[4] CRIMINAL LAW ⇐ 629.5(8)
110k629.5(8)
Government's failure to respond directly to defendant's motion requesting information regarding prior bad acts was not fatal in light of defense counsel's admission that the evidence had been fully disclosed and that he was aware of government's intention to present it. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[5] CRIMINAL LAW ⇐ 1253
110k1253
Defendant's failure to appear for state court proceedings warranted two-level enhancement for obstruction of justice in connected federal prosecution for falsely misrepresenting social security account number (SSAN); misrepresentation of SSAN was intimate part of conduct for which local police had arrested defendant. U.S.S.G. § 3C1.1, 18 U.S.C.A.App.

***62** Allen I. Harris, St. Louis, MO, argued, for appellant.

Jonathan I. Goldstein, St. Louis, MO, argued (Edward L. Dowd, Jr. and Jonathan I. Goldstein), on the brief for appellee.

Before RICHARD S. ARNOLD, Chief Judge, HENLEY, Senior Circuit Judge, and MAGILL, Circuit Judge.

HENLEY, Senior Circuit Judge.

Abdul-Rahma Adediran appeals his conviction and sentence for falsely misrepresenting his Social Security Account Number (SSAN), with the intent to deceive and for the purpose of obtaining something of value, in violation of 42 U.S.C. § 408(a)(7)(B) (1991). We affirm.

I.

In late October 1991, Adediran, posing as Francis Machante and using false SSANs, opened accounts with Mail Boxes, Etc. and Answer St. Louis, a telephone answering service. In December 1991, Adediran opened checking accounts at five banks in the St. Louis area. At each bank he posed as Francis Machante, providing a false Wisconsin identification in that name. His initial deposits ranged from $100.00 to $130.00, and he used different SSANs, all of which were false, at each bank.

One of the account representatives who dealt with Adediran became suspicious when she recognized the address he gave as belonging to Mail Boxes, Etc. She alerted the local police, who, after further investigation, apprehended Adediran. Adediran was held for several days until he posted bond. He was then released with instructions to appear for arraignment on January 15, 1992. On that date, Adediran failed to appear as ordered.

On December 23, 1991, a person using the name David Bolade opened three accounts at banks in Rockford, Illinois. All of the accounts were opened with $100.00 deposits and with different SSANs, all of which were false. A fictitious Wisconsin identification was provided to each institution. In January 1992, the Rockford banks began receiving deposits for the Bolade accounts. Included in these deposits were several checks originally issued to Adediran by one of the St. ***63** Louis banks. These checks were never paid, but while the balances on the Bolade accounts remained inflated, over $10,000.00 was withdrawn from the Rockford banks. Adediran was eventually arrested in Chicago, Illinois, in April 1993.

In a seven-count indictment Adediran was charged with violating 42 U.S.C. § 408(a)(7)(B). Each count related to one of the St. Louis institutions at which he had presented a false SSAN. At trial the government presented evidence concerning events in both St. Louis and Rockford. Adediran objected to admission of the Rockford evidence, claiming the government had failed to establish that he was the person responsible for those incidents. The district court [FN1] overruled the objection and admitted the evidence under Rule 404(b) of the Federal Rules of Evidence.

FN1. The Honorable George F. Gunn, Jr., United States District Judge for the Eastern District of Missouri.

The jury eventually found Adediran guilty on all seven counts. The district court then imposed sentence based in part on the financial losses suffered by the Rockford institutions. In addition, the court increased Adediran's base offense level for obstruction of justice.

II.

[1] On appeal, Adediran claims the district court abused its discretion in admitting the Rockford evidence pursuant to Rule 404(b). The government argues in response that the evidence was not subject to Rule 404(b)'s requirements because it was proof of the crime charged. Alternatively, the government contends the evidence was properly admitted under that rule. Though this may well be a case where the other crime is so "inextricably intertwined" with the charged crime that Rule 404(b) is not implicated, United States v. DeLuna, 763 F.2d 897 (8th Cir.), cert. denied, 474 U.S. 980, 106 S.Ct. 382, 88 L.Ed.2d 336 (1985), we will apply that rule's more rigorous requirements. This decision does not affect our ultimate conclusion.

Rule 404(b) prohibits admission of evidence of other crimes for the purpose of proving action in conformity therewith but allows admission for other purposes, such as proof of intent. This court has held that other crimes are admissible if (1) relevant to a material issue, (2) established by a preponderance of the evidence, [FN2] (3) more probative than prejudicial, and (4) similar in kind and close in time to the events at issue. King v. Ahrens, 16 F.3d 265, 268 (8th Cir.1994); United States v. Aranda, 963 F.2d 211, 215 (8th Cir.1992).

FN2. Huddleston v. United States, 485 U.S. 681, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1987), establishes that a preponderance standard is appropriate. See

United States v. Aranda, 963 F.2d 211, 215 n. 5 (8th Cir.1992); United States v. Mothershed, 859 F.2d 585, 588 n. 2 (8th Cir.1988).

[2] Adediran does not contest either that the Rockford evidence was relevant to intent or that it was similar in kind and close in time to the acts for which he was prosecuted. Instead, he asserts that there was insufficient proof of his involvement in Rockford and that the evidence was more prejudicial than probative. We reject both contentions. First, we believe a preponderance of the evidence linked Adediran to Rockford. Most important in this regard was the deposit in Rockford of the very checks issued to Adediran by a St. Louis bank. Moreover, the schemes in St. Louis and Rockford were similar in several respects. In both cities, the person opening checking accounts did so with minimal cash amounts and a fictitious Wisconsin identification. False SSANs were used at different banks, but at all banks the numbers began with the same five digits. Though Adediran relies primarily on the fact that no Rockford witness could identify him at his trial, which took place some eighteen months after the Bolade accounts were opened, both testimony and photographs indicated that the person posing as David Bolade was a tall, thin, African-American male. Adediran fits this description. Finally, handwriting samples of both Francis Machante and David Bolade were submitted for the jury to compare. Similarities between the two signatures are evident.

***64** [3] As to Adediran's argument that the unfair prejudice resulting from the Rockford evidence outweighed its probative value, we note that the district court made an explicit finding to the contrary. Such balancing is peculiarly within the discretion of the district court and should not be disturbed absent a clear showing of abuse. United States v. Brown, 956 F.2d 782, 786 (8th Cir.1992). Considering the substantial probative value of the Rockford evidence, we can find no clear abuse in this case.

[4] Adediran also contends he received insufficient notice of the government's intent to introduce "other crimes" evidence. In particular, he notes that before trial he filed a motion requesting information regarding prior bad acts. The government's response failed to indicate any intention to introduce the Rockford incidents.

Rule **404(b)** provides that "upon request by the accused, the prosecution in a criminal case shall provide reasonable **notice** in advance of trial, or during trial if the court excuses pretrial **notice** on good cause shown, of the general nature of any such evidence it intends to introduce at trial." Though the government failed to indicate its intention to introduce the Rockford events in its direct response to Adediran's motion, defense counsel admitted before trial that the Rockford evidence had been fully disclosed and that he was aware of the government's intention to present it. In light of these admissions, the failure to respond directly to Adediran's motion was not fatal.

III.

Adediran contests the sufficiency of the evidence, but his argument is conditioned on a ruling that the Rockford evidence is inadmissible. Because we have ruled adversely to Adediran on the evidentiary issue, we need not reach the sufficiency claim. Nevertheless, after careful review, we hold that, with or without the Rockford evidence, the record sufficiently supports the jury's verdict.

IV.

Adediran challenges two aspects of his sentence. First, he argues that the district court erred in considering in its calculations the losses suffered by the Rockford banks. This argument is without merit, for it is based solely on the already rejected contention that there was insufficient evidence linking Adediran to Rockford. Because we have held that a preponderance of the evidence supports a conclusion that Adediran opened the Bolade accounts, the district court did not clearly err by making that finding.

[5] Adediran next contends the district court erred in imposing a two-point enhancement for obstruction of justice. This enhancement, imposed pursuant to U.S.S.G. § 3C1.1, was based on three factors: Adediran's failure to provide his true identity to police, his momentary refusal to submit to fingerprinting, and his failure to appear for state court proceedings in January 1992. Adediran claims that none of these factors justifies the enhancement. He argues that his momentary refusal to be fingerprinted was of such short duration that it caused no hindrance, that his failure to properly

identify himself did not actually cause a significant hindrance to the investigation, and that his failure to appear is excused because it involved a state rather than a federal court. Because it is dispositive, we consider only Adediran's failure to appear.

> Section 3C1.1 provides as follows:
> If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by 2 levels.

Application note 3(e) provides that "willfully failing to appear, as ordered, for a judicial proceeding" warrants an obstruction enhancement. Without a doubt, if Adediran had failed to appear for a federal court date, the enhancement would have been proper. We must therefore decide whether the mere fortuity of being charged in state court should excuse Adediran's blatant attempt to avoid the administration of justice.

***65** We note first that the Guidelines make no distinction between state and federal authorities or proceedings. Section 3C1.1 itself requires only that the obstruction occur "during the investigation, prosecution, or sentencing of the instant offense." This of course requires some connection between the obstructed state proceedings and the investigation of the federal offense. However, this requirement is easily satisfied here, for Adediran's misrepresentation of his SSAN was an intimate part of the conduct for which local police arrested him.

Few courts have explicitly dealt with the federal-state distinction in this context. However, in United States v. Lato, 934 F.2d 1080 (9th Cir.), cert. denied, --- U.S. ----, 112 S.Ct. 271, 116 L.Ed.2d 224 (1991), the Ninth Circuit rejected the argument that Adediran now proposes. That court reasoned as follows:

> The actions of Lato were certainly designed to obstruct the investigation of the offense he committed, that is to prevent the successful uncovering of his scheme to defraud insurance companies. That fraud violated federal as well as state law, and we are satisfied that Lato made no rarefied distinction between them when he sought to cover up his crime. Nor should we. Indeed, it is not likely that, absent the Guidelines, any sentencing judge would fail to consider Lato's activities when it became time to pronounce sentence. There is no reason to think that the Guidelines were intended to change that sensible approach to Lato's culpability.

Lato, 934 F.2d at 1083; see also United States v. Emery, 991 F.2d 907 (1st Cir.1993) ("[S]o long as some official investigation is underway at the time of the obstructive conduct, the absence of a federal investigation is not an absolute bar to the imposition of a section 3C1.1 enhancement.").

Moreover, several Eighth Circuit opinions have upheld enhancements even when the obstruction involved state authorities. See, e.g., United States v. Ball, 999 F.2d 339, 340 (8th Cir.1993) (because defendant was facing federal drug charges at the time, his attempt to escape from county jail following his arrest on a state assault charge constituted obstruction of federal investigation); United States v. Dortch, 923 F.2d 629, 632 (8th Cir.1991) (throwing bag of cocaine out of car during traffic stop by local police supported obstruction enhancement in federal prosecution); United States v. Paige, 923 F.2d 112, 114 (8th Cir.1991) (engaging in high speed chase with state highway patrol and throwing evidence out window supported enhancement). We conclude that this circuit does not prohibit obstruction enhancements in federal prosecutions merely because state entities were involved. Furthermore, we find the reasoning of the Lato court persuasive. Consequently, we hold that the district court did not err by imposing the two-level enhancement for obstruction of justice. [FN3]

> FN3. Adediran's failure to properly identify himself also may have justified the enhancement, for authorities were forced to run his prints through several services before discovering his true identity. Nevertheless, Adediran argues that such checks are routine and that the police therefore did nothing more than what they would have done had he properly identified himself. Consequently, he claims the evidence does not support a finding that his conduct "actually resulted in a significant hindrance," as is now required by U.S.S.G. § 3C1.1, comment. (n. 4). Because we hold that the failure to appear warrants imposition of the enhancement, we need not decide whether this argument has merit.

Accordingly, the judgment of the district court is affirmed.

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UNITED STATES of America, Plaintiff-Appellee,
v.
Darrell A. TOMBLIN, Defendant-Appellant.
No. 93-8679.
United States Court of Appeals,
Fifth Circuit.
Feb. 24, 1995.

Defendant was convicted in the United States District Court for the Western District of Texas, H.F. Garcia, J., of bribery, extortion and related offenses, and he appealed. The Court of Appeals, Emilio M. Garza, J., held that: (1) any deficiencies in affidavits in support of wiretap authorization did not require suppression; (2) bribery instruction was adequate; (3) evidence was sufficient to support bribery conviction; (4) extortion instruction was adequate; (5) because defendant was not a public official, his conviction for extortion had to be reversed; (6) introduction of evidence of defendant's character did not require reversal; (7) prosecutor was not required to give notice of intent to use other-acts evidence; and (8) upward departure in base offense level for bribery was warranted.

Affirmed in part, vacated in part and remanded.



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FN49. We note that, had we addressed Tomblin's Rule 608(b) good faith argument, we would have reached the same conclusion.

2

[37][38] Tomblin also argues that, because the prosecutor did not provide advance notice, the introduction of evidence of other bad acts when cross-examining Tomblin violated Federal Rule of Evidence 404(b). [FN50] The government contends that the other-acts evidence was proper under Rule 608(b) because it was introduced only to impeach Tomblin and was not offered in the prosecutor's case in chief. [FN51] Whether Rule 404(b) or Rule 608(b) applies to the admissibility of other-act evidence depends on the purpose for which the prosecutor introduced the other-acts evidence. United States v. Schwab, 886 F.2d 509, 511 (2d Cir.1989), cert. denied, 493 U.S. 1080, 110 S.Ct. 1136, 107 L.Ed.2d 1041 (1990). Rule 404(b) applies when other-acts evidence is offered as relevant to an issue in the case, such as identity or intent. Id. Rule 608(b) applies when other-acts evidence is offered to impeach a witness, "to show the character of the witness for untruthfulness," or to show bias. Id. The prosecutor contends that his cross-examination questions were probative of Tomblin's character for truthfulness.

FN50. Rule 404(b) requires the prosecution in a criminal case to provide notice in advance of trial of its intent to use other acts evidence. Fed.R.Evid. 404(b) advisory committee notes (stating that the purpose of the notice requirement is to reduce surprise and promote early resolution of admissibility issues).

FN51. Rule 608(b) states that: "Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility ... may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness ...." Fed.R.Evid. 608(b). Unlike Rule 404(b), however, Rule 608(b) does not require advance notice of the prosecutor's intent to use specific instances of defendant's conduct to impeach the defendant when he testifies. United States v. Baskes, 649 F.2d 471, 477 (7th Cir.1980) ("No rule or rationale guarantees the defense advance knowledge of legitimate impeachment before it calls a witness."), cert. denied, 450 U.S. 1000, 101 S.Ct. 1706, 68 L.Ed.2d 201 (1981).

[39][40] A defendant makes his character an issue when he testifies. Waldrip, 981 F.2d at 803; United States v. Blake, 941 F.2d

UNITED STATES of America, Plaintiff-Appellee,
v.
Hernan Francisco PEREZ-TOSTA, Gustavo Javier Correa-Patino, Erasmo Perez-Aguilera, Luis Guillermo Rojas-Valdez, Defendants-Appellants.

No. 92-4781.

United States Court of Appeals, Eleventh Circuit.

Nov. 8, 1994.

Defendants were convicted in the United States District Court for the Southern District of Florida, No. 90-6120-CR-KMM, K. Michael Moore, J., of conspiracy to distribute cocaine and two defendants also were convicted of possession of cocaine with intent to distribute. Appeals were taken. The Court of Appeals, Cox, Circuit Judge, held that: (1) evidence supported findings that two defendants voluntarily and knowingly participated in cocaine conspiracy, but did not support finding that another defendant voluntarily and knowingly participated; (2) evidence supported conviction for possession of cocaine with intent to distribute; (3) notice only minutes before voir dire was reasonable pretrial notice of intent to offer testimony on prior bad acts; and (4) ambiguous presentencing report (PSI) on amount of cocaine attributable to defendant required remand for factual finding to support calculation of offense level for conspiracy conviction.

Affirmed in part, reversed in part, and vacated and remanded in part.

[1] CRIMINAL LAW ⇐ 788
110k788
District court did not abuse its discretion in refusing to give missing witness instruction concerning witness whose testimony was likely to be unfavorable to defendant.

[2] WITNESSES ⇐ 9
410k9
District court did not abuse its discretion in refusing untimely request on afternoon of last day of trial seeking issuance of subpoena to compel appearance of witness.

[3] CRIMINAL LAW ⇐ 1139
110k1139
Denial of motion for acquittal is reviewed de novo.

[4] CONSPIRACY ⇐ 40.3
91k40.3
To convict defendant for conspiracy, evidence must show that conspiracy existed, that defendant knew of conspiracy, and that defendant, with knowledge, voluntarily joined conspiracy.

[5] CONSPIRACY ⇐ 40.1
91k40.1
Defendant may be guilty of conspiracy even if defendant plays only minor role and does not know all details of conspiracy.

[6] CRIMINAL LAW ⇐ 552(3)
110k552(3)
Reasonable inferences from circumstantial evidence, rather than mere speculation, must support jury's verdict.

[7] CONSPIRACY ⇐ 44.2
91k44.2
Inference of participation from presence and association with conspirators alone does not suffice to convict for conspiracy, but such inference is permissible in evaluating totality of circumstances.

[8] CONSPIRACY ⇐ 47(12)
91k47(12)
Evidence supported finding that defendant voluntarily and knowingly participated in cocaine conspiracy; defendant engaged in evasive driving countersurveillance measures which led government agents away from trail of coconspirator, documents found in coconspirator's house indicated relationship between defendant and coconspirator, and informant testified to defendant's prior acts in support of coconspirator's organization.

[9] CONSPIRACY ⇐ 47(12)
91k47(12)
Evidence did not support finding that defendant knowingly and voluntarily participated in conspiracy to distribute cocaine; although defendant was runner of keys and registration papers for truck containing concealed compartments and defendant rode in countersurveillance vehicle near site of cocaine transfer, it was possible that defendant was

merely unwitting dupe.

[10] CONSPIRACY ⚿ 47(12)
91k47(12)
Circumstantial evidence supported finding that defendant voluntarily and knowingly participated in cocaine conspiracy; defendant drove cocaine-laden truck into garage at coconspirator's house, 70 kilogram-sized packages of cocaine were removed from truck and placed in bedroom during 25-minute period that defendant and truck remained inside garage, and defendant implausibly testified that he left truck outside garage and merely sat alone in living room until coconspirator asked him to leave.

[11] DRUGS AND NARCOTICS ⚿ 73.1
138k73.1
To convict for possession of cocaine with intent to distribute, government must show both knowing possession and intent to distribute, but constructive possession is sufficient and intent to distribute may be inferred from quantity of cocaine involved.

[11] DRUGS AND NARCOTICS ⚿ 107
138k107
To convict for possession of cocaine with intent to distribute, government must show both knowing possession and intent to distribute, but constructive possession is sufficient and intent to distribute may be inferred from quantity of cocaine involved.

[12] DRUGS AND NARCOTICS ⚿ 123.2
138k123.2
Evidence supported conviction for possession of cocaine with intent to distribute; defendant drove truck containing cocaine to house occupied only by defendant and coconspirator, and 70 one-kilogram packages of cocaine were moved from truck to bedroom in 25-minute period.

[13] CRIMINAL LAW ⚿ 1153(1)
110k1153(1)
District court rulings on admissibility of evidence are reviewed under abuse of discretion standard.

[14] CRIMINAL LAW ⚿ 374
**110k374**
Factors to consider in determining reasonableness of government's pretrial **notice** of intent to introduce evidence of prior bad acts include time when government could have learned of availability of evidence through timely preparation for trial, extent of prejudice to defendant from lack of time to prepare, and how significant evidence is to government's case. Fed.Rules Evid.Rule **404(b)**, 28 U.S.C.A.

[15] CRIMINAL LAW ⚿ 374
**110k374**
Government gave reasonable pretrial **notice** of intent to offer testimony on prior bad acts by defendant concerning cocaine-related work for coconspirator, even though **notice** was given only minutes before voir dire; reasonable trial preparation would not have revealed testimony to prosecutor any earlier, defense counsel did not indicate additional measures that could have been taken to rebut testimony if more **notice** had been given, and testimony was significant to government's case on issue of defendant's awareness of and participation in charged conspiracy. Fed.Rules Evid.Rule **404(b)**, 28 U.S.C.A.

[16] CRIMINAL LAW ⚿ 662.7
110k662.7
Defendant's confrontation clause rights were not violated by district court's admonishment to defense counsel to avoid cross-examination on sentencing issues, in light of defense counsel's effective impeachment of witness' credibility by exposing witness' expectation that he would receive sentencing reduction in return for testifying for government. U.S.C.A. Const.Amend. 6.

[17] CRIMINAL LAW ⚿ 1134(3)
110k1134(3)
Claim of ineffective assistance of counsel could not be considered for first time on direct appeal, in light of defendant's failure to raise claim as ground for new trial motion and insufficient development of record to allow Court of Appeals to evaluate merits of claim. U.S.C.A. Const.Amend. 6.

[18] CRIMINAL LAW ⚿ 1181.5(8)
110k1181.5(8)
Presentencing report (PSI) was ambiguous on amount of cocaine attributable to defendant under Sentencing Guidelines and thus, required remand for factual finding to support calculation of offense level for cocaine conspiracy conviction; PSI stated that total amount of cocaine involved in conspiracy was 700 kilograms, but also stated that it was doubtful defendant realized quantity of cocaine transported. U.S.S.G. §§ 1B1.3(a)(1), 2D1.1(c)(2), 18

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[19] CRIMINAL LAW ⇐ 822(1)
110k822(1)
District court has broad discretion in formulating jury charge as long as charge as whole is correct statement of law.

[20] CRIMINAL LAW ⇐ 1172.1(1)
110k1172.1(1)
Jury instruction will not support reversal of conviction unless issues of law were presented inaccurately or charge improperly guided jury in substantial enough manner to violate due process. U.S.C.A. Const.Amends. 5, 14.

[21] CRIMINAL LAW ⇐ 772(5)
110k772(5)
Evidence did not support deliberate ignorance instruction in light of evidence of defendant's actual knowledge of cocaine hidden in truck rather than deliberate avoidance of suspicions about presence of cocaine.

[21] DRUGS AND NARCOTICS ⇐ 128
138k128
Evidence did not support deliberate ignorance instruction in light of evidence of defendant's actual knowledge of cocaine hidden in truck rather than deliberate avoidance of suspicions about presence of cocaine.

[22] CRIMINAL LAW ⇐ 1173.2(2)
110k1173.2(2)
Erroneous instruction on deliberate ignorance concerning presence of cocaine in truck driven by defendant was harmless error in light of strong circumstantial evidence that defendant had actual knowledge of cocaine hidden in truck.

***1554** Benjamin S. Waxman, Weiner, Robbins, Tunkey, Ross, Amsel & Raben, P.A., Miami, FL, for Perez-Tosta.

Oscar Arroyave, Miami, FL, for Correa-Patino.

Peter Raben, Coconut Grove, FL, for Perez-Aguilera.

William D. Matthewman, Miami, FL, for Rojas-Valdez.

Mary V. King, Asst. U.S. Atty., Miami, FL, for appellee.

Appeals from the United States District Court for the Southern District of Florida.

Before TJOFLAT, Chief Judge, COX, Circuit Judge, and YOUNG [FN*], Senior District Judge.

FN* Honorable George C. Young, Senior U.S. District Judge for the Middle District of Florida, sitting by designation.

COX, Circuit Judge:

Defendants Hernan Perez-Tosta (Tosta), Gustavo Correa-Patino (Correa), Erasmo Perez-Aguilera (Aguilera), and Luis Rojas-Valdez (Rojas) appeal convictions for conspiracy to distribute cocaine in violation of 21 U.S.C. § 846 and, in Rojas's and Correa's cases, possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1). Because the prosecutor gave only a few minutes' pretrial notice, Aguilera challenges the district court's admission of prior bad acts evidence under Fed.R.Evid. 404(b). In addition, Aguilera, Tosta, and Rojas contend that the evidence was insufficient to support their convictions. All the appellants also raise other issues.

I. BACKGROUND

For over a year before the arrests in this case, the Drug Enforcement Agency (DEA) conducted an undercover investigation targeting a suspected cocaine trafficker, Fernando Loaiza-Alzate (Loaiza). As part of the probe, DEA agent Joseph Giuffre offered Loaiza his services as a smuggler of shipments of Colombian cocaine from the Bahamas into South Florida. For one of these shipments, Giuffre was put in touch with Adelsis Grieco. Grieco and Giuffre planned for Grieco to have the cocaine flown from northern Colombia to the southeastern Bahamas, where the cocaine would be dropped for Giuffre's men to retrieve. After Giuffre had smuggled the cocaine into South Florida, the cocaine would be transferred to Grieco's men.

One of these transfers in Florida was to take place on July 20, 1990. Grieco's organization owned two pickup trucks equipped with concealed cargo compartments under the truckbed. Grieco was to

turn the trucks over to Giuffre, who was to have the concealed compartments filled with cocaine. Giuffre would then have his people park the trucks at two southwest Miami locations that Grieco would code into Guiffre's beeper.

On July 18, 1990, Giuffre and Grieco met in a Kendall, Florida restaurant for the initial transfer of the trucks. Grieco explained the pickups' hidden compartments to Giuffre as the two of them circled the parking lot in Giuffre's car. After Grieco had told Giuffre where the trucks were, Giuffre stopped the car, and Grieco rolled down his window and whistled. Tosta appeared with an envelope containing one of the trucks' keys, registration, and insurance papers. Tosta and ***1555** Grieco exchanged a few words in Spanish and left together in Grieco's car.

On July 20, 1990, the day planned for the transfer, Tosta and Aguilera arrived at Grieco's house at 10:20 a.m. in a LeBaron rented in Aguilera's name. Grieco took the wheel, and for the next hour and a half to two hours, he drove erratically around the neighborhood and up and down U.S. 1, pulling into driveways and pulling directly out again, making U-turns, and even coming to a full stop in moving traffic on U.S. 1. Agents identified this erratic driving as countersurveillance, a ploy for Grieco to determine if he was being followed. Meanwhile, around 11:00, DEA agents parked the pickups, each carrying seventy kilograms of cocaine, in two designated shopping center parking lots on U.S. 1. Grieco's erratic route took him repeatedly past the lots where the trucks were parked.

A few minutes after DEA agents had put the cocaine-laden trucks in the lots, Rojas and Victor Manuel Estrada-Correa [FN1] arrived to drive the trucks to Grieco's storage sites. Rojas was led by a small brown car to Correa's house. The testimony is in conflict as to what happened at Correa's house. DEA agents testified that Rojas drove the truck into the garage and closed the garage door, only to emerge a little while later, driving the same truck without the load of cocaine. Rojas testified that he never parked the truck in the garage, and that he was directed by a man to sit in Correa's living room. He did so until Correa (whom Rojas had never met) appeared, wet from the shower, and told Rojas to get out of the house. Rojas then left in the pickup he had arrived in.

> FN1. Estrada-Correa is not a party to this appeal. He was tried with the other defendants and found not guilty of possession of cocaine with intent to distribute. The jury could not reach a verdict on the conspiracy to distribute charge against him.

As Rojas left, the DEA agents stopped the truck and arrested him. The agents immediately discovered that the cocaine was missing from the hidden compartments, and they returned to Correa's house. One agent discovered Correa with his body half out a window in the rear of the house. Correa went back in, and before agents could ram Correa's door in, Correa emerged from the open garage door in an attempt to flee. He was arrested. Agents then entered the house and discovered the cocaine in a bedroom.

Meanwhile, Grieco had observed the DEA agents' unmarked cars following the LeBaron's erratic maneuvers, and he got out of the car at a gas station on U.S. 1. Aguilera took the wheel and continued the erratic driving for another half hour to forty-five minutes, when agents stopped the car and arrested both Aguilera and Tosta.

After the arrests, Grieco and Giuffre remained in contact for a few more weeks, but Grieco was never arrested and remained a fugitive at the time of trial.

Aguilera, Tosta, Correa, Rojas, Grieco, and Estrada-Correa were all charged with one count of conspiracy to possess with intent to distribute cocaine in violation of 21 U.S.C. § 846 and one count of possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1). At trial, most of the law enforcement personnel who surveilled the defendants testified as to what they saw on July 20. However, the Government did not call Agent John Shepard, the one agent who had direct visual contact with Correa's house while Rojas and Correa were inside.

In addition to the agents and officers, the Government called Luis Zaldivar, who was not a subject of this investigation, to testify that he had seen Aguilera on at least two prior occasions working for Grieco's organization. Only a few minutes before voir dire, the Government notified Aguilera's counsel that it intended to present this

evidence under Fed.R.Crim.Evid. 404(b). Aguilera's counsel objected to the admission of the evidence with such short notice. At the hearing on the issue during trial, the district court concluded that because six days had elapsed between voir dire and the day the Government planned to call Zaldivar, the notice was in fact reasonable and the testimony therefore admissible.

The jury convicted Correa, Aguilera, Tosta, and Rojas of conspiracy to distribute cocaine. Correa and Rojas were also convicted of possession of cocaine with intent to distribute. ***1556** All defendants moved for judgments of acquittal both at the close of the Government's evidence and at the close of all the evidence. At the close of the Government's evidence, the district court denied Rojas's and Correa's motions and reserved ruling on the others. At the close of all the evidence, the district judge denied all the motions.

At the sentencing hearings, the district court ruled that the defendants would be held liable for all seven hundred kilograms of cocaine that Grieco had planned to import through Giuffre. After adjustments, the court sentenced all four defendants to 235 months' imprisonment and five years' supervised release.

II. ISSUES ON APPEAL

[1][2] Each of the four appellants raises a number of issues on appeal, and some of the issues are common to more than one appellant: [FN2]

> FN2. In addition to the issues listed in the text, Correa contends that the district court erred in refusing to give a "missing witness" instruction to the jury. Correa's argument concerns Agent John Shepard, whom the Government did not call and who was the only agent with a direct view of Correa's house. We hold that the court did not abuse its discretion in refusing to give such an instruction. Testimony at trial from agents in radio contact with Shepard showed that Shepard's testimony was likely to be unfavorable to Correa. In this circumstance, the "missing witness" instruction is inappropriate. See United States v. Link, 921 F.2d 1523, 1529 (11th Cir.), cert. denied, 500 U.S. 958, 111 S.Ct. 2273, 114 L.Ed.2d 724 (1991). Correa also asserts that the district court violated his constitutional right to compulsory process by refusing to subpoena Agent Shepard. On the afternoon of the last day of trial, Correa requested a subpoena be issued to compel Shepard's appearance. The issuance of subpoenas under Fed.R.Crim.P. 17 is within the trial court's discretion, and timeliness is one of the factors the trial court may consider. United States v. Rinchack, 820 F.2d 1557, 1566 (11th Cir.1987). The district court was well within its discretion in refusing so untimely a request.

(1) Aguilera, Rojas, and Tosta all challenge the district court's denial of their motions for acquittal, contending that the Government's evidence did not suffice to show they voluntarily participated in the conspiracy, or, in Rojas's case, to show that he knowingly possessed cocaine.

(2) Aguilera contends that the district court erred in admitting 404(b) evidence when Aguilera received notice of the Government's intent to offer the evidence only a few minutes before trial.

(3) Aguilera contends that the district court erroneously forbade him from cross-examining the Government's 404(b) witness on his knowledge of the sentencing guidelines.

(4) Rojas contends that he was denied effective assistance of counsel.

(5) Tosta and Rojas take issue with the district court's attribution of 700 kilograms of cocaine to them for sentencing purposes.

(6) Rojas argues that the district court erred in giving the jury a "deliberate ignorance" instruction.

III. DISCUSSION

A. Sufficiency of the Evidence

Three defendants, Tosta, Aguilera, and Rojas, contend that the district court improperly denied their motions for acquittal because the Government's evidence was insufficient to convict them. We find the evidence sufficient as to Aguilera and Rojas, but we hold that the evidence was insufficient to convict Tosta. After reviewing the relevant principles of law, we discuss each defendant in turn.

1. Standard of Review

[3] We review the denial of a defendant's motion for acquittal de novo. United States v. Mieres-Borges, 919 F.2d 652, 656 (11th Cir.1990), cert. denied, 499 U.S. 980, 111 S.Ct. 1633, 113 L.Ed.2d 728 (1991); United States v. Kelly, 888 F.2d 732, 739 (11th Cir.1989). In considering the sufficiency of the evidence, we draw all reasonable inferences in the Government's favor. Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942); United States v. Keller, 916 F.2d 628, 632 (11th Cir.1990), cert. denied, 499 U.S. 978, 111 S.Ct. 1628, 113 L.Ed.2d 724 (1991). For the evidence to support a conviction, it need not "exclude every reasonable hypothesis of innocence or ***1557** be wholly inconsistent with every conclusion except that of guilt, provided a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt." United States v. Bell, 678 F.2d 547, 549 (5th Cir. Unit B 1982) (en banc), aff'd on other grounds, 462 U.S. 356, 103 S.Ct. 2398, 76 L.Ed.2d 638 (1983).

2. Law and Analysis

[4][5] To convict a defendant for conspiracy under 21 U.S.C. § 846, the evidence must show (1) that a conspiracy existed, (2) that the defendant knew of it, and (3) that the defendant, with knowledge, voluntarily joined it. E.g., United States v. Sullivan, 763 F.2d 1215, 1218 (11th Cir.1985). "Participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a 'development and collocation of circumstances.' " Glasser, 315 U.S. at 80, 62 S.Ct. at 469 (quoting U.S. v. Manton, 107 F.2d 834, 839 (2d Cir.1939)); see also United States v. Badolato, 701 F.2d 915, 920 (11th Cir.1983). Guilt may exist even when the defendant plays only a minor role and does not know all the details of the conspiracy. Id.

[6][7] The Government's case against Aguilera, Tosta, and Rojas was circumstantial. Thus, reasonable inferences, and not mere speculation, must support the jury's verdict. United States v. Villegas, 911 F.2d 623, 628 (11th Cir.1990), cert. denied, 499 U.S. 977, 111 S.Ct. 1625, 113 L.Ed.2d 722 (1991). The inference of participation from presence and association with conspirators alone does not suffice to convict. United States v. Bell, 833 F.2d 272, 275 (11th Cir.1987), cert. denied, 486 U.S. 1013, 108 S.Ct. 1747, 100 L.Ed.2d 210 (1988). However, such an inference is permissible in evaluating the totality of the circumstances. Id.

a. Aguilera

[8] Aguilera argues that the Government failed to show that Aguilera voluntarily participated in the conspiracy. The Government's case, according to Aguilera, showed mere association and flight. Aguilera understates the Government's evidence. The Government's case against Aguilera included testimony by law enforcement agents concerning the events on the day of his arrest, testimony by an informant about Aguilera's prior work for Grieco's organization, and documentary evidence associated with Aguilera that agents found in a search of Grieco's house.

The law enforcement agents testified for the Government that on the day of Aguilera's arrest, Aguilera arrived at Grieco's house at 10:20 a.m. in a car rented in Aguilera's name. Aguilera then rode with Grieco for nearly two hours of erratic driving that the agents considered to be countersurveillance. After Grieco observed that he was being followed and left the car, Aguilera continued to drive in the same erratic fashion until he was arrested.

The Government informant, Luis Zaldivar, testified that he had seen Aguilera performing menial tasks for Grieco's organization on at least two prior occasions. [FN3] In June or July of 1988, Zaldivar met Aguilera when Aguilera showed up at Zaldivar's boat to pick up a load of cocaine for Grieco. Zaldivar also transferred cocaine to Aguilera on another occasion in late 1988 or early 1989.

> FN3. At trial, the jury heard that Zaldivar was a former cocaine addict and a drug trafficker serving a sentence that he could reduce only by providing substantial assistance to the Government under Fed.R.Crim.P. 35. (Tr. at 1044, 1045, 1057.) Nonetheless, in reviewing the sufficiency of the Government's evidence, we must resolve all credibility issues in favor of the Government and assume that the jury believed Zaldivar. See United States v. Morales, 868 F.2d 1562, 1574 (11th Cir.1989).

Finally, the Government introduced several documents associated with Aguilera that agents

found in a filing cabinet in Grieco's house. The documents included a photocopy of Aguilera's driver's license, registration papers for a boat trailer in Aguilera's name, receipts from major purchases by Aguilera, certificates of title for a pair of jetskis owned by Aguilera, a boat registration and insurance papers showing Grieco and Aguilera as co-owners, business records for GPV International, a partnership in which Aguilera and Grieco were both partners, and a check written ***1558** by Aguilera to a marina where Grieco and Aguilera's boat was docked.

This evidence supports a finding that Aguilera voluntarily participated in the conspiracy. The jury could reasonably have inferred from Aguilera's evasive driving after Grieco's exit that Aguilera was both aware of and voluntarily assisting the conspiracy. See United States v. Morales, 868 F.2d 1562, 1574 (11th Cir.1989) (including evasive driving by the defendant in a list of evidence showing involvement and active participation in a drug conspiracy). In particular, the fact that Aguilera's countersurveillance effectively led law enforcement agents astray from Grieco's trail could have supported an inference that Aguilera intentionally assisted Grieco in furthering the conspiracy. The jury could also have legitimately taken into account Aguilera's relationship with Grieco, as evidenced by the presence of documents associated with Aguilera in Grieco's house, to find that a conspiracy existed between them. Cf. United States v. Cole, 704 F.2d 554, 557 (11th Cir.1983) (alleged coconspirators' status as members of an "insular" motorcycle club a factor in finding a conspiracy). Finally, evidence of Aguilera's prior acts in support of Grieco's organization could legitimately have reinforced the jury's findings that Aguilera was not merely a bystander, but a knowing and voluntary participant in Grieco's organization. Cf. United States v. Adams, 799 F.2d 665, 672 (11th Cir.1986) (mere presence under suspicious circumstances coupled with a defendant's prior presence under similar circumstances enough to support conviction), cert. denied sub nom. Morrell v. United States, 481 U.S. 1070, 107 S.Ct. 2464, 95 L.Ed.2d 873 (1987). Thus, we affirm Agilera's conviction.

b. Tosta

[9] Tosta also challenges the district court's denial of his motion for acquittal. Tosta argues that the Government's case would not support a finding beyond a reasonable doubt that Tosta knew of and voluntarily participated in the conspiracy. We agree.

The Government's evidence showed Tosta's involvement in two events. The first was on July 18, 1990, when Grieco and Giuffre met to discuss the details of the July 20 cocaine transfer and for Grieco to turn over the trucks with concealed compartments. On July 18, Tosta appeared in response to Grieco's whistle and produced an open envelope containing the keys, registration, and insurance binder for one of the trucks. After handing over the envelope, Tosta and Grieco exchanged a few words in Spanish. [FN4] After Grieco and Giuffre concluded their meeting, Tosta and Grieco left together.

FN4. The content of their conversation is not known because Agent Giuffre speaks no Spanish.

The second event was Grieco and Aguilera's countersurveillance on July 20, 1990, the day of Tosta's arrest. On that day, Tosta was present in the car with Grieco and Aguilera, and later just Aguilera, as Grieco and then Aguilera drove erratically over a course that took them back and forth past the sites where the cocaine-laden trucks were to be parked. Agents finally stopped the car and arrested Tosta and Aguilera. When one of the agents mentioned Tosta's actions on July 18, Tosta responded, "So, what's wrong with that?"

This case is very close, but the Government's case fatally lacks evidence that would support a finding beyond a reasonable doubt that Tosta voluntarily participated in the conspiracy. The sum of the inferences from the evidence is tantamount to that presented against Evasio Garcia in United States v. Kelly, 749 F.2d 1541 (11th Cir.), cert. denied, 472 U.S. 1029, 105 S.Ct. 3506, 87 L.Ed.2d 636 (1985). In Kelly, the Government showed that Garcia had inspected a shrimpboat that was later used to import marijuana. Id. at 1548. The Government also showed that Garcia had been present at a meeting of key conspirators, and that Garcia had been sitting in a parked car near the house where the offloading crew had been preparing to go meet the shrimpboat with its load of contraband. Id. The Kelly court concluded that "all

the record shows is that [Garcia] was an acquaintance of [a key conspirator]." Id.

Tosta's case is very similar to Garcia's. Like Garcia, Tosta performed a facially innocent act that furthered the conspiracy's use ***1559** of one of its instrumentalities. Garcia inspected the shrimpboat, and Tosta was a runner for the keys and registration papers of a truck with concealed compartments. Furthermore, Tosta, like Garcia, was present in very suspicious circumstances. Garcia was sitting in a parked car where the smugglers were preparing to offload the marijuana; Tosta was riding in a countersurveillance vehicle near the site of a cocaine transfer.

The Kelly court concluded that "[a] reasonable jury could not conclude that Evasio Garcia was a co-conspirator in the importation and distribution schemes." Id. at 1549. Likewise, a reasonable jury could not ignore the doubts raised by the possibility that Tosta was an unwitting dupe in his sole action that furthered the conspiracy. See United States v. Littrell, 574 F.2d 828, 833 (5th Cir.1978). Furthermore, in the absence of any evidence that Tosta himself was on the lookout, a reasonable jury could not infer from Tosta's mere presence in Aguilera's rental car that Tosta was knowingly engaged in countersurveillance in furtherance of the conspiracy. Cf. United States v. Villegas, 911 F.2d 623, 628 (11th Cir.1990) (holding that the defendant's looking left and right in the vicinity of the defendant's brother's cocaine deal was not sufficient to show participation in the conspiracy).

Thus, we conclude that the Government's evidence was insufficient to convict Tosta of conspiracy to distribute cocaine. We therefore reverse Tosta's conviction.

c. Rojas

Rojas also challenges the district court's denial of his motion for acquittal on both the conspiracy and possession counts. Rojas argues that the evidence failed to show that he knowingly participated in the conspiracy and that he knowingly possessed cocaine. We disagree. We address the conspiracy conviction first, under the rules of law discussed above.

i. Conspiracy

[10] In Rojas's case, the evidence was ample to show Rojas's knowing and voluntary participation in the conspiracy. The Government showed that Rojas picked up the truck with the contraband and drove the truck to Correa's house, following a small brown car. Government agents testified that Rojas drove the truck into Correa's garage and closed the garage door. A little while later, Rojas emerged from the garage in the truck emptied of its load of cocaine. While Rojas was in the house, no one entered or left. Government agents testified that shortly after Rojas left they discovered the cocaine in a bedroom of Correa's house.

Rojas testified in his defense that he never drove the truck into the garage, which was occupied by the car of a man whose name he did not know. He was told to stay in Correa's living room. He sat there alone for twenty-five or thirty minutes. Then Correa, whom Rojas did not know, came out of the shower and told him to leave. He never saw anyone else in the house except Correa.

Circumstantial evidence suffices to show participation in a conspiracy, see Glasser, 315 U.S. at 80, 62 S.Ct. at 469, and the evidence here clearly supports reasonable inferences of guilt, see Villegas, 911 F.2d at 628. A jury could reasonably have inferred from Rojas's collection of the cocaine-laden truck and following of the little brown car to Correa's house that Rojas was voluntarily performing the task for the conspiracy. The jury could also reasonably have inferred that the movement of seventy one-kilogram packages of cocaine from the truck to a bedroom in twenty-five minutes occurred with Rojas's knowing cooperation and assistance. Moreover, Rojas's implausible testimony itself could legitimately support an inference of guilt. See United States v. Eley, 723 F.2d 1522, 1525 (11th Cir.1984). Thus, we conclude that a reasonable jury could have found Rojas guilty beyond a reasonable doubt.

ii. Possession

[11][12] To convict Rojas for possession of cocaine with intent to distribute, the Government must show both knowing possession and an intent to distribute. United States v. Gardiner, 955 F.2d 1492, 1495 (11th Cir.1992). Constructive possession is sufficient, and intent to distribute is inferable from the quantity of cocaine. Id. The

evidence was ***1560** also ample to convict Rojas on this charge. The Government showed that in twenty-five minutes seventy kilograms of cocaine moved from the truck that Rojas had driven to a bedroom in a house occupied only by Rojas and Correa. The jury could reasonably have inferred that Rojas was in possession of the cocaine during that twenty-five minutes. Moreover, the jury could have inferred an intent to distribute from the large quantity of cocaine. Thus, we conclude that the district court properly denied Rojas's motion for acquittal.

B. 404(b) Reasonable Notice

1. Standard of Review

[13] We review district court rulings on the admissibility of evidence under an abuse of discretion standard. United States v. Cardenas, 895 F.2d 1338, 1342 (11th Cir.1990).

2. Discussion

Because the prosecutor failed to provide notice of the testimony until immediately before jury voir dire, Aguilera asserts that the district court abused its discretion in admitting prior bad acts testimony under Federal Rule of Evidence 404(b). A few minutes before jury selection on May 26, the prosecutor notified Aguilera's counsel that she intended to call two witnesses, Fernando Loaiza-Alzate and Luis Zaldivar, to testify about Aguilera's role in Grieco's earlier drug deals. Aguilera's counsel objected to the late notice. The district court did not immediately rule on its admissibility, asking instead for memoranda from the parties.

On June 1, Aguilera's counsel again raised the issue, and after a hearing the district court found that the prosecutor had not known of the potential 404(b) testimony until Friday, May 22, and that the prosecutor had notified the defense the next business day, May 26. [FN5] Because the prosecutor did not plan to call the witnesses until June 1, the court found that the defense had in fact had six days' notice. The court concluded that six days' notice was reasonable under the rule, and that the prosecution had therefore satisfied the requirement.

FN5. Monday, May 25, 1992 was Memorial Day.

At the hearing, Aguilera called the DEA case agent, Joseph Giuffre, who testified that he had known of Loaiza's potential 404(b) testimony against Aguilera as early as the fall of 1990. However, Giuffre had not known of Zaldivar, or of Zaldivar's dealings with Grieco's organization, until the week before the trial, when the prosecutor learned of it. Ultimately, the prosecution did not call Loaiza, but did call Zaldivar. It is the admission of Zaldivar's testimony that Aguilera challenges.

Rule 404(b) was amended in 1991 to require the prosecution to provide reasonable notice in advance of trial of its intention to present 404(b) evidence, if the accused has requested the notice. [FN6] In this case, counsel for Aguilera had requested notice by adopting codefendant Tosta's motion for disclosure of extrinsic evidence, which the magistrate judge granted in September, 1990. Thus, the 404(b) testimony was admissible against Aguilera only if the prosecution's notice a few minutes before voir dire constituted "reasonable notice in advance of trial." [FN7] The construction of 404(b)'s reasonable notice requirement ***1561** is a question of first impression in this circuit.

FN6. The rule now reads: (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial. Fed.R.Evid. 404(b) (emphasis added).

FN7. Our analysis here does not concern whether the Government has shown the "good cause" that 404(b) requires for admission of 404(b) evidence during trial. See Fed.R.Evid. 404(b). The Government did give pretrial notice, however brief, and thus our inquiry is limited to whether this pretrial notice was reasonable. See id.

In the particular circumstances of this case, we hold that the district court did not abuse its

discretion in ruling that the prosecution had provided "reasonable notice" of Zaldivar's testimony. The policy behind 404(b) is "to reduce surprise and promote early resolution on the issue of admissibility." Fed.R.Evid. 404(b) Judiciary Committee note. The rule imposes no specific time limits beyond requiring reasonable pretrial notice, and the Committee notes explain that "what constitutes a reasonable ... disclosure will depend largely on the circumstances of each case." Id.

The Committee notes are silent as to what circumstances are relevant. To fill this gap, we analogize to other evidentiary notice provisions, such as those in the residual hearsay exceptions (Fed.R.Evid. 803(24) and 804(b)(5)), and to notice requirements imposed by discovery orders. We are mindful that the analogies cannot be taken too far, since the language of other notice requirements in the Federal Rules of Evidence is more specific than the "reasonable notice" required by 404(b). See Fed.R.Evid. 609(b), 803(24), 805(b)(5). Furthermore, discovery order notice requirements are not exactly parallel because the trial judge has more discretion in fashioning a remedy for discovery violations than for failure to give notice under 404(b). See United States v. Hartley, 678 F.2d 961, 977 (11th Cir.1982), cert. denied, 459 U.S. 1170, 103 S.Ct. 815, 74 L.Ed.2d 1014 (1983); compare Fed.R.Crim.P. 16(d)(2) with Fed.R.Evid. 404(b). Despite these differences, we find that three circumstances appearing in the analogous caselaw comport with the language and purpose of 404(b).

First, in evaluating the sufficiency of evidentiary notice, courts have considered the motivations and circumstances of the party presenting the evidence. See, e.g., United States v. Euceda-Hernandez, 768 F.2d 1307, 1313 (11th Cir.1985) (reversing a district court's suppression of evidence not disclosed by the prosecution under a discovery order, noting among other things that the prosecution's failure to notify was unintentional); United States v. Bailey, 581 F.2d 341, 348 (3d Cir.1978) (affirming admission of hearsay despite a lack of notice under 804(b)(5) because the declarant became unavailable only after trial began, thus making it impossible for the proponent to give earlier notice); United States v. Iaconetti, 540 F.2d 574, 578 (2d Cir.1976) (admitting hearsay under 803(24) despite a lack of notice when the hearsay unexpectedly became necessary for effective rebuttal), cert. denied, 429 U.S. 1041, 97 S.Ct. 739, 50 L.Ed.2d 752 (1977). "Reasonable notice" under 404(b) should also take into account the circumstances of the prosecution's own discovery of the evidence. However, the notice requirement's purpose of "reduc[ing] surprise" is not served by allowing mere negligence to excuse a prosecutor's failure to give notice. To protect defendants from "trial by ambush," the Government should be charged with the knowledge of 404(b) evidence that a timely and reasonable preparation for trial would have revealed.

Second, courts have focused upon the prejudice suffered by the defendant because of the lack of notice. See, e.g., United States v. Parker, 749 F.2d 628, 633 (11th Cir.1984) (affirming the admission of hearsay under 803(24) despite a lack of notice because the opponent of the evidence had not shown he was harmed); United States v. Leslie, 542 F.2d 285, 291 (5th Cir.1976) (affirming the admission of hearsay under 803(24) although the record showed no notice, because the defendant was not harmed by the lack of notice); United States v. Doe, 860 F.2d 488, 492 (1st Cir.1988) (affirming admission of hearsay under 803(24) when defendants did not appear to be prejudiced by the lack of notice), cert. denied sub nom. Andrades-Salinas v. United States, 490 U.S. 1049, 109 S.Ct. 1961, 104 L.Ed.2d 430 (1989). Since the policy of 404(b)'s notice provision is to protect the defendant by reducing surprise, see Fed.R.Evid. 404(b) Judiciary Committee note, the possibility of prejudice to the defendant from a lack of opportunity to prepare should weigh heavily in the court's consideration.

Finally, a few courts have considered the importance of the evidence to the proponent's ***1562** case. See, e.g., Euceda-Hernandez, 768 F.2d at 1313 (reversing an order to suppress evidence not disclosed by the prosecutor under a discovery order, noting among other things that the suppressed evidence was "extremely important to the Government's case"); United States v. Burkhalter, 735 F.2d 1327, 1329 (11th Cir.1984) (reversing as too extreme a sanction an order effectively suppressing evidence not disclosed under a discovery order). As in the discovery cases, the court should take into account the significance of the evidence to the prosecution's case. The second sentence of rule 404(b) is a rule of inclusion, and 404(b) evidence, like other relevant evidence, should not lightly be excluded when it is central to

the prosecution's case.

[14] Thus, by analogy to other notice provisions, we can discern three factors the court should consider in determining the reasonableness of pretrial notice under 404(b):

(1) When the Government, through timely preparation for trial, could have learned of the availability of the witness;

(2) The extent of prejudice to the opponent of the evidence from a lack of time to prepare; and

(3) How significant the evidence is to the prosecution's case.

We now apply these factors to the circumstances of this case.

[15] First, the district court found that the prosecutor did not know of Zaldivar's potential testimony until the Friday before trial began. [FN8] The case agent testified that he did not know of Zaldivar before the prosecutor did. Although the Government's failure to timely prepare for a trial would not excuse the lack of notice, it is clear from the record that a reasonably timely preparation for trial would not have revealed Zaldivar's possible testimony before that time. Although Zaldivar had made a statement to the DEA as early as January 1992, Zaldivar was not part of the conspiracy in which the defendants were involved and that Agent Giuffre was investigating. Thus, it is not apparent how Giuffre would have learned that Zaldivar had made statements concerning Aguilera. In fact, Zaldivar's testimony came to the attention of the prosecutor only when Zaldivar himself telephoned her.

FN8. The trial began the following Tuesday.

Second, Aguilera's counsel has been vague, both during trial and in this appeal, as to what measures he might have taken, given more time, to meet the evidence. At the district court hearing on the 404(b) evidence's admissibility six days after the prosecution had notified the defense of the 404(b) evidence, Aguilera's counsel proposed only to send out his investigator to check Zaldivar's stories. If even after six days Aguilera could point to no specific actions he might take given more preparation time, it was within the district court's discretion to conclude that Aguilera would not be prejudiced by having only six days' notice. [FN9]

FN9. In cross-examination of Zaldivar, Aguilera's lawyer in fact brought out that Zaldivar was a cocaine and marijuana smuggler, that Zaldivar had lied to a Customs inspector, that he did not pay taxes on his drug profits, that his testimony was part of an effort to get out of prison sooner, that he had been granted use immunity, that Zaldivar had not mentioned Aguilera during his initial debriefing, that Zaldivar was a cocaine addict, that he tested positive for marijuana when he was first incarcerated, that at the time of his arrest three state arrest warrants had been issued for him, that he had been arrested for burglary, and that Zaldivar could not remember who his last employer was. Thus, it seems likely that even if the district court erred in admitting the 404(b) evidence on such short notice, the error was harmless.

Finally, the evidence was significant to the Government's case against Aguilera. The Government's other evidence was merely that Aguilera was present in the countersurveillance car, that Aguilera later drove the car, and that papers associated with Aguilera were in Grieco's house. Zaldivar's testimony to Aguilera's prior cocaine-related work for Grieco lent strong support to a finding that Aguilera was aware of and voluntarily participated in the conspiracy. Along with the other factors, this circumstance weighs in the Government's favor.

On the record in this case, all three considerations thus weigh somewhat in favor of finding that the Government's pretrial notice was reasonable. We therefore hold that the ***1563** district court did not abuse its discretion in admitting the evidence.

C. Other Issues

1. Exclusion of Sentencing Cross-Examination

[16] Aguilera contends that the district court's violation of his Sixth Amendment Confrontation Clause rights entitles him to a new trial. During cross-examination of Zaldivar, the Government's 404(b) witness, Aguilera's counsel attempted to elicit Zaldivar's understanding of the sentencing benefits he would earn by testifying for the

Government. [FN10] On the Government's objection, the court admonished Aguilera's counsel to "stay away from anything having to do with any sentencing." (Tr. at 1075.)

> FN10. The relevant transcript passage reads: Q. Your initial sentence was reduced from 17.7 years to nine years, is that correct? A. That is correct. Q. And by testifying here today your [sic] hoping with this story to get another sentence reduction, isn't that correct? MS. KING [prosecutor]: Objection form of the objection [sic]. THE COURT: Overruled. THE WITNESS: Yes, that is correct.
>
> . . . . .
>
> Q. How much of a reduction, sir, do you think you're going to get out of this case? A. I don't know, sir.
>
> . . . . .
>
> Q. Sir, in federal court you serve about eighty-five percent of your sentence, do you not? MS. KING: Objection, your Honor.
>
> . . . . .
>
> Q. So you're familiar with the guidelines? THE COURT: Sustained.
>
> . . . . .
>
> Q. Are you familiar with the Sentencing Guidelines? MS. KING: Objection, your Honor. A. Yes, I am. Q. Do you have an opinion as to how much--MS. KING: Objection, your Honor. THE COURT: Counsel, stay away from anything having to do with any sentencing. (Tr. at 1073-75.)

Aguilera argues that he was unable to expose Zaldivar's motive for testifying. He was thus effectively rendered unable to attack Zaldivar's credibility, in violation of his Sixth Amendment rights. See Davis v. Alaska, 415 U.S. 308, 315-16, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974). We disagree. Our reading of the transcript convinces us that Aguilera not only effectively impeached Zaldivar's credibility, but also impeached it repeatedly on the very issue of sentence reduction. (Tr. at 1065, 1074, 1078-79.) Aguilera's contention is thus meritless.

2. Ineffective Assistance of Counsel

[17] Rojas challenges his conviction on the ground that he was denied effective assistance of counsel in violation of his Sixth Amendment rights. It is settled law in this circuit that a claim of ineffective assistance of counsel cannot be considered on direct appeal if the claims were not first raised before the district court and if there has been no opportunity to develop a record of evidence relevant to the merits of the claim. See United States v. Hilliard, 752 F.2d 578, 580 (11th Cir.1985); United States v. Lopez, 728 F.2d 1359, 1363 (11th Cir.), cert. denied, 469 U.S. 828, 105 S.Ct. 112, 83 L.Ed.2d 56 (1984); United States v. Griffin, 699 F.2d 1102, 1107 (11th Cir.1983). Rojas did not raise ineffective assistance of counsel as a ground for his motion for new trial, and the record is not sufficiently developed to evaluate the merits of the claim. Hence, the claim is more appropriately raised in a proceeding under 28 U.S.C. § 2255. See id.

3. Sentencing

[18] Rojas also challenges his sentence. [FN11] In calculating Rojas's offense level, the district court attributed to Rojas 700 kilograms of cocaine, the total amount of the importation Grieco and Giuffre planned. See U.S.S.G. § 1B1.3(a)(1) (1991); id. § 2D1.1(c)(2). Rojas contends that seventy kilograms, the quantity hidden in the truck Rojas drove, was the appropriate amount.

> FN11. Tosta makes a similar challenge, but our reversal of his conviction makes it unnecessary to address his contentions.

The Guidelines provide that a member of the conspiracy is liable for all conduct of others in furtherance of the conspiracy that is reasonably foreseeable by the defendant. Id. § 1B1.3(a)(1). At Rojas's sentencing ***1564** hearing, Rojas did not request an individualized finding of fact as to what quantity would have been reasonably foreseeable to him, and the district court did not make one. Under these circumstances, the district court is entitled to rely upon the factual statements in the presentencing report (PSI) without making an individualized finding. See Fed.R.Crim.P. 32(c)(3)(D). But

Rojas's PSI is at best ambiguous. It conclusorily states that "the amount of cocaine involved in this offense is approximately 700 kilograms." On that basis, the PSI fixes the offense level at 40 because the offense involves at least 500, but less than 1500 kilograms. See U.S.S.G. § 2D1.1(a)(3), (c)(2) (1991). The PSI also states, however, that Rojas served as a "hired hand" and that it "is doubtful that the defendant realized the quantity of contraband he was transporting...." It is unclear whether this latter statement refers to the contraband on Rojas's truck or to the contraband involved in the overall conspiracy. However construed, the statement casts doubt on the propriety of attributing 700 kilograms to Rojas.

Because we find the PSI ambiguous, we conclude that no factual finding supports the quantity of cocaine attributable to Rojas under the guidelines. We therefore vacate Rojas's sentence and remand for resentencing following a finding relative to the quantity of cocaine attributable to Rojas. [FN12]

> FN12. The Government does not argue that there is a finding relative to the quantity of cocaine attributable to Rojas or that Rojas waived the objection by failing to object after sentencing. The Government's argument is rather that we should uphold the sentence because the record would support a finding attributing 700 kilograms to Rojas. We prefer that the district court resolve this factual dispute.

4. Jury Instructions

a. Standard of Review

[19][20] The district court has broad discretion in formulating a jury charge as long as the charge as a whole is a correct statement of the law. United States v. Bent, 707 F.2d 1190, 1195 (11th Cir.1983), cert. denied, 466 U.S. 960, 104 S.Ct. 2174, 80 L.Ed.2d 557 (1984). We will not reverse a conviction unless we find that issues of law were presented inaccurately or the charge improperly guided the jury in such a substantial way as to violate due process. United States v. Turner, 871 F.2d 1574, 1578 (11th Cir.), cert. denied, 493 U.S. 997, 110 S.Ct. 552, 107 L.Ed.2d 548 (1989).

b. Discussion

Rojas contends that the district court improperly gave the jury a "deliberate ignorance" instruction. [FN13] We agree. However, we find that the error was harmless. A "deliberate ignorance" instruction is appropriate when "the facts ... support the inference that the defendant was aware of a high probability of the existence of the fact in question and purposely contrived to avoid learning all of the facts in order to have a defense in the event of a subsequent prosecution." United States v. Rivera, 944 F.2d 1563, 1571 (11th Cir.1991) (quoting United States v. Alvarado, 838 F.2d 311, 314 (9th Cir.1987)). "[A] district court should not instruct the jury on 'deliberate ignorance' ***1565** when the relevant evidence points only to actual knowledge, rather than deliberate avoidance." Id. (emphasis in original).

> FN13. The court instructed the jury: When knowledge of the existence of a particular fact is an essential part of an offense, such knowledge may be established if a defendant is aware of a high probability of its existence unless he actually believes that it does not exist. So with respect to the issue of defendants Estrada and Rojas's knowledge in this case, if you find from all evidence beyond a reasonable doubt that a defendant believed that he possessed cocaine and deliberately and consciously tried to avoid learning that there was cocaine and deliberately and consciously tried to avoid learning of its presence in order to be able to say, if he should be apprehended, that he did not know cocaine was on or about his person, you may treat such deliberate avoidance, if so found, of positive knowledge as the equivalent of knowledge. In other words, you may find that a defendant acted knowingly if you find beyond a reasonable doubt either that the defendant actually knew that he possessed cocaine or, two, that he deliberately closed his eyes to what he had every reason to believe was the fact. I must emphasize, however, that the requisite proof of knowledge on the part of the defendant cannot be established by merely demonstrating that he was negligent, careless or foolish. (Tr. at 1774-75.)

In Rivera, the defendants were arrested while attempting to bring three false-bottomed suitcases into the country with cocaine in the false bottoms. Id. at 1565. In its analysis of the appropriateness of the instruction, the court pointed out that the defendants had not indicated in any way their awareness of the unusual construction of their

suitcases and their avoidance of positive knowledge of the contents. Id. at 1572. Nor was there any evidence that the defendants had acquired their suitcases under suspicious circumstances, but that the defendants deliberately avoided confirming their suspicions. Id. Thus, to contend that the instruction was appropriate because the defendants should have known they were carrying cocaine "skate[d] dangerously close to [urging] a negligence standard." Id.

[21] In Rojas's case, the evidence likewise pointed to actual knowledge rather than deliberate avoidance. The relevant evidence was that Rojas drove one of the cocaine-laden trucks to Correa's house and was present while seventy kilograms of cocaine were taken off the truck and placed in a bedroom of the house. The inference of knowledge based on this evidence is that Rojas, being present during such a large movement of cocaine, had to have been aware of it. No evidence suggests that Rojas strongly suspected cocaine but "purposely contrived" not to learn about it. See id. at 1572. Hence, giving the instruction was error.

[22] However, as in Rivera, we find that the error was harmless. Id. at 1572-73. The Government's evidence, though circumstantial, very strongly supported a finding that Rojas knew of the cocaine. The jury could easily have based its verdict on a finding of actual knowledge, rather than deliberate ignorance. We therefore affirm Rojas's convictions.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the convictions of Correa, Rojas, and Aguilera. However, we REVERSE Tosta's conviction, and we VACATE Rojas's sentence and REMAND for resentencing.

AFFIRMED in part; REVERSED in part; VACATED and REMANDED in part.

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UNITED STATES of America, Appellee,
v.
Garry D. KERN, Appellant.
UNITED STATES of America, Appellee,
v.
Troy P. REEVES, Appellant.

Nos. 93-1524, 93-1566.

United States Court of Appeals,
Eighth Circuit.

Submitted Oct. 13, 1993.

Decided Dec. 17, 1993.

Defendants were convicted in the United States District Court for the District of Nebraska, Lyle E. Strom, Chief Judge, of bank robbery, conspiracy to commit bank robbery, and carrying of firearm during and in relation to crime of violence. Defendants appealed. The Court of Appeals, Magill, Circuit Judge, held that: (1) other acts evidence was admissible on issue of intent to conspire; (2) motion for new trial on basis of newly discovered evidence was properly denied; and (3) state's knowledge of its police report potentially exonerating defendants could not be imputed to federal prosecutor on issue whether prosecutor withheld evidence and thereby violated Brady.

Affirmed.

[1] CRIMINAL LAW ⇐ 374
110k374
Government gave "reasonable **notice**" of general nature of bad act evidence to be used, when government informed defendants in hearing before magistrate judge that it might use evidence from some local robberies and when it provided the reports one week later, a week before trial. Fed.Rules Evid.Rule **404(b)**, 28 U.S.C.A.

See publication Words and Phrases for other judicial constructions and definitions.

[2] CRIMINAL LAW ⇐ 369.2(8)
110k369.2(8)
Victim's testimony identifying defendants as participants in hotel robbery was relevant to issue of defendants' intent to conspire to rob bank 17 days earlier and was admissible; both robberies were committed by three stocking-masked males, in both robberies larger male carried black short-barreled shotgun, and smaller robber in both robberies vaulted over relatively high obstacle. 18 U.S.C.A. §§ 371, 2113(a, d); Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[2] CRIMINAL LAW ⇐ 371(8)
110k371(8)
Victim's testimony identifying defendants as participants in hotel robbery was relevant to issue of defendants' intent to conspire to rob bank 17 days earlier and was admissible; both robberies were committed by three stocking-masked males, in both robberies larger male carried black short-barreled shotgun, and smaller robber in both robberies vaulted over relatively high obstacle. 18 U.S.C.A. §§ 371, 2113(a, d); Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[3] CRIMINAL LAW ⇐ 945(2)
110k945(2)
Police report indicating confession to hotel robbery and refusal to name accomplices would not exonerate defendants in bank robbery prosecution using evidence of defendants' involvement in the hotel robbery, and, thus, report did not entitle defendants to new trial; if the evidence had been presented to jury, it could reasonably have believed that hotel robber was merely protecting defendants, and although jury could also have inferred that hotel robbery victim improperly identified defendants, evidence of guilt warranted denial of new trial motion. Fed.Rules Cr.Proc.Rule 33, 18 U.S.C.A.

[4] CRIMINAL LAW ⇐ 700(6)
110k700(6)
State's knowledge of its police report potentially exonerating defendants could not be imputed to federal prosecutor on issue whether prosecutor withheld evidence and thereby violated Brady. U.S.C.A. Const.Amends. 5, 14.

***123** Mark W. Bubak, Omaha, NE, argued, for appellants.

Michael P. Norris, Asst. U.S. Atty., Omaha, NE, argued, for appellee.

Before McMILLIAN, BOWMAN, and MAGILL,

Circuit Judges.

MAGILL, Circuit Judge.

Troy B. Reeves (Reeves) and Garry D. Kern (Kern) appeal the judgment entered by the district court [FN1] following a jury's finding of guilt on three bank-robbery-related counts. Specifically, Reeves and Kern (the defendants) contend the trial court erred when it admitted evidence of another subsequent robbery, when it refused to grant a new trial after the discovery of new evidence, and when it found as a matter of law that conspiracy to commit bank robbery is a crime of violence. For the reasons addressed below, we affirm the judgment of the district court.

FN1. The Honorable Lyle E. Strom, Chief Judge, United States District Court for the District of Nebraska.

## I. BACKGROUND

On June 12, 1992, an Omaha branch office of the First Federal Savings and Loan Association of Lincoln (First Federal) was robbed of approximately $12,700 by two stocking-masked males who differed significantly in height and weight. The smaller robber entered the bank first and the larger robber followed carrying a black short-barreled shotgun. The robbers left the bank and entered a recently-stolen white Buick driven by a third male. Immediately after the robbery, a stocking mask with a few human hairs was found outside the bank.

Kern's girlfriend at the time, Andrea Fraire (Fraire), testified at trial that Kern had related a plan to her to rob a jewelry store and bank in Omaha. According to Fraire, the planned robberies were to take place on June 12, 1992, and involved the use of stolen getaway cars. Fraire further testified that on the evening of June 12, 1992, Kern arrived home with $4000 to $4500 in cash.

Jack Parrott, a security guard for the shopping center in which the bank was located, testified at trial that he observed a rusted gold Oldsmobile Cutlass (Cutlass) occupied by four males in the shopping center parking lot on June 11, 1992. The next day, June 12, the same car was observed again by Parrott, again occupied by four males. Later that same morning, Parrott observed the Cutlass in a church parking lot parked beside a white Buick. The white Buick was now occupied by three of the males and the Cutlass held the fourth individual. After observing the Buick for a short time, Parrott noticed a shotgun being passed to a backseat passenger. Parrott subsequently identified Reeves from a photograph array as the frontseat passenger. Although Parrott was unable to identify Kern from a police lineup, he did identify Kern at trial as the backseat passenger.

The bank employees were unable to identify Reeves or Kern from lineups or at trial. Reeves and Kern both had alibi witnesses testify that they were elsewhere at the time of the robbery. The human hairs in the mask, however, were identified by an FBI hair and fiber expert as matching samples taken from Kern.

At trial, testimony was introduced by the government regarding the defendants' alleged participation in a hotel robbery that occurred seventeen days after the bank robbery. Kern was charged in state court with commission of this robbery. The testimony was prefaced by a limiting instruction prohibiting the jury from using this testimony to establish "bad" character and, accordingly, conformity with that character. The testimony was then introduced pursuant to Federal ***124** Rule of Evidence 404(b). The hotel robbery victim, Ashford, testified he was robbed by three armed masked males, and he identified both Reeves and Kern as two of the individuals who robbed him.

Following a jury trial, the defendants were convicted of all three counts against them. Count I charged the defendants with conspiracy to commit bank robbery in violation of 18 U.S.C. § 371. Count II charged them with the June 12, 1992 bank robbery of First Federal in violation of 18 U.S.C. § 2113(a), (d). Count III charged Reeves with carrying a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1), and Kern was charged as Reeves' co-conspirator on that count.

After the jury convicted Reeves and Kern for the First Federal robbery, the government received from the Omaha police a supplementary report related to the hotel robbery. An individual named Stacey Lue (Lue) confessed to participating with two accomplices in the hotel robbery. Lue was

specifically asked if Reeves and Kern were his accomplices, but he denied any participation on their part. Lue, however, refused to name his two accomplices. Upon receipt, the government immediately disclosed this information to the defendants' attorneys. Following the disclosure of the Lue confession, Reeves and Kern moved for a new trial. In state court, Kern pleaded nolo contendere to the hotel robbery charge and was convicted.

## II. DISCUSSION

The defendants contend that three errors of the trial court mandate reversal and a new trial: admission of Ashford's testimony, Brady [FN2] evidence and/or newly discovered evidence, and the district court's finding as a matter of law that conspiracy to commit bank robbery is a crime of violence as defined by 18 U.S.C. § 16. We find that the district court committed no reversible error, and we affirm the court's judgment.

FN2. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

### A. The Hotel Robbery Evidence

The defendants object to the admission into evidence of Ashford's testimony regarding the hotel robbery because they claim the government gave insufficient **notice** that it planned on using this evidence and it was not properly admissible under Federal Rule of Evidence **404(b)** (Rule **404(b)**). The district court, however, has broad discretion to admit such evidence and its decision will not be overturned unless it is clear that the evidence has no bearing on the case. United States v. Sykes, 977 F.2d 1242, 1246 (8th Cir.1992).

[1] The government gave the defendants adequate **notice** that it planned on using Rule **404(b)** evidence. The rule states the prosecution must "provide reasonable **notice** in advance of trial, or during trial ... on good cause shown, of the general nature of any such evidence." Fed.R.Evid. **404(b)**. The magistrate judge specifically ordered that any "bad act" evidence be disclosed at least fourteen days prior to trial. The government complied by informing the defendants in a hearing before the magistrate judge that the government might use evidence from some local robberies. See Tr. at 335. At that time, the government did not yet have the state reports concerning these robberies. Approximately one week before trial, when the government obtained the reports, the defendants were likewise provided with these reports. Id. We find that the government's **notice** satisfies the requirements of Rule **404(b)**; the district court did not abuse its discretion in finding that this **notice** was reasonable.

Rule 404(b) prohibits the admission of "other crimes, wrongs, or acts" to prove the character of a person, and hence, conformity with that character; that is, it prohibits propensity evidence. See id. The rule, nonetheless, specifically recognizes that evidence of "other crimes, wrongs, or acts" could be admissible for other purposes, such as to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake. Id.

To properly admit Rule 404(b) evidence for purposes other than to prove propensity, it must (1) be relevant to a material issue raised at trial, (2) be similar in kind and close ***125** in time to the crime charged, (3) be supported by sufficient evidence to support a finding by a jury that the defendant committed the other act, and (4) not have a prejudicial value that substantially outweighs its probative value. Sykes, 977 F.2d at 1246; United States v. Johnson, 934 F.2d 936, 939 (8th Cir.1991). The district court warned the jury in an instruction prior to Ashford's testimony that "the mere fact that these defendants may have committed a similar act in the past is not evidence that they committed the acts charged in this case." Tr. at 365. The district court repeated essentially the same warning in Jury Instruction No. 10. The permissible purposes enumerated by the district court for which this testimony could be considered included proof of identity, knowledge, plan, motive, and intent to conspire.

[2] We find that the hotel robbery evidence was properly admitted to prove that Reeves and Kern intended to enter into an agreement or understanding to commit robbery and that they understood the purpose of this agreement. [FN3] The court instructed the jury that in order to find the defendants guilty of conspiracy to commit bank robbery, it had to find four elements: (1) two or more persons reached an agreement to commit the crime, (2) the defendant voluntarily and

intentionally joined in the agreement, (3) at the time the defendant joined in the agreement, he knew the purpose of the agreement, and (4) that while the agreement was in effect, one or more of the persons who had joined in the agreement did an overt act in order to carry out the agreement. Thus, the hotel robbery evidence was relevant to a material fact: intent to conspire. See Cheek v. United States, 858 F.2d 1330, 1336-37 (8th Cir.1988); United States v. Scholle, 553 F.2d 1109, 1121 (8th Cir.), cert. denied, 434 U.S. 940, 98 S.Ct. 432, 54 L.Ed.2d 300 (1977); United States v. Carlson, 547 F.2d 1346, 1354 & n. 5 (8th Cir.1976), cert. denied, 431 U.S. 914, 97 S.Ct. 2174, 53 L.Ed.2d 224 (1977).

> FN3. We do not decide whether the hotel robbery evidence could otherwise have been admissible as evidence of identity, plan, or motive, because we find the district court did not abuse its discretion in allowing its admission into evidence and the limiting instruction properly warned the jury not to impermissibly use this evidence as proof of propensity. However, we do not countenance the district court's use of this virtual laundry list of permissible Rule 404(b) purposes. See United States v. Mothershed, 859 F.2d 585, 589 (8th Cir.1988). Such an action, nevertheless, in itself is not a basis for reversal. See id.

As required by Sykes and Johnson, the hotel robbery evidence was similar in kind and close in time to the crime charged. The hotel robbery occurred only seventeen days after the bank robbery. Both robberies were committed by three stocking-masked males. In both robberies, the larger male carried a black short-barreled shotgun. Moreover, the smaller masked robber in both robberies vaulted over a relatively high obstacle: the teller's counter in the bank robbery and the desk in the hotel robbery.

Ashford's testimony regarding the hotel robbery was sufficient for a jury to have found that Reeves and Kern committed the hotel robbery. Ashford not only made a positive identification of the defendants at trial, but he also identified Reeves from an array of photographs soon after the hotel robbery.

Moreover, the court's limiting instruction to the jury was sufficient to prevent undue prejudice from the admission of this evidence. Therefore, because the hotel robbery evidence was admissible to prove that the defendants intended to enter into a conspiracy to rob, we find that the district court did not abuse its discretion when it allowed Ashford to testify.

B. The Supplementary Omaha Police Division Report

[3] After the defendants received the Omaha police division supplementary report (the report) indicating that Lue had confessed to the hotel robbery and refused to name his accomplices, the defendants moved for a new trial. Reeves and Kern claim that the report "exonerated" them and hence a new trial should have been granted pursuant to Federal Rule of Criminal Procedure 33 (Rule 33). Furthermore, they claim that Brady mandates a new trial because the knowledge ***126** of the Omaha police regarding this report should be imputed to the federal prosecutor. We do not agree that the new evidence exonerated the defendants or that the prosecutor withheld evidence from the defendants.

Rule 33 allows a court to grant a motion for a new trial on the basis of newly discovered evidence if the evidence is, in fact, discovered since trial; the court may infer the movant has been diligent; the evidence is not merely cumulative or impeaching; the evidence is material; and the newly discovered evidence would probably produce an acquittal. United States v. Gustafson, 728 F.2d 1078, 1084 (8th Cir.), cert. denied, 469 U.S. 979, 105 S.Ct. 380, 83 L.Ed.2d 315 (1984); see also United States v. Wang, 964 F.2d 811, 813 (8th Cir.1992) (new trial may be granted if the defendant's substantial rights are affected). The defendants' argument fails because the report did not exonerate them; that is, it would not have been likely to have produced an acquittal. As stated by the district court, the report [FN4] would merely have "given the jury some additional information to evaluate in determining whether or not Mr. Ashford had indeed properly identified the two defendants as being participants." Tr. at 766. Had this evidence been presented to the jury, the jury could reasonably have believed that Reeves and Kern were Lue's accomplices and that Lue was merely protecting them by denying their participation in the hotel robbery. The jury could also have inferred that Ashford improperly identified Reeves and Kern as participants in the hotel robbery. The district court, however, found that this latter possibility did not warrant a new

trial. Particularly in light of the amount of evidence presented to the jury on the issue of the defendants' guilt, the district court did not abuse its discretion by denying the defendants' motion for a new trial. See Gustafson, 728 F.2d at 1084.

> FN4. The report states, in relevant part: [Lue] had committed that robbery with two other individuals. Previously arrested in connection with this robbery was a Garry KERN, and a Troy REEVES had also been identified as a suspect in this robbery also. I, Officer MAHONEY, asked Stacy LUE if these other two suspects were with him when this robbery occurred, and LUE stated that they were not; however, he would not name the other two suspects out of fear.

[4] Nor does Brady mandate a new trial in this case. See Brady, 373 U.S. at 87-88, 83 S.Ct. at 1196-97. A defendant's due process rights are violated under Brady if a prosecutor "withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty." Id. In order to establish such a claim, the prosecutor must have suppressed or withheld evidence that was both favorable and material to the defense. Moore v. Illinois, 408 U.S. 786, 794, 92 S.Ct. 2562, 2568, 33 L.Ed.2d 706 (1972). Nothing in this record indicates that this prosecutor withheld evidence from the defendants. Here, the prosecutor simply did not have the report until the trial was over. Such a case is fundamentally different than when information is in the prosecutor's files. See State v. Agurs, 427 U.S. 97, 110, 96 S.Ct. 2392, 2400, 49 L.Ed.2d 342 (1976). We do not accept the defendants' proposal that we impute the knowledge of the State of Nebraska to a federal prosecutor. See United States v. Walker, 720 F.2d 1527, 1535 (11th Cir.1983) (refusing to impute the knowledge of state officials to a federal prosecutor), cert. denied, 465 U.S. 1108, 104 S.Ct. 1614, 80 L.Ed.2d 143 (1984). Consequently, we hold that the district court did not abuse its discretion when it refused to grant a new trial.

Finally, we find wholly without merit Kern's contention that conspiracy to commit bank robbery is not a crime of violence as defined by 18 U.S.C. § 16, and we reaffirm our previous holding to that effect. See United States v. Johnson, 962 F.2d 1308, 1311 (8th Cir.), cert. denied, --- U.S. ----, 113 S.Ct. 358, 121 L.Ed.2d 271 (1992), and cert. denied, --- U.S. ----, 113 S.Ct. 1418, 122 L.Ed.2d 788 (1993).

## III. CONCLUSION

Accordingly, we find that the district court did not abuse its discretion when it admitted the hotel robbery evidence and denied the defendants' motion for a new trial. Moreover, the district court properly found that conspiracy to commit bank robbery is a ***127** crime of violence. Therefore, we affirm the judgment of the district court.

END OF DOCUMENT

UNITED STATES of America, Appellee,
v.
Eugene Lamar SUTTON, Appellant.

No. 94-2597.

United States Court of Appeals,
Eighth Circuit.

Submitted Oct. 11, 1994.

Decided Dec. 7, 1994.

Defendant was convicted in the United States District Court for the District of Minnesota, Paul A. Magnuson, Chief Judge, of bank robbery, use of firearm in course of violent crime, and being felon in possession of firearm. Defendant appealed. The Court of Appeals, McKay, Senior Circuit Judge, sitting by designation, held that: (1) district court did not abuse its discretion in excusing the government's failure to timely notify defendant that it intended to introduce evidence of defendant's prior narcotics use; (2) evidence of defendant's prior drug use was not material; (3) prejudicial impact of evidence substantially outweighed its probative effect; (4) admission of evidence of defendant's prior drug use was harmless error; (5) district court did not abuse its discretion in precluding defendant from calling witness who would have testified to inconsistent statements made by prosecution witness; and (6) conviction was supported by sufficient evidence.

Affirmed.

[1] CRIMINAL LAW ⇐ 374
110k374
District court did not abuse its discretion in excusing the government's failure to notify defendant at least four days prior to trial, pursuant to district court orders, that it intended to introduce evidence of defendant's prior narcotics use in trial for bank robbery; the government discovered the evidence only five days before trial on a Friday and notified defendant on the following Monday, and defendant was on notice that his involvement with drugs would be an issue at trial. 18 U.S.C.A. § 2113(a, d); Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[2] CRIMINAL LAW ⇐ 371(12)
110k371(12)
In bank robbery prosecution, evidence of defendant's prior drug use was not material, where government simply asked the jury to draw a raw inference about defendant's motive from the fact that he used drugs. 18 U.S.C.A. § 2113(a, d); Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[3] CRIMINAL LAW ⇐ 371(12)
110k371(12)
In bank robbery prosecution, even if motive was material issue and evidence of defendant's prior drug use was probative of motive, prejudicial impact of evidence substantially outweighed its probative effect; slight probative value of knowing one possible motive for defendant to commit robbery did not outweigh likely prejudicial effect on jury of being told that defendant was crack- cocaine user. 18 U.S.C.A. § 2113(a, d); Fed.Rules Evid.Rules 403, 404(b), 28 U.S.C.A.

[4] CRIMINAL LAW ⇐ 1169.2(3)
110k1169.2(3)
In bank robbery prosecution, admission of evidence of defendant's prior drug use was harmless error, where defendant's bad character was established by admissible evidence; defendant claimed that large amounts of cash in his possession after bank robbery were result of defendant's act of breaking into cocaine dealer's home and stealing cash, and evidence that defendant purchased large amounts of cocaine was introduced into evidence to establish a recent acquisition of wealth. 18 U.S.C.A. § 2113(a, d); Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[5] WITNESSES ⇐ 389
410k389
District court did not abuse its discretion in precluding defendant from calling witness who would have testified to inconsistent statements made by one of key prosecution witnesses, where defendant failed to give prosecution witness the opportunity to explain or deny having made a prior inconsistent statement while he was on the stand; Barrett rule allowing such evidence so long as witness is available to be recalled to explain inconsistent statements had not been adopted in circuit, and thus was optional procedure, not mandatory. Fed.Rules Evid.Rule 613(b), 28 U.S.C.A.

[6] ROBBERY ⚿ 2
342k2
Conviction of bank robbery was supported by evidence of bank surveillance photographs of robber, testimony from defendant's aunt and police officer who knew defendant well identifying defendant as man in photographs, testimony that defendant possessed large amounts of cash later on same day as robbery, and testimony of two admitted accomplices implicating defendant in crime, despite fact that accomplices had made plea bargains, and existence of minor inconsistencies in accomplices' and eyewitnesses' testimony, which were easily explained by rapidity and stress of events. 18 U.S.C.A. § 2113(a, d).

[7] CRIMINAL LAW ⚿ 1144.13(3)
110k1144.13(3)
In examining challenge to sufficiency of evidence, Court of Appeals views evidence in light most favorable to government and resolves all evidentiary conflicts in favor of the government.

***1258** Glenn P. Bruder, Minneapolis, MN, argued, for appellant.

David L. Lillehaug, U.S. Atty., Minneapolis, MN, argued (Jon M. Hopeman, on the brief), for appellee.

Before McMILLIAN, Circuit Judge, McKAY, [FN*] Senior Circuit Judge, and BOWMAN, Circuit Judge.

FN* The HONORABLE MONROE G. McKAY, Senior Circuit Judge, United States Court of Appeals for the Tenth Circuit, sitting by designation.

McKAY, Circuit Judge.

Eugene Lamar Sutton appeals from a final judgment entered in the United States District Court for the District of Minnesota finding him guilty upon a jury verdict of bank robbery, use of a firearm in the course of a violent crime, and being a felon in possession of a firearm, in violation of 18 U.S.C. § 2113(a)(d), 18 U.S.C. § 924(c)(1) and (2), and 18 U.S.C. § 922(g)(1), respectively. Mr. Sutton presents three issues on appeal: (1) he challenges the admission of certain evidence; (2) he challenges the exclusion of certain evidence; and (3) he challenges the sufficiency of the evidence as a whole. We affirm the judgment of the district court.

[1] Mr. Sutton contends that the district court improperly admitted evidence of his prior narcotic use under Fed.R.Evid. 404(b). In support of this claim, he has demonstrated that he was provided notice of this evidence only two days before trial, despite the fact that the district court explicitly ordered the government to notify the defendant at least four days prior to trial of any 404(b) evidence it planned to use. The district court excused this breach for two reasons. First, the government discovered the evidence only five days prior to trial, on a Friday, and they notified the defendant on the following Monday. Second, the government had provided the defendant with a copy of the statement of another one of its witnesses over a month before the trial. This statement related to a drug buy the day of the robbery. Thus, the defendant was on notice that his involvement with drugs would be an issue at the trial and had adequate time to prepare for this type of evidence. The district court did not abuse its discretion in excusing the government's late ***1259** notification of Mr. Sutton under these circumstances.

[2] Mr. Sutton also argues, persuasively, that the evidence of his drug use does not meet our test for admissibility under Rule 404(b).

> In order for the trial court to admit evidence under Rule 404(b), the evidence must satisfy the following conditions:
> 1. The evidence of the bad act or other crime is relevant to a material issue raised at trial;
> 2. The bad act or crime is similar in kind and reasonably close in time to the crime charged;
> 3. There is sufficient evidence to support a finding by the jury that the defendant committed the other act or crime; and
> 4. The potential prejudice of the evidence does not substantially outweigh its probative value.

United States v. DeAngelo, 13 F.3d 1228, 1231 (8th Cir.) (citing United States v. Johnson, 934 F.2d 936, 939 (8th Cir.1991)), cert. denied, --- U.S. ----, 114 S.Ct. 2717, 129 L.Ed.2d 842 (1994).

Mr. Sutton contends that his prior drug use does not meet either the first or last part of this test. We agree, but find the error to be harmless.

The first part of our test under Rule 404(b) allows

evidence of prior bad acts where it is used for purposes "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." The government argues that the evidence of Mr. Sutton's drug use showed a motive for the bank robbery. In other words, the government was attempting to show that he stole the money to support his drug habit. Although other circuits have allowed evidence of drug use to demonstrate motive to commit a bank robbery (see, e.g., United States v. Miranda, 986 F.2d 1283, 1285 (9th Cir.) (citing cases), cert. denied, --- U.S. ----, 113 S.Ct. 2393, 124 L.Ed.2d 295 (1993)), we have never decided this precise issue.

This court has allowed evidence of other prior bad acts to show motive in a robbery case. United States v. Mays, 822 F.2d 793, 797 (8th Cir.1987). However, that case is readily distinguishable from the present case. First, in Mays we held that motive was a material issue in that case, although we did not explain why. Furthermore, the facts that were admitted as evidence of motive were also clearly relevant to the issue of identity, which is indisputably a material issue in a robbery case. [FN1] Id. at 797. Another distinction between this case and Mays is that in Mays the evidence of motive ("to secure enough funds to start a new life together") was offered as direct testimony by a co-conspirator. In this case, motive was not a material issue; the defendant did not put his motive in issue; there was no testimony by his co-conspirators about his motive; and the facts which the government used to show motive were not also relevant to identity. The government simply asked the jury to draw a raw inference about the defendant's motive from the fact that he used drugs. We decline to approve such a tenuous link.

> FN1. The evidence related to a previous bank robbery committed by defendant that was "similar enough to establish some identity between the robberies. Both banks were located in an isolated rural area; before both robberies a four-wheel drive vehicle was stolen and later abandoned; and in both robberies a .45 caliber automatic pistol was used." Id.

[3] Even if motive were a material issue in this robbery case and drug use were probative of it, the evidence would still fail the fourth part of our test, which is derived from the general requirement of Rule 403 that the prejudicial impact of the evidence should not substantially outweigh its probative value. The admission of evidence of prior wrongful acts creates a danger that the jury will convict the accused on the basis of bad character; thus, it is normally excluded under Rule 404. We cannot say that the slight probative value of knowing one possible motive for Mr. Sutton to commit a robbery outweighs the likely prejudicial effect on the jury of being told that the defendant was a crack-cocaine user. [FN2] In any event, it could hardly come as ***1260** a surprise to the jury that Mr. Sutton was robbing a bank because he needed money for some reason. [FN3]

> FN2. There is a substantial split among the cases about whether this type of evidence should be admissible. See generally, Debra T. Landes, Annotation, Admissibility of Evidence of Accused's Drug Addiction or Use to Show Motive for Theft of Property Other Than Drugs, 2 A.L.R. 4th 1298 (1980). We think the better-reasoned cases exclude such evidence. See State v. LeFever, 102 Wash.2d 777, 690 P.2d 574 (1984) (Evidence of defendant's addiction to heroin, offered by prosecution to show motive for robbery, is inadmissible in that resulting prejudice overwhelmed any possible relevance or probativeness.); People v. Holt, 37 Cal.3d 436, 208 Cal.Rptr. 547, 554, 690 P.2d 1207, 1214 (1984) (Whatever probative value defendant's drug use might have had to show motive for robbery was outweighed by prejudicial value.).

> FN3. This brings to mind the story of a more famous bank robber with the same surname. When asked why he robbed banks, Willie Sutton replied, "That's where the money is."

[4] Although we believe that the admission of Mr. Sutton's prior drug use was erroneous, we nevertheless find the error to be harmless, because when viewed in the context of all the evidence presented at Mr. Sutton's trial, any possible prejudice that Mr. Sutton suffered was de minimis. For example, in Mr. Sutton's opening statement, his counsel referred to his association with drug dealers and how he broke into a cocaine dealer's home and stole $10,000. (Tr. [FN4] 35-36) This information was a crucial part of Mr. Sutton's defense, as it provided an alternative explanation for how Mr. Sutton came to have large amounts of cash just after

the time of the bank robbery. However, these statements also gave the government the prerogative to explore on cross-examination the basis for his knowledge that there would be large amounts of cash in the drug dealer's house and the nature of his relationship with the drug dealer. Furthermore, testimony was presented that Mr. Sutton purchased large amounts of cocaine the day of the robbery. This evidence was properly admitted because it tended to establish a recent acquisition of wealth. We think Mr. Sutton's bad character was so thoroughly established by admissible evidence (including his own) that there is no likelihood that this additional bad character evidence would have influenced the outcome in this case.

FN4. Trial Transcript.

[5] Mr. Sutton also contends that the district court improperly precluded him from presenting a witness who would have testified to inconsistent statements made by one of the key prosecution witnesses, Mr. Smith. This testimony was not allowed because Mr. Smith was not given the opportunity to explain or deny having made a prior inconsistent statement while he was on the stand, which is normally the proper foundation for impeachment under Fed.R.Evid. 613(b). Mr. Sutton points out that the First Circuit has relaxed this requirement, requiring only that a witness be available to be recalled to explain inconsistent statements. United States v. Barrett, 539 F.2d 244, 254-56 (1st Cir.1976); United States v. Hudson, 970 F.2d 948, 955 (1st Cir.1992). However, this procedure is not mandatory, but is optional at the trial judge's discretion. Id. at 956 & n. 2. More to the point, since this circuit has never adopted the rule in Barrett, we cannot say that the district court abused its discretion in not applying it.

[6][7] Mr. Sutton has also challenged the sufficiency of the evidence. Accordingly, we must examine whether a rational trier of fact could have found the defendant guilty beyond a reasonable doubt. United States v. Fetlow, 21 F.3d 243, 247 (8th Cir.), cert. denied sub nom., Ferguson v. United States, --- U.S. ----, 115 S.Ct. 456, 130 L.Ed.2d 365 (1994). In examining such a claim, we view the evidence in the light most favorable to the government and resolve all evidentiary conflicts in favor of the government. United States v. Nelson, 984 F.2d 894, 899 (8th Cir.), cert. denied, --- U.S. ----, 113 S.Ct. 2945, 124 L.Ed.2d 693 (1993).

The evidence, viewed in the light most favorable to the prosecution, indicates that a man matching the description of Mr. Sutton robbed the Chisago City Bank. (Tr. 46). There were photographs taken by bank surveillance cameras which the jury viewed and compared to Mr. Sutton. There was also testimony that his Aunt and a police officer who knew him well identified him as the man in the photos. (Tr. 145, 158).

Further testimony demonstrated that Mr. Sutton had in his possession large quantities ***1261** of cash later on the same day of the robbery. He used this money to purchase a car for $2500 in cash (Tr. 42) and $2400 worth of cocaine. (Tr. 261, 263, 265). Mr. Sutton provided conflicting and unsubstantiated claims for the origins of the money (Tr. 351, 378-79), but it is undisputed that he did not earn the money through legal gainful employment.

Furthermore, two admitted accomplices of Mr. Sutton implicated him in the crime and provided sufficient detail that the jury might rationally have found them credible. Although the accomplices had made plea bargains, the jury was properly instructed by the trial judge on this point. The inconsistencies in the accomplices' and eyewitnesses' testimony are minor and are easily explained by the rapidity and stress of the events. The bank tellers' inability to pick Mr. Sutton's photo out of a lineup may also be explained by the speed and stress of the event, plus the fact that the robber was wearing a hat and sunglasses. This weakness in the evidence was overcome by the independent identification by Mr. Sutton's aunt and the police officer.

After carefully reviewing the evidence presented in the light most favorable to the government, we conclude that there was sufficient evidence to support the jury's verdict.

Accordingly, the judgment of the district court is affirmed.

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Citation 12 F.3d 1436 | Rank(R) R 10 OF 23 | Page(P) P 1 OF 41 | Database CTA8 | Mode Page

**(Cite as: 12 F.3d 1436)**

UNITED STATES of America, Plaintiff-Appellee,
v.
Delano Romanus OAKIE, Defendant-Appellant.
UNITED STATES of America, Plaintiff-Appellee,
v.
Kirk Morin OAKIE, Defendant-Appellant.
Nos. 92-3268, 92-3622.
United States Court of Appeals,
Eighth Circuit.
Submitted May 11, 1993.
Decided Dec. 17, 1993.
Rehearing and Suggestion for Rehearing
En Banc Denied Jan. 27, 1994
in No. 92-3622 and
Jan. 28, 1994 in No. 92-3268.

Two defendants were convicted in the United States District Court, District of South Dakota, Donald J. Porter, J., of assault with dangerous weapon, use of firearm during crime of violence, and assaulting federal officer with dangerous weapon, and one of the defendants was also convicted for being felon in possession of firearm. Defendants appealed. The Court of Appeals, Loken,





**(Cite as: 12 F.3d 1436, *1441)**

920 (8th Cir.) (internal quotation omitted), cert. denied, 474 U.S. 980, 106 S.Ct. 382, 88 L.Ed.2d 336 (1985). In light of the other trial evidence and the impeachment evidence available to the government, we agree with the district court that the proffered testimony of Kirk Oakie did not meet this standard.

[12] Delano next contends that he was entitled to a severance because he and Kirk presented antagonistic defenses: Kirk Oakie's cross examination of Wallace Rooks characterized Kirk and Shane Oakie as "prisoners in that car," whereas Delano's defense was that he believed he was being chased by an enemy, rather than the police, and did not know his passengers were shooting at the pursuing vehicle. To warrant severance on this ground, the co-defendants' defenses must be more than inconsistent, they must be "actually irreconcilable." United States v. Mason, 982 F.2d 325, 328 (8th Cir.1993). Kirk and Delano presented different defenses, but they were not irreconcilable or even antagonistic.

The district court did not abuse its discretion in denying Delano Oakie's motion to sever.

[13][14] B. Prior Acts Evidence. Rule **404(b)** of the Federal Rules of Evidence permits evidence of a defendant's "other crimes, wrongs, or acts" only for limited purposes and, if the defendant requests, only after reasonable **notice** of the general nature of any such evidence the prosecution intends to use. Delano requested such **notice,** and the government responded that it did

not intend to introduce any Rule **404(b)** evidence. During the government's case-in-chief, Wallace Rooks testified that he believed Delano drove away from the Avery residence because Delano "had some old warrants on him." In addition, the government impeached Shane Oakie with his statement to the grand jury that, "Delano said he had a warrant out for him and didn't want to get caught."

Delano argues that this was Rule 404(b) evidence that should have been excluded because of the government's failure to notify him of its intent to use it. We disagree.

Evidence which is probative of the crime charged ... is not "other crimes" evidence. Further, where the evidence of an act and the evidence of the crime charged are inextricably ***1442** intertwined, the act is not extrinsic and Rule 404(b) is not implicated.

DeLuna, 763 F.2d at 913 (citations omitted). See also United States v. Bettelyoun, 892 F.2d 744, 746 (8th Cir.1989). In this case, evidence regarding why Delano turned the car around and fled explained the circumstances of the charged offense and was not Rule 404(b) evidence. Because this testimony was very brief and revealed no details concerning the outstanding warrants, it was not unduly prejudicial, and the district court did not abuse its discretion by admitting it.

V. Jury Instruction Issues.

404(b) notice not reqd where acts are "inextricably intertwined" with charged offenses.



UNITED STATES of America, Appellee,
v.
Michael Anthony SEVERE, Appellant.
UNITED STATES of America, Appellee,
v.
Don Edward WITHERS, Appellant.
UNITED STATES of America, Appellee,
v.
James E. HOWARD, Jr., also known as Terence Terell Washington, Appellant.

Nos. 93-3744, 93-3746 and 93-3933.

United States Court of Appeals,
Eighth Circuit.

Submitted May 12, 1994.

Decided July 13, 1994.
Rehearing Denied
Aug. 17, 1994 in No. 93-3746.

Defendants were convicted in the United States District Court for the District of Minnesota, David S. Doty, J., of drug charges and they appealed. The Court of Appeals, Magill, Circuit Judge, held that: (1) evidence sustained finding that defendants consented voluntarily to search of motel room, and (2) evidence sustained conviction.

Affirmed.

[1] SEARCHES AND SEIZURES ⚿ 194
349k194
To justify consensual search, government has burden of proving that individual voluntarily gave consent to search; issue of consent is question of fact that requires consideration of totality of circumstances.

[1] SEARCHES AND SEIZURES ⚿ 201
349k201
To justify consensual search, government has burden of proving that individual voluntarily gave consent to search; issue of consent is question of fact that requires consideration of totality of circumstances.

[2] CRIMINAL LAW ⚿ 1158(4)
110k1158(4)
District court's determination that defendant voluntarily gave consent to search is reviewed under clearly erroneous standard.

[3] SEARCHES AND SEIZURES ⚿ 183
349k183
Finding that defendant consented to search of motel room was supported by evidence that officers knocked on the door of the room and identified themselves as law enforcement officers, that they did not use force to enter the room, that they were invited into the room, that defendant and companion were not put under arrest and were informed that they could refuse consent and were free to leave, and that both defendant and companion read, considered, and signed written consent form, even though officers told defendant that search warrant would be obtained if defendant and his companion did not consent to search.

[3] SEARCHES AND SEIZURES ⚿ 184
349k184
Finding that defendant consented to search of motel room was supported by evidence that officers knocked on the door of the room and identified themselves as law enforcement officers, that they did not use force to enter the room, that they were invited into the room, that defendant and companion were not put under arrest and were informed that they could refuse consent and were free to leave, and that both defendant and companion read, considered, and signed written consent form, even though officers told defendant that search warrant would be obtained if defendant and his companion did not consent to search.

[4] CRIMINAL LAW ⚿ 1245(1)
110k1245(1)
District court could properly consider prior uncounseled misdemeanor convictions in determining defendant's criminal history score.

[5] CRIMINAL LAW ⚿ 369.2(3.1)
110k369.2(3.1)
Testimony by witness that defendants had delivered a kilogram of crack cocaine to her duplex on March 16 was not prior bad acts testimony requiring **notice** but, rather, was testimony concerning acts intertwined with the conspiracy charged in indictment which alleged that the conspiracy continued until on or about March 17. Fed.Rules Evid.Rule **404(b),** 28 U.S.C.A.

[6] INDICTMENT AND INFORMATION

⚿ 87(7)
210k87(7)
Indictment was not impermissibly vague with respect to its allegations of dates even though testimony of coconspirator included events which occurred two weeks prior to the "on or about" date listed in the indictment, where defendant had notice that government would present evidence of earlier delivery of cocaine base.

[7] CONSPIRACY ⚿ 28(3)
91k28(3)
To establish conspiracy to distribute narcotics, government need not establish overt act but simply must prove that defendant entered into an agreement to distribute narcotics. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

[8] CONSPIRACY ⚿ 47(12)
91k47(12)
Defendant's conviction for conspiracy to distribute cocaine base was supported by evidence that he and another person brought a kilogram of cocaine to duplex, that he and the other person broke the cocaine base into one ounce quantities using an electronic scale, and that his companion was then given over $10,000 in cash. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

[9] CRIMINAL LAW ⚿ 1026.10(4)
110k1026.10(4)
Defendant who entered into plea agreement acknowledging a minimum penalty of ten years' imprisonment and who had certain charges against him dropped waived right to challenge sentence on grounds that mandatory minimum sentence violated due process and equal protection. U.S.C.A. Const.Amend. 5.

***445** Thomas J. O'Connor, Chaska, MN, argued, for appellant, Severe, Lee R. Johnson, Minneapolis, MN, argued, for appellant Withers, Patrick R. Townley, Minneapolis, MN, argued, for appellant Howard (Craig E. Cascarano, on the brief).

Jon M. Hopeman, Minneapolis, MN, argued (B. Todd Jones, on the brief), for appellee.

Before MAGILL, Circuit Judge, FLOYD R. GIBSON and JOHN R. GIBSON, Senior Circuit Judges.

MAGILL, Circuit Judge.

Michael Severe challenges his conviction and sentence for conspiracy to distribute cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and 846 (1988), and aiding and abetting the distribution of cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A). James Howard, Jr., challenges his conviction for conspiracy to distribute cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and 846. Don Edward Withers appeals the sentence imposed by the district court [FN1] after he pleaded guilty to possession with intent to distribute more than fifty grams of cocaine base in violation of 21 U.S.C. § 841(a)(1). We affirm.

FN1. The Honorable David S. Doty, United States District Judge for the District of Minnesota.

## I. BACKGROUND

On March 16, 1993, Minneapolis police officers made arrangements to purchase two ounces of cocaine base through a confidential informant. In arranging this transaction, a call was placed to a duplex on North 6th Street (6th Street Duplex) in Minneapolis. Surveillance officers observed Craig Cage and Charles Nichols arrive by car at the 6th Street Duplex. Minutes later, Cage and Nichols met with the officers' confidential informant to complete the transaction.

The officers arrested Cage and Nichols and recovered a pager from Cage that continued to activate. The officers determined that the telephone number coming into the pager originated from Room 216 of the Budgetel Motel. The officers proceeded to the motel and found that Severe and Howard were the registered occupants of Room 216. The officers asked if they could search the room. Both Severe and Howard consented to the search and signed consent-to-search forms. The officers discovered over $10,000 cash, army fatigues, and a plane ticket to Los Angeles. Based on the call from Cage's pager and the items recovered from Room 216, the officers arrested Severe and Howard.

***446** On March 17, 1993, officers executed a search warrant at an apartment located at 625 East 18th Street in Minneapolis. Avis Smith and Withers

lived in this apartment. The officers recovered cash, a gun with ammunition, several pagers, and a small quantity of cocaine base. Later that day, the officers executed another search warrant at the 6th Street Duplex and recovered 800 grams of cocaine base. The officers later arrested Carlena Wilson, who was the resident of the 6th Street Duplex.

Prior to trial, Withers pleaded guilty to a single count of possession with intent to distribute more than fifty grams of cocaine base. Severe's and Howard's consolidated jury trials commenced in August 1993. Wilson testified on behalf of the government regarding her relationship with Severe and Howard. In particular, Wilson testified that on March 16, 1993, Severe and Howard delivered a kilogram of "crack cocaine" that the officers later recovered during their March 17 search of her 6th Street Duplex. Wilson also testified that Severe and Howard had delivered another kilogram of cocaine base to her 6th Street Duplex about two weeks before the March 16 delivery.

Cage corroborated Wilson's testimony that Severe and Howard had brought the kilogram of cocaine base to the 6th Street Duplex on March 16, 1993. Cage testified that Severe and Howard broke down the cocaine base into ounce quantities using a digital scale. Cage testified that Nichols gave Howard over $10,000 cash. Finally, Nichols, a defense witness, testified on cross-examination that Severe and Howard had brought the cocaine base to Wilson's 6th Street Duplex.

The jury returned a verdict of guilty against Severe and Howard. The district court sentenced Severe to 292 months' imprisonment, Howard to 188 months' imprisonment, and Withers to 120 months' imprisonment. Severe, Howard, and Withers appealed.

## II. DISCUSSION

Severe argues that the district court improperly (1) determined that Severe and Howard voluntarily consented to the search of Room 216 of the Budgetel Motel, and (2) used prior uncounseled misdemeanors in calculating his criminal history score. Howard challenges (1) the district court's admission of Wilson's testimony based on Federal Rule of Evidence 404(b) (Rule 404(b)), and (2) the sufficiency of the evidence to support the jury's verdict. Finally, Withers challenges his sentence based on the constitutionality of the 100 to 1 disparity between the sentences for cocaine base and cocaine. We address these claims in turn.

### A. Severe's Conviction and Sentence

[1][2] To justify a consensual search, the government has the burden of proving that an individual voluntarily gave consent to search. United States v. Larson, 978 F.2d 1021, 1023 (8th Cir.1992). The issue of consent is a question of fact that requires consideration of the totality of the circumstances. United States v. Cortez, 935 F.2d 135, 142 (8th Cir.1991), cert. denied, --- U.S. ----, 112 S.Ct. 945, 117 L.Ed.2d 114 (1992). We review a district court's determination that a defendant voluntarily gave consent to search under the clearly erroneous standard. Id.

[3] Examining the totality of the circumstances, we conclude that the district court's determination that Severe voluntarily consented to the search of Room 216 was not clearly erroneous. Severe relies heavily on the fact that the officers informed him that if he and Howard refused consent, the officers would obtain a search warrant. Hearing Tr. at 117. That, however, is only one factor in the totality of the circumstances inquiry. See Larson, 978 F.2d at 1023 ("When a person consents to a search after officers state they will attempt to obtain a warrant if the person does not consent, the consent is not necessarily coerced."). The totality of the circumstances supports the district court's determination that Severe voluntarily gave consent.

First, the officers knocked on the door of Room 216 and identified themselves as law enforcement officials. Hearing Tr. at 96-97. The officers did not use force to enter Room 216; rather, they were invited into the room. ***447** Id. at 114. Severe and Howard were not put under arrest and were informed that they could refuse consent and were free to leave. Id. at 26, 97-98. Finally, Severe and Howard both read, considered, and signed a written consent form. Id. at 13, 99. We conclude that the district court's determination that Severe voluntarily consented to the search of Room 216 was not clearly erroneous. See Cortez, 935 F.2d at 142.

[4] Severe also claims that the district court erred when it considered three prior uncounseled

misdemeanor convictions when it determined his criminal history score. At sentencing, Severe also sought to attack collaterally those misdemeanor convictions. In Nichols v. United States, the Supreme Court held that a district court properly could consider prior uncounseled misdemeanors in determining a defendant's criminal history score. --- U.S. ----, ----, 114 S.Ct. 1921, 1928, 128 L.Ed.2d 745 (1994); accord United States v. Thomas, 20 F.3d 817, 823 (8th Cir.1994) (en banc). Further, in United States v. Hewitt, this court held that a district court should include a defendant's prior convictions in his criminal history score unless the defendant demonstrates that the prior convictions were "previously ruled constitutionally invalid." 942 F.2d 1270, 1276 (8th Cir.1991). Nichols and Hewitt foreclose Severe's claim.

B. Howard's Conviction

Howard argues that the district court improperly admitted Wilson's testimony in violation of the **notice** requirements of Rule **404(b)**. We review a district court's decision to admit evidence for an abuse of discretion. United States v. Davis, 882 F.2d 1334, 1343 (8th Cir.1989), cert. denied, 494 U.S. 1027, 110 S.Ct. 1472, 108 L.Ed.2d 610 (1990). Rule **404(b)** allows admission of evidence of other crimes, wrongs, or bad acts for purposes "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable **notice** in advance of trial." Fed.R.Evid. **404(b)** (emphasis added). However, "[w]here the evidence of an act and the evidence of a crime charged are inextricably intertwined, the act is not extrinsic and Rule **404(b)** is not implicated." United States v. DeLuna, 763 F.2d 897, 913 (8th Cir.), cert. denied, 474 U.S. 980, 106 S.Ct. 382, 88 L.Ed.2d 336 (1985); see also United States v. Rankin, 902 F.2d 1344, 1346 (8th Cir.1990).

[5][6] We conclude that the district court properly admitted Wilson's testimony because that testimony concerned not prior acts, but acts intertwined with the conspiracy charged. The indictment charged Howard with conspiracy to possess with intent to distribute cocaine base "continuing to on or about the 17th day of March, 1993." Severe's App. at 1. [FN2] Wilson, who was named as a coconspirator, testified that Howard and Severe delivered a kilogram of cocaine base to her residence in the beginning of March 1993. That evidence did not implicate Rule 404(b) because it tends to prove whether a conspiracy to distribute cocaine existed, and therefore is inextricably intertwined with the conspiracy charged. See DeLuna, 763 F.2d at 913; see also Rankin, 902 F.2d at 1346. Thus, we reject Howard's Rule 404(b) claim.

FN2. We have considered Howard's claim made at oral argument that the indictment was impermissibly vague because Wilson's testimony included events that occurred two weeks prior to the date listed in the indictment, and we conclude that it lacks merit. See United States v. Turner, 975 F.2d 490, 494 (8th Cir.1992), cert. denied, --- U.S. ----, 113 S.Ct. 1053, 122 L.Ed.2d 360 (1993); see also United States v. Hallock, 941 F.2d 36, 40-41 (1st Cir.1991) (holding that absence of a statement of precise dates of a conspiracy does not necessarily render indictment impermissibly vague). Howard had notice that the government would present evidence of the earlier delivery of the cocaine base. Thus, any variance did not affect Howard's substantial rights or cause him actual prejudice. See United States v. Valentine, 984 F.2d 906, 911 (8th Cir.1993).

[7] Next, Howard argues that there was insufficient evidence to support the jury's verdict. In reviewing a jury verdict for sufficiency, we view the evidence in the light most favorable to the jury verdict; we accept all reasonable inferences supporting the conviction; and we must affirm the jury's verdict if substantial evidence supports it. United ***448** States v. Gaines, 969 F.2d 692, 696 (8th Cir.1992). To establish a conspiracy to distribute narcotics, the government need not establish an overt act, but simply must prove that the defendants entered into an agreement to distribute narcotics. Id.

[8] Applying this deferential standard, we conclude that substantial evidence supports the jury's verdict. At trial, Cage testified that (1) Howard and Severe brought a kilogram of cocaine base to the 6th Street Duplex; (2) Howard and Severe broke the cocaine base into one-ounce quantities using an electronic scale; and (3) Nichols then gave Howard over $10,000 cash. The pager recovered from Cage led police to Room 216 of the Budgetel Motel. Howard and Severe, the residents

of that room, consented to a search, and the officers discovered over $10,000 cash. On cross-examination, Nichols, a defense witness, admitted that Howard and Severe had delivered the cocaine base that was found in the 6th Street Duplex. We conclude that substantial evidence supports the jury's verdict.

C. Withers' Sentence

Finally, Withers challenges his mandatory minimum sentence for violation of 21 U.S.C. § 841(a)(1) because the 100 to 1 disparity between violations involving cocaine base and cocaine violates due process and denies him equal protection.

[9] Withers, however, entered into a plea agreement in which he pleaded guilty to possession with intent to distribute in excess of fifty grams of cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A). Plea Agreement at 2. Withers acknowledged in the plea agreement that the charge to which he had pleaded guilty had a minimum penalty of ten years' imprisonment. Id. In return, the government dropped the charges against Withers for (1) conspiracy to possess with intent to distribute more than one kilogram of cocaine base, and (2) using and carrying a firearm in relation to a drug trafficking crime. Id. " '[A] defendant who explicitly and voluntarily exposes himself to a specific sentence may not challenge that punishment on appeal.' " United States v. Durham, 963 F.2d 185, 187 (8th Cir.) (quoting United States v. Fritsch, 891 F.2d 667, 668 (8th Cir.1989)), cert. denied, --- U.S. ----, 113 S.Ct. 662, 121 L.Ed.2d 587 (1992); accord United States v. Livingston, 1 F.3d 723, 725 (8th Cir.1993). Therefore, we conclude that Withers has waived the right to challenge his sentence.

III. CONCLUSION

For the foregoing reasons, we affirm the judgments and sentences of the district court.

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18 Fed. R. Evid. Serv. 1355
**(Cite as: 766 F.2d 1426)**

UNITED STATES of America, Plaintiff-Appellee,
v.
Graham Lee KENDALL, Defendant-Appellant.
No. 83-1908.
United States Court of Appeals,
Tenth Circuit.
July 3, 1985.

Defendant was convicted in the United States District Court for the Western District of Oklahoma, Ralph G. Thompson, J., of conspiracy to possess marijuana with intent to distribute and one count of violating the Traffic Act, and he appealed. The Court of Appeals, Seymour, Circuit Judge, held that: (1) evidence supported convictions; (2) other acts evidence was admissible; and (3) pretrial disclosure by the government of the other acts evidence was not required.

Affirmed.





much larger conspiracy to fix horse races. The defendant had no other connection with any members of the conspiracy and was acquitted of the conspiracy charge. The court, in refusing to characterize this conduct as engaging in an illegal business enterprise, emphasized the one bet and the absence of any other participation by the defendant. Clearly, such conduct is more accurately described as casual, or sporadic, and thus not within the scope of the Travel Act.

IV.
Evidence of Other Wrongs

Kendall next argues that the trial court erred in admitting evidence of his alleged ***1436** earlier crimes, wrongs, or acts. He contends that such evidence was not admissible to prove his character and did not come within any purpose permissible under Fed.R.Evid. 404(b); that even if relevant, the value of such evidence was substantially outweighed by the danger of unfair prejudice, citing Fed.R.Evid. 403; and that the admission of such prejudicial evidence was an abuse of discretion requiring a new trial. Because the evidence was crucial to the Government's case against Kendall and because this claim raises serious evidentiary issues, we review the evidence and the actions of the trial court in detail.

[12][13] Rule 404(b) provides that "[e]vidence of other crimes, wrongs, or

acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." [FN5] Such evidence may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Id.; United States v. Biswell, 700 F.2d 1310, 1317 (10th Cir.1983); United States v. Nolan, 551 F.2d 266, 270 (10th Cir.), cert. denied, 434 U.S. 904, 98 S.Ct. 302, 54 L.Ed.2d 191 (1977); United States v. Freeman, 514 F.2d 1184, 1189-90 (10th Cir.1975); United States v. Parker, 469 F.2d 884, 889 (10th Cir.1972). In Nolan, we enumerated some guidelines to test whether evidence of such crimes or acts should be admitted. The evidence (1) must tend to establish intent, knowledge, motive, identity, or absence of mistake or accident; (2) must also be so related to the charged offense that it serves to establish intent, knowledge, motive, identity, or absence of mistake or accident; and (3) must have real probative value, not just possible worth. 551 F.2d at 271. The uncharged crime or act must also be close in time to the crime charged. Id. at 272. See also United States v. Burkhart, 458 F.2d 201, 204 (10th Cir.1972) (en banc). This court has previously stated:

FN5. To fall within the scope of 404(b), an act need not be criminal, so long as it tends to impugn a defendant's character. United States v. Terebecki, 692 F.2d 1345, 1348 n. 2 (11th Cir.1982); United States v.





Beechum, 582 F.2d 898, 902 n. 1 (5th Cir.1978), cert. denied, 440 U.S. 920, 99 S.Ct. 1244, 59 L.Ed.2d 472 (1979); United States v. Cooper, 577 F.2d 1079, 1087-88 (6th Cir.1978), cert. denied, 439 U.S. 868, 99 S.Ct. 196, 58 L.Ed.2d 179 (1978).

"[E]ven relevant evidence should be excluded under Rule 403 'if its probative value is substantially outweighed by the danger of unfair prejudice.' While trial courts have discretion in striking the balance between probative value and unfair prejudice, ... they must be particularly sensitive to the potential prejudice that is always inherent in evidence of an accused's prior uncharged crimes or wrongs.... Although Rule 403 provides broad umbrella protection from unfair or undue prejudice, the specific provision in Rule 404(a) prohibiting evidence of uncharged crimes to show bad character or tendencies toward criminality not only reflects the special danger of other crimes evidence but should alert trial courts to be particularly careful in admitting such evidence."
United States v. Carleo, 576 F.2d 846, 849 (10th Cir.), cert. denied, 439 U.S. 850, 99 S.Ct. 153, 58 L.Ed.2d 152 (1978) (citations omitted).
[14][15] In Biswell, we reviewed the problems associated with Rule 404(b) evidence and the standards governing its use. In an effort to ensure that such evidence is not used in an unfair or impermissible manner, we held that where

evidence is offered under Rule 404(b), the Government bears the burden of showing how the proffered evidence is relevant to one or more issues in the case. 700 F.2d at 1317. The Biswell standard is clear. The Government must articulate precisely the evidentiary hypothesis by which a fact of consequence may be inferred from the evidence of other acts. In addition, the trial court must specifically identify the purpose for which such evidence is offered and a broad statement merely invoking or restating Rule 404(b) will not suffice. A specific articulation of the relevant purpose and specific inferences to be drawn from each proffer of evidence of other acts will enable the trial ***1437** court to more accurately make an informed decision and weigh the probative value of such evidence against the risks of prejudice specified in Rule 403. This requirement is an attempt to ensure that a decision to admit or exclude be made only after issues and reasons are exposed and clearly stated. See id. at 1317 n. 5. In addition, specific and clear reasoning and findings in the trial record will greatly aid an appellate court in its review of these evidentiary issues.

Before trial, Kendall sought discovery of evidence of other crimes, wrongs, or bad acts which the Government intended to present as evidence at trial. The trial court denied Kendall's request that the Government be ordered to produce such evidence before trial. The court, however, did enter a pretrial order prohibiting the Government from offering such evidence without prior court





approval. The order stated, in pertinent part:

"The evidence here in dispute is governed by the provisions of Rule 404, Federal Rules of Evidence. While the government states that it does not know whether it will use such evidence, it is clear that the potential for prejudice by the improper admission of such evidence is sufficient to require the Court to carefully consider the reasons for which the evidence would be offered.

Accordingly, counsel for the government is prohibited from offering any evidence of prior or subsequent crimes, wrongs or bad acts, not charged in the indictment, without first informing the Court and counsel for the defense of the specific evidence to be offered so that the Court may consider the arguments of counsel, outside the presence of the jury, regarding the admissibility of said evidence."

Rec., vol. II, at 356.

[16] Kendall claims the first error occurred when, in direct contravention of the pretrial order, the Government elicited testimony concerning an earlier sale by Kendall of an airplane subsequently used in drug smuggling. On direct examination, Geittmann was asked about his involvement in a prior marijuana smuggling venture that resulted in his conviction in 1975. When asked the identity of the pilot and the source of the airplane used in that venture, Geittmann responded that he had financed the purchase through the pilot, and that the pilot had purchased the airplane from Kendall. Defense counsel

promptly objected and moved for a mistrial. This motion was denied, but the trial court admonished the Government and, at the request of defense counsel, instructed the jury to disregard the testimony. The court agreed that the Government had violated the pretrial order, but concluded that the violation was an oversight that under the circumstances did not require a mistrial. Any potential prejudicial effect was minimized by the court's proper and timely admonition that the jurors disregard the testimony. There is no evidence that the Government's actions were more than an oversight and Kendall does not allege that the Government acted in bad faith. Reviewing the record as a whole, we conclude that the trial court correctly refused to declare a mistrial.

Kendall next argues that the court erred in admitting evidence of prior airplane sales by Kendall to Geittmann. Later in Geittmann's direct examination, after the Government complied with the pretrial order, Geittmann testified about two aircraft that he purchased from Kendall in 1982. Over defense objection, he testified that during the sale of the first aircraft, Kendall showed Geittmann that the aircraft had been "plumbed" to accommodate extra fuel, and that Kendall had personally demonstrated the plane and this special fuel feature to him. Finally, he testified that two weeks after this first sale he traded in the plane for a second identical model because "[it] was a little better outfitted ... it had 350 gallons of fuel built into it





which would enable me to go just about anyplace I wanted to go in Central, South America." Rec., vol. X, at 584.

[17] Kendall argues that this is not Rule 404(b) evidence. At trial, the Government ***1438** contended that the evidence of these sales and the manner in which the special fuel system was presented by Kendall was relevant to show that Kendall had dealt with Geittmann before meeting Callihan; that Kendall knew Geittmann and the nature of his business; and that the plane had been prepared and could be used for smuggling purposes. The trial court concluded that these reasons justified admission of the evidence under Rule 404(b). We agree that the evidence is within the scope of Rule 404(b) and that the Government made a sufficient showing of the purpose for, and inferences to be drawn from, the evidence. The sales were close in time to Kendall's introduction of Callihan to Geittmann, and the testimony concerning the two sales had real probative value. The evidence is relevant to whether Kendall knew of Geittmann's activities and needs, from which a jury could infer the critical element of Kendall's intent and knowledge in introducing Callihan to Geittmann. It thus meets the requirements for Rule 404(b) evidence set forth in Nolan. In addition, the Government's explanation and the trial court's findings in the record were sufficiently explicit and clear within the meaning of Biswell. The trial court did not err in admitting this evidence.

Kendall next argues that the court erred in admitting evidence of Kendall's

request that Geittmann check the status of Callihan's plane in Mexico. Over defense counsel's objection, Geittmann testified that in July or August 1982, Kendall asked him to check the airplane's tail registration numbers in Mexico. Geittmann stated that "[h]e told me the aircraft had been fired upon on one of the beaches south of Mazatlan. They were down there to pick up some marijuana. And he wanted to know if the plane was hot, if the Mexican police had gotten the numbers off the tail and if they were looking for it." Rec., vol. X, at 606. The Government complied with the pretrial order and offered its reasons for admission prior to the testimony. The Government claimed that "it shows knowledge, aiding and assisting by Mr. Kendall of Mr. Callihan in this particular venture, and that if this plane was hot, then it could not fly into Cancun for this particular venture". Rec., vol. X, at 603. The trial court agreed that the evidence was within Rule 404(b), and while acknowledging that the evidence might be damaging to Kendall, nevertheless found that it was not sufficiently prejudicial to require exclusion. The court also gave an appropriate limiting instruction to the jury.

[18] On appeal, Kendall argues that this evidence did not meet the Rule 404(b) foundation requirements and that any probative value was outweighed by the risk of substantial prejudice. We disagree. The conversation took place shortly before Kendall introduced Callihan to Geittmann. The evidence is relevant to prove that Kendall knew about Callihan's and Carr's smuggling





activities and plans; that Kendall aided and assisted them in preparing for and furthering these plans; that Kendall knew how they were using their airplane; and that Kendall knew of both Geittmann's influence in Mexico and his involvement in smuggling activities. This proof is relevant to the issue of Kendall's knowledge of, and participation in, the conspiracies charged. The evidence meets the requirements of Nolan. The Government's explanation and the trial court's findings and actions were sufficiently explicit and clear to comply with Biswell.

[19] Kendall next claims that error occurred when the Government asked Geittmann about a conversation with Kendall concerning an aircraft that Kendall owned and that had been seized in Mexico. Kendall argues that this evidence of prior acts is impermissible character evidence, does not fall within Rule 404(b), and was substantially prejudicial. We are not persuaded. Earlier, on direct examination, Geittmann had testified about a prior business relationship with Kendall, in which Geittmann had assisted Kendall in trying to recover a C-46 aircraft from Mexico. This testimony occurred at a point in the trial when the prosecution was attempting to establish the extent of prior dealings between ***1439** Kendall and Geittmann. In describing his efforts to free the plane, Geittmann stated, "I'm sure it's still down there where it had been seized or where it had been taken to after it was seized." Rec., vol. X, at 607. Defense counsel did not object to this testimony.

On redirect examination, Geittmann elaborated on the details of this seizure, and testified that Kendall told him the plane had been seized because it was carrying contraband electronics from the United States to Mexico. Although Kendall now challenges this testimony, he did not object at trial. Furthermore, Kendall's defense counsel, on recross-examination of Geittmann, persisted in discussing and explaining the events surrounding the seizure, stressing that the activities, while illegal in Mexico, were not illegal in the United States. Later, on direct examination, Kendall himself testified that the plane had violated Mexican law and had been confiscated, and that he tried to use Geittmann to recover it. On cross-examination of Kendall, the Government, over objection, attempted to inquire further into the events surrounding the aircraft's seizure. Kendall admitted that he knew that the aircraft was being used for illegal purposes, that he and Geittmann had attempted to recover the plane by bribing certain officials, and that he had relied on Geittmann to make the bribe payments.

Kendall's own testimony about the seizure on direct and cross-examination does not pose a Rule 404(b) problem. Through his counsel, Kendall raised the issue of his own knowledge of, and participation in, the events surrounding the contraband seizure of the plane. Having thus raised this issue, he cannot complain now about the Government's cross-examination in this area.

The question is whether Geittmann's direct examination testimony concerning





these events is admissible under Rule 404(b). The trial court concluded that this evidence qualified under Rule 404(b) as relevant to show Kendall's motive and lack of mistake or accident. The events surrounding the aircraft seizure occurred shortly before Kendall introduced Callihan to Geittmann. This evidence showed that Kendall, faced with the loss of a plane for carrying contraband, chose to enlist the aid of Geittmann. There was evidence introduced to show Geittmann's influential contacts with certain Mexican officials and his ability to engage in illicit activities in Mexico. This ability and influence was crucial to Geittmann's success as a drug smuggler. The extent to which Kendall knew of and relied on Geittmann's illicit influence is relevant to the issues of Kendall's knowledge of Geittmann's activities, Kendall's motives for dealing with and later assisting Geittmann, and the lack of mistake or accident by Kendall when he introduced Callihan to Geittmann. As we stated earlier, these issues were central to the conspiracy charges against Kendall. The requirements of Nolan and Biswell were met.

There was also no abuse of discretion when the trial court concluded that the evidence was not so prejudicial as to bar its admission under Rule 403. While Geittmann's testimony was certainly damaging to Kendall, its probative value sufficiently outweighed any potential prejudicial impact. Kendall's defense counsel chose to pursue the inquiry and focus attention on the seizure while examining both Geittmann and Kendall, and Kendall was acquitted on the charge

of conspiring to import marijuana. We are not persuaded that Geittmann's initial testimony was so prejudicial that its admission constitutes reversible error. The evidence was properly admitted.

[20] Finally, Kendall claims that the prosecution committed reversible error in its closing argument when it referred to the aircraft seizure in Mexico as being related to "smuggling." Rec., vol. XII, at 955. The trial court overruled defense counsel's objection that the term "smuggling" had no foundation in the record. On appeal, Kendall argues that this comment caused incurable damage and was highly prejudicial. We disagree. While Geittmann and Kendall never used the term ***1440** "smuggling" when describing the aircraft seizure in Mexico, there was ample testimony by both that the plane was carrying contraband into Mexico illegally. The prosecution's use of the term "smuggling" was thus based on a sufficient evidentiary foundation in the record. See United States v. Perez, 493 F.2d 1339, 1343 (10th Cir.1974); cf. Marks v. United States, 260 F.2d 377, 383 (10th Cir.1958), cert. denied, 358 U.S. 929, 79 S.Ct. 315, 3 L.Ed.2d 302 (1959).

[21] Moreover, not all improper comments require a new trial or reversal on appeal. It is only when a remark could have influenced the jury's verdict and the trial court failed to take appropriate steps to remove it from the jury's consideration that there is reversible error. Devine v. United States, 403 F.2d 93, 96 (10th Cir.1968), cert. denied, 394 U.S. 1003, 89 S.Ct. 1599, 22

UNITED STATES of America, Plaintiff, Appellee,
v.
Hector H. TUESTA-TORO, Defendant, Appellant.

No. 93-2182.

United States Court of Appeals,
First Circuit.

Heard June 7, 1994.

Decided July 25, 1994.

Defendant was convicted in the United States District Court for the District of Puerto Rico, Hector M. Laffitte, J., of possession of cocaine with intent to distribute, carrying firearm during drug trafficking offense, and using communication facility to facilitate drug trafficking scheme. Defendant appealed. The Court of Appeals, Cyr, Circuit Judge, held that: (1) defendant's omnibus pretrial motion was not sufficient to trigger government's responsibility to disclose "other wrongful acts" evidence as precondition to its use at trial; (2) admission of defendant's prior drug dealing was not plain error; (3) evidence supported conviction on use of communication facility counts; (4) admission of hearsay testimony was harmless error; and (5) evidence supported sentence enhancement for managerial role in offense.

Affirmed.

[1] CRIMINAL LAW ⚿ 374
110k374
In order to trigger government's responsibility to disclose "other wrongful acts" evidence as precondition to its use at trial, defendant's pretrial request, at minimum, must be sufficiently clear and particular, in objective sense, to alert prosecution that defense is invoking its specific right to pretrial notification of general nature of "other wrongful acts" evidence government intends to introduce. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[2] CRIMINAL LAW ⚿ 374
110k374
Defendant's omnibus pretrial motion seeking "confessions, admissions and statements" that "in any way exculpate, inculpate or refer to the defendant" was not sufficient to trigger government's responsibility to disclose "other wrongful acts" evidence as precondition to its use at trial; motion made no discernible reference to "other wrongful acts" evidence and did not request mere notification of general nature of any such evidence. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[3] CRIMINAL LAW ⚿ 1036.1(8)
110k1036.1(8)
Rulings regarding admissibility of "other wrongful acts" evidence are normally reviewed for abuse of discretion, but, where defendant makes no contemporaneous objection, Court of Appeals reviews for plain error and will reverse only if error seriously affected fundamental fairness and basic integrity of proceedings. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[3] CRIMINAL LAW ⚿ 1153(1)
110k1153(1)
Rulings regarding admissibility of "other wrongful acts" evidence are normally reviewed for abuse of discretion, but, where defendant makes no contemporaneous objection, Court of Appeals reviews for plain error and will reverse only if error seriously affected fundamental fairness and basic integrity of proceedings. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[4] CRIMINAL LAW ⚿ 1036.1(8)
110k1036.1(8)
Admission of evidence of defendant's prior drug dealings was not plain error; evidence was admitted for limited purpose of refuting defendant's "mere presence" defense, that he was present by mistake at scene of drug transaction giving rise to charges at issue, and district court minimized any potential for prejudice with contemporaneous limiting instruction, which it reiterated in final charge. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[5] TELECOMMUNICATIONS ⚿ 363
372k363
Conviction for two counts of use of communication facility to facilitate felonious drug offense was supported by codefendant's testimony that he telephoned defendant twice to arrange time and place at which cocaine transaction would occur, as well as price and quantity of cocaine. Comprehensive Drug Abuse Prevention and Control

Act of 1970, § 403(b), 21 U.S.C.A. § 843(b).

[6] CRIMINAL LAW ⚿ 419(1.5)
110k419(1.5)
Drug enforcement agent's testimony that during debriefing session confidential informant stated that codefendant acted in behalf of defendant in setting up cocaine deals was hearsay; testimony was offered for sole purpose of proving truth of matter asserted, that is, defendant's role in offense, rather than as background information. Fed.Rules Evid.Rule 801, 28 U.S.C.A.

[7] CRIMINAL LAW ⚿ 1169.2(6)
110k1169.2(6)
Error in admitting drug enforcement agent's hearsay testimony that during debriefing session confidential informant stated that codefendant acted in behalf of defendant in setting up cocaine deals was harmless; testimony was cumulative of codefendant's testimony on same matter, and independent admissible evidence confirmed that defendant determined conditions of sale, supplied cocaine, and witnessed cocaine exchange from nearby while in possession of loaded firearm.

[8] CRIMINAL LAW ⚿ 1134(3)
110k1134(3)
Court of Appeals addresses ineffectiveness of counsel claims on direct appeal only if critical facts are not in dispute and sufficiently developed record exists. U.S.C.A. Const.Amend. 6.

[9] CRIMINAL LAW ⚿ 997.5
110k997.5
Ordinarily, collateral proceeding to vacate sentence is proper forum for fact-bound ineffective assistance of counsel claims. 28 U.S.C.A. § 2255; U.S.C.A. Const.Amend. 6.

[10] CRIMINAL LAW ⚿ 1035(7)
110k1035(7)
Court of Appeals would not consider ineffective assistance of counsel claim raised on direct appeal; defendant's contention that trial counsel inexplicably failed to discover identity of confidential informant was not raised in district court and was sufficiently fact-bound to preclude effective review on present record. U.S.C.A. Const.Amend. 6.

[10] CRIMINAL LAW ⚿ 1119(1)
110k1119(1)
Court of Appeals would not consider ineffective assistance of counsel claim raised on direct appeal; defendant's contention that trial counsel inexplicably failed to discover identity of confidential informant was not raised in district court and was sufficiently fact-bound to preclude effective review on present record. U.S.C.A. Const.Amend. 6.

[11] CRIMINAL LAW ⚿ 1037.1(1)
110k1037.1(1)
In absence of contemporaneous objection, Court of Appeals reviews allegations of prosecutorial misconduct for plain error and will overturn jury verdict only if government's closing argument so "poisoned the well" that it is likely that verdict was affected.

[12] CRIMINAL LAW ⚿ 1037.1(2)
110k1037.1(2)
Prosecutor's statement in closing argument that "when a person repents and wants to cooperate, we need to present the testimony to the jury so that the jury has the facts at hand" was not plain error, notwithstanding contention that prosecutor improperly vouched for codefendant's credibility; any vouching which might have occurred was so faint as to be virtually indiscernible even to trained ear, and, thus, there was no likelihood that verdicts were tainted by alleged prosecutorial misconduct.

[13] CRIMINAL LAW ⚿ 1252
110k1252
District court could deny sentence reduction for acceptance of responsibility, notwithstanding contention that court did not afford defendant adequate opportunity to evince remorse; defendant continued to assert his innocence during postconviction interview with probation officer, district court twice invited defendant at sentencing to accept responsibility by pointing out that sentencing hearing would be his last opportunity to do so, and, though defendant asked court for leniency, he said nothing which might be taken to indicate remorse. U.S.S.G. § 3E1.1, 18 U.S.C.A.App.

[14] CRIMINAL LAW ⚿ 1313(2)
110k1313(2)
For sentence enhancement purposes, defendant's role in offense must be established by preponderance of evidence. U.S.S.G. § 3B1.1, 18 U.S.C.A.App.

[15] CRIMINAL LAW ⚿ 1158(1)
110k1158(1)
Sentencing court's factual findings are reviewed only for clear error.

[16] CRIMINAL LAW ⚿ 1251
110k1251
Exercise of decision-making authority, degree of participation in planning or organizing offense, and degree of control and authority defendant exercised over others are among factors to be considered in determining managerial role in offense for sentence enhancement purposes. U.S.S.G. § 3B1.1, 18 U.S.C.A.App.

[17] CRIMINAL LAW ⚿ 1251
110k1251
Finding, for purposes of sentence enhancement, that defendant performed managerial role in drug trafficking offense was supported by evidence that codefendant acted at defendant's direction in setting time and place of transaction and price and quantity of cocaine and by evidence of unusual purity of cocaine, which was 98% pure, which defendant supplied to codefendant. U.S.S.G. § 3B1.1, 18 U.S.C.A.App.

***773** Kevin G. Little, Los Angeles, CA, for appellant.

Jose A. Quiles Espinosa, Sr. Litigation Counsel, Hato Rey, PR, with whom Guillermo Gil, U.S. Atty., Washington, DC, and Warren Vazquez, Asst. U.S. Atty., Hato Rey, PR, were on brief, for appellee.

Before SELYA, CYR and BOUDIN, Circuit Judges.

CYR, Circuit Judge.

Following a three-day trial, a jury returned guilty verdicts on four drug-related charges against defendant-appellant Hector H. Tuesta Toro ("Tuesta"), who was sentenced to serve 128 months in prison, and this appeal ensued. Finding no reversible error, we affirm.

## I
## FACTS

We set out the salient facts in the light most favorable to the verdicts. United States v. Tejeda, 974 F.2d 210, 212 (1st Cir.1992). On September 2, 1992, after receiving information from a confidential informant ("CI") that Tuesta and codefendant Carlos Martinez Diaz ("Martinez") were distributing large quantities of cocaine in the San Juan metropolitan area, the United States Drug Enforcement Administration ("DEA") recorded telephone conversations during which Martinez agreed to sell the CI five kilograms of cocaine at $16,500 per kilogram and identified Tuesta as his source. Martinez in turn spoke with Tuesta by cellular phone in order to establish the price and quantity of the cocaine to be sold to the CI and the site of the drug transaction, but then lost phone contact with Tuesta.

The next day Martinez advised the CI by phone that a one-kilogram transaction (rather than the five-kilogram transaction discussed the day before) would take place that afternoon, but that Tuesta did not wish to be seen by the buyer. Martinez reestablished telephone contact with Tuesta at 2:40 in the afternoon. En route to the scene of the transaction, Martinez noted that Tuesta was carrying a gun and more than one kilogram of cocaine. At Tuesta's instruction, Martinez parked their vehicle so that Tuesta could witness the drug deal without being observed. Martinez then exited the car and delivered the cocaine to the CI, who was accompanied by an undercover DEA agent.

Shortly thereafter, Martinez and Tuesta were arrested and charged with possessing cocaine, with intent to distribute, see 21 U.S.C. § 841(a)(1), 18 U.S.C. § 2; carrying a firearm during and in relation to a drug trafficking offense, see id. §§ 942(c)(1), 2; and with two counts of using a communication facility to facilitate a drug trafficking offense, see 21 U.S.C. § 843(b), 18 U.S.C. § 2. Martinez eventually entered into a plea agreement with the government and testified against Tuesta at trial. Following Tuesta's conviction on all counts, he was sentenced to 128 months' imprisonment.

## II
## DISCUSSION

### A. Evidence Rule 404(b)

Prior to trial, Tuesta filed an omnibus motion to

compel discovery which included the following request:

> [a]ll confessions, admissions and statements to the United States Attorney, or any law enforcement agent, made by any other person, whether indicted or not, that in any way exculpate, inculpate or refer to the defendant, whether or not such confessions, admissions and statements have been reduced to writing.

(Emphasis added.) The motion made no mention of Rule 404(b) or "other wrongful acts" evidence.

The government responded that it intended to pursue an "open file" discovery policy and that only government agents would be called to testify against Tuesta. Following the government's response, however, Martinez entered into a plea agreement which provided that he would testify against Tuesta. ***774** Except as discussed below, Tuesta did not claim surprise.

At trial, the defense objected when the government asked Martinez how he knew Tuesta. The government responded that Martinez would testify to prior drug dealings with Tuesta. Tuesta objected on the ground that he had not been afforded pretrial notification of the government's intention to use Rule 404(b) evidence. The court admitted the evidence for the limited purpose of refuting Tuesta's "mere presence" defense, see United States v. Hernandez, 995 F.2d 307, 314 (1st Cir.), cert. denied, --- U.S. ----, 114 S.Ct. 407, 126 L.Ed.2d 354 (1993), after ruling that its probative value was not substantially outweighed by the danger of unfair prejudice, see Fed.R.Evid. 403. The court, acting sua sponte, gave the jury a contemporaneous limiting instruction.

1. The Notification Requirement of Rule 404(b)

Tuesta first contends that the "other wrongful acts" evidence introduced through codefendant Martinez should have been excluded because the government failed to provide the pretrial notification required by Evidence Rule 404(b) in response to Tuesta's omnibus motion for discovery. The government maintains that Tuesta made no cognizable Rule 404(b) request prior to trial.

[1] The question presented is one of first impression: how particular must a pretrial discovery request be in order to trigger the government's responsibility to disclose Rule 404(b) evidence as a precondition to its use at trial? Rule 404(b), as amended in 1991, provides in relevant part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial ... of the general nature of any such evidence it intends to introduce at trial.

Fed.R.Evid. 404(b) (emphasis added). As the rule speaks only of a "request by the accused" and the duty of the prosecution to provide reasonable pretrial notification "of the general nature of any such evidence it intends to introduce at trial," id., we turn elsewhere for guidance.

The advisory committee's notes to the 1991 amendment define the responsibilities of the respective parties in requesting and affording pretrial notification under Rule 404(b): "The amendment to Rule 404(b).... expects that counsel for ... the defense ... will submit the necessary request ... in a reasonable and timely manner." Fed.R.Evid. 404(b) advisory committee's notes (1991 amendment) (emphasis added). The advisory committee note simply confirms the requirement implicit in the rule itself--that the defense must submit, "in a reasonable and timely manner," its request for pretrial notification of the general nature of any evidence of other crimes, wrongs, or acts the government intends to introduce at trial for purposes of proving "motive, intent, preparation, plan, knowledge, identity or absence of mistake or accident," Fed.R.Evid. 404(b). We think it beyond question, therefore, that a "reasonable" request for notification, at a minimum, must be sufficiently clear and particular, in an objective sense, fairly to alert the prosecution that the defense is requesting pretrial notification of the general nature of any Rule 404(b) evidence the prosecution intends to introduce.

[2] An overbroad pretrial request, like the present--for "confessions, admissions and statements ... that in any way exculpate, inculpate or refer to the defendant"--is insufficiently specific at the very

least, if not misleading. Cf. United States v. Carrasquillo-Plaza, 873 F.2d 10, 12 (1st Cir.1989) (noting that overbroad discovery requests, absent a specific showing of materiality, do not afford the prosecution proper notice in analogous Rule 16 context); United States v. Hemmer, 729 F.2d 10, 14-15 (1st Cir.) (same), cert. denied, 467 U.S. 1218, 104 S.Ct. 2666, 81 L.Ed.2d 371 (1984). The omnibus motion submitted by Tuesta made no discernible reference to anything resembling "other ***775** wrongful acts" evidence nor did it request mere notification of the general nature of any such evidence. Rather, it demanded outright pretrial disclosure of statements in any form, referring to the defendant in any way, without regard to their admissibility or the government's intention to introduce them. [FN1] See Fed.R.Evid. 404(b); cf., United States v. Williams, 792 F.Supp. 1120, 1133 (S.D.Ind.1992) (notification required in response to detailed request reciting text of Rule 404(b)); United States v. Alex, 791 F.Supp. 723, 728 (N.D.Ill.1992) (similar; request specifically referencing Rule 404(b)).

> FN1. As a further condition precedent to the government's duty, we note that Rule 404(b) seemingly requires pretrial notification only of "other wrongful acts" evidence which the government presently intends, as of the time the government responds to the request, to introduce at trial. The present appeal neither requires that we determine the point nor consider its ramifications.

Accordingly, at a minimum the defense must present a timely request sufficiently clear and particular, in an objective sense, to fairly alert the prosecution that the defense is invoking its specific right to pretrial notification of the general nature of all Rule 404(b) evidence the prosecution intends to introduce at trial. The rule we describe will bring pretrial practice under Rule 404(b) in line with circuit precedent governing the prosecution's duty to provide discovery material under Federal Rule of Criminal Procedure 16. Cf. Fed.R.Evid. 404(b) advisory committee's notes (1991 amendment) (noting that amended rule "places Rule 404(b) in the mainstream with notice and disclosure provisions in other rules of evidence" but was not intended to impose on government a greater disclosure burden than "currently ... required ... under [Fed.R.Crim.P.] 16") (emphasis added). See also supra note 1.

2. Admission of 404(b) Evidence at Trial

[3] Next, Tuesta contends that it was reversible error to admit the Martinez testimony to rebut Tuesta's "mere presence" defense. These evidentiary rulings normally are reviewed for abuse of discretion. United States v. Figueroa, 976 F.2d 1446, 1454 (1st Cir.1992), cert. denied, --- U.S. ---, 113 S.Ct. 1346, 122 L.Ed.2d 728 (1993). As Tuesta made no contemporaneous objection, however, we review for "plain error," id. at 1453, and will reverse only if the error "seriously affect[ed] the fundamental fairness and basic integrity of the proceedings," United States v. Carty, 993 F.2d 1005, 1012 n. 9 (1st Cir.1993).

[4] A Rule 404(b) proffer must undergo a two-step inquiry:

> First, under the "absolute bar" of Rule 404(b), the evidence is inadmissible if relevant solely to show the defendant's character or propensity for criminal conduct; it must have some "special relevance" to a material issue such as motive, opportunity, intent, preparation, plan or knowledge. Second, under Rule 403, the trial court must satisfy itself that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice, confusion or undue delay.

Id. at 1011 (citations omitted). The district court admitted the Martinez testimony relating to prior drug deals with Tuesta for the limited purpose of refuting Tuesta's "mere presence" defense that he was at the drug scene by "mistake." Fed.R.Evid. 404(b) (evidence admissible to prove, inter alia, knowledge, intent, absence of mistake); Carty, 993 F.2d at 1011 (prior drug-dealing evidence admitted where defendant raised "mere presence" defense); United States v. Agudelo, 988 F.2d 285, 287 (1st Cir.1993) (same). Further, after the district court ruled that the probative value of the evidence outweighed any "danger of unfair prejudice," Fed.R.Evid. 403, it minimized the potential for prejudice with a contemporaneous limiting instruction, which it reiterated in the final charge. See Tejeda, 974 F.2d at 214. We discern no error, plain or otherwise.

B. Use of Communication Facility to Effect Drug Crime

Tuesta challenges the guilty verdicts on counts

three and four, on the grounds that the district court misinterpreted 18 U.S.C. § 2 and that there was insufficient evidence that he aided and abetted Martinez in the use of a communication facility to effect the ***776** cocaine transaction, see 21 U.S.C. § 843(b). We disagree.

Section 843(b) prohibits use of a communication facility to cause or facilitate a felonious drug offense. See United States v. Cordero, 668 F.2d 32, 43 (1st Cir.1981). Tuesta's challenge to the sufficiency of the evidence requires that "[w]e view the evidence in the light most favorable to the verdict, in order to determine whether a rational trier of fact could have found guilt beyond a reasonable doubt. All reasonable inferences are drawn in favor of the verdict and any credibility determination must be compatible with the judgment of conviction." Tejeda, 974 F.2d at 212 (citations omitted).

[5] The jury was entitled to credit Martinez's testimony that he telephoned Tuesta, on September 2 and 3, 1992, to arrange the time and place at which the cocaine transaction would occur, as well as the price and quantity of cocaine. No more was required. Thus, even if Tuesta had played no part in the two telephone conversations between Martinez and the CI, the jury rationally could have inferred, from the two telephone conversations between Martinez and Tuesta, that Tuesta knowingly used a communication facility to effect the cocaine deal. [FN2]

> FN2. Since the indictment, as well as the jury instruction on the section 843(b) charges, encompassed Tuesta's conduct as a principal and as an aider and abettor, we need not address his contention that he could not be convicted under 18 U.S.C. § 2 because there was no evidence that he instructed Martinez to use a communication device to arrange the cocaine sale.

C. "Background" Hearsay

A DEA agent testified that during a debriefing session the CI stated that Martinez acted in behalf of Tuesta in setting up cocaine deals. Tuesta contends that admission of this hearsay testimony, over timely objection, was error. We agree.

[6][7] As the government conceded at oral argument, the agent's testimony purported to relate an out-of-court statement by the CI offered for the sole purpose of proving the truth of the matter asserted (i.e., Tuesta's role in the instant offenses). See Fed.R.Evid. 801; cf. Figueroa, 976 F.2d at 1458 (noting that so-called "background" hearsay is not hearsay at all unless introduced to prove the truth of the matter asserted). Thus, its admission constituted error. We conclude, however, that the error was harmless. See id.

First, the testimony was cumulative of Martinez's testimony on the same matter. Further, independent admissible evidence confirmed that Tuesta determined the conditions of sale, supplied the cocaine, and witnessed the cocaine exchange from nearby while in possession of a loaded firearm. Thus, "we can say 'with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the [jurors'] judgment was not substantially swayed by the error.' " Id. at 1459 (quoting Kotteakos v. United States, 328 U.S. 750, 765, 66 S.Ct. 1239, 1248, 90 L.Ed. 1557 (1946) ("harmless error" standard)).

D. Ineffective Assistance of Counsel

[8][9][10] Next, Tuesta attempts to present an "ineffective assistance" claim on direct appeal. As a general rule, we address such Sixth Amendment claims on direct appeal only if "the critical facts are not in dispute and a sufficiently developed record exists." United States v. Jadusingh, 12 F.3d 1162, 1169 (1st Cir.1994) (citing United States v. Daniels, 3 F.3d 25, 26-27 (1st Cir.1993)). Ordinarily, a collateral proceeding under 28 U.S.C. § 2255 is the proper forum for fact-bound ineffective assistance claims. See Jadusingh, 12 F.3d at 1170. Tuesta's contention that trial counsel inexplicably failed to discover the identity of the CI was not raised in the district court and is sufficiently fact-bound to preclude effective review on the present record.

E. Prosecutorial Misconduct

[11][12] Tuesta contends that the prosecution improperly vouched for Martinez's testimony during its closing argument. [FN3] In the absence of a contemporaneous objection, we ***777** review allegations of prosecutorial misconduct for plain error, and will overturn a jury verdict only "if the government's closing argument 'so poisoned the

well' that it is likely that the verdict was affected." United States v. Smith, 982 F.2d 681, 682 (1st Cir.1993) (citing United States v. Mejia-Lozano, 829 F.2d 268, 274 (1st Cir.1987)). Any vouching which may have occurred was so faint as to be virtually indiscernible even to the trained ear. We are confident that there is no likelihood that the verdicts were tainted by the alleged prosecutorial misconduct. Id.

FN3. Tuesta argues that the prosecutor improperly vouched for Martinez's credibility by stating that "when a person repents and wants to cooperate, we need to present the testimony to the jury so that the jury has the facts at hand." Although he states that there was no evidence that Martinez approached the government and offered to testify, Tuesta concedes that evidence was presented that the plea agreement did not require Martinez to testify. Second, Tuesta contends that the prosecutor's reference to "the facts at hand" placed the government's prestige behind Martinez.

F. Cumulative Error

As most assignments of error were baseless, we must also reject Tuesta's final contention that the conviction was tainted by cumulative error. See United States v. Barnett, 989 F.2d 546, 560 (1st Cir.) ("The Constitution entitles a criminal defendant to a fair trial, not a perfect one.") (citing Delaware v. Van Arsdall, 475 U.S. 673, 681, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674 (1986)), cert. denied, --- U.S. ----, 114 S.Ct. 148, 126 L.Ed.2d 110 (1993).

G. Sentencing Error

1. Acceptance of Responsibility

[13] Tuesta argues that the district court improperly denied a reduction for acceptance of responsibility, see U.S.S.G. § 3E1.1, without affording him an adequate opportunity to evince remorse.

Tuesta distorts the record. He continued to assert his innocence during a post-conviction interview with the probation officer. At sentencing, the district court twice invited him to accept responsibility, by pointing out that the sentencing hearing would be his last opportunity to do so. [FN4] Nonetheless, though Tuesta asked the court for leniency, he said nothing which might be taken to indicate remorse. Thus, he squandered several opportunities to verbalize acceptance of responsibility, leaving the district court little choice but to adopt a presentence report recommendation that no reduction be allowed. There was no error.

FN4. Prior to Tuesta's allocution, the court stated: "I haven't heard any acceptance of responsibility." Moments later, the court said: "Well, you can say some things that may be able to help you; but if you don't say them ... that's up to you."

2. Sentencing Enhancement for Managerial Role

[14][15] Finally, Tuesta challenges the two-level enhancement imposed for his managerial role in the offense, see U.S.S.G. § 3B1.1 (1993), which the district court premised in part upon the unusual purity of the cocaine supplied by Tuesta. A defendant's role in the offense must be established by a preponderance of the evidence, see United States v. Sostre, 967 F.2d 728, 731 (1st Cir.1992), and the sentencing court's factual findings are reviewed only for clear error, Jadusingh, 12 F.3d at 1169.

[16][17] The exercise of decision-making authority, the degree of participation in planning or organizing the offense, and the degree of control and authority the defendant exercised over others are among the factors to be considered in determining managerial role. See U.S.S.G. § 3B1.1, comment (n. 4). The record is replete with evidence that Martinez acted at the direction of Tuesta in setting the time and place of the drug transaction, and the price and quantity of the cocaine. United States v. Cronin, 990 F.2d 663, 665 (1st Cir.1993) (noting that such evidence supports finding of managerial role.) Additionally, the district court properly relied on the unusual purity of the cocaine (98%) Tuesta supplied to Martinez, as a further ground for inferring that Tuesta performed a managerial role. See United States v. Iguaran-Palmar, 926 F.2d 7, 9 (1st Cir.1991). There was no error.

The judgment is affirmed.

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UNITED STATES of America, Plaintiff-Appellee,
v.
Bernard C. BIRCH, Jr., aka Chubby, Defendant-Appellant.

No. 93-3348.

United States Court of Appeals,
Tenth Circuit.

Nov. 3, 1994.

Defendant was convicted in the United States District Court for the District of Kansas, Patrick F. Kelly, Chief Judge, of assault on federal officer and possession of firearm during violent crime. Defendant appealed. The Court of Appeals, Tacha, Circuit Judge, held that: (1) trial court did not abuse its discretion in allowing courtroom demonstration of defendant's version of shooting; (2) district court abused its discretion in allowing prosecution to present evidence of defendant's two previous convictions for battery on law enforcement officer, but error was harmless in light of significant evidence of defendant's guilt; (3) defendant's placement into custody of state secretary of social and rehabilitation services at time defendant was juvenile was "confinement" within meaning of sentencing guideline providing for assessment of criminal history points for juvenile convictions; and (4) orders committing defendant, when juvenile, to such custody were properly considered sentences to confinement of "at least 60 days," for purposes of that guideline.

Affirmed.

[1] CRIMINAL LAW ⚿ 650
110k650
Trial court did not abuse its discretion in allowing courtroom demonstration of defendant's version of shooting, in which chairs were placed side-by-side simulating front seat of car and defendant was asked to show how shooting by alleged passenger occurred, which was followed by testimony that bullet fired from gun in position demonstrated by defendant could not have had trajectory of bullet that wounded federal agent; defendant himself participated in demonstration and prosecution met burden of showing substantial similarity between courtroom demonstration and seating in defendant's car.

[2] CRIMINAL LAW ⚿ 1035(10)
110k1035(10)
Defense, having neither requested that court view outside jury's presence demonstrative evidence purporting to reenact events at trial, nor requested that limiting instruction be given, could not allege on appeal that trial court erred in failing to take those steps.

[3] CRIMINAL LAW ⚿ 369.13
110k369.13
District court abused its discretion in allowing prosecution to present evidence of defendant's two previous convictions for battery on law enforcement officer in prosecution for assault on federal officer, as specific purpose for admitting evidence was not apparent; notice of intent to introduce evidence stated only that purpose of evidence was "to prove the defendant's knowledge, identity and absence of mistake or accident," and did not articulate relevant purpose and specific inferences to be drawn from evidence. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[3] CRIMINAL LAW ⚿ 374
**110k374**
District court abused its discretion in allowing prosecution to present evidence of defendant's two previous convictions for battery on law enforcement officer in prosecution for assault on federal officer, as specific purpose for admitting evidence was not apparent; **notice** of intent to introduce evidence stated only that purpose of evidence was "to prove the defendant's knowledge, identity and absence of mistake or accident," and did not articulate relevant purpose and specific inferences to be drawn from evidence. Fed.Rules Evid.Rule **404(b),** 28 U.S.C.A.

[4] CRIMINAL LAW ⚿ 374
110k374
In order to aid district court's determination of whether evidence of other criminal acts of defendant is offered to prove issue other than character, government must precisely articulate purpose of proffered evidence. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[5] CRIMINAL LAW ⚿ 369.2(1)

110k369.2(1)
Even absent adherence to Tenth Circuit's requirements for admission of other crimes evidence, mandating that government precisely articulate purpose of proffered evidence and requiring trial court to specifically identify purpose for which evidence is offered, other crimes evidence is nevertheless admissible if decision to admit fulfills requirements of Supreme Court opinion noting that federal rules of evidence contain four sources of protection to prevent introduction of unduly prejudicial other crimes evidence, i.e., that evidence be offered for proper purpose, that it be relevant, that probative value not be outweighed by potential for unfair prejudice, and that jury is instructed on proper purpose for which evidence is to be considered.

[5] CRIMINAL LAW ⊜ 374
110k374
Even absent adherence to Tenth Circuit's requirements for admission of other crimes evidence, mandating that government precisely articulate purpose of proffered evidence and requiring trial court to specifically identify purpose for which evidence is offered, other crimes evidence is nevertheless admissible if decision to admit fulfills requirements of Supreme Court opinion noting that federal rules of evidence contain four sources of protection to prevent introduction of unduly prejudicial other crimes evidence, i.e., that evidence be offered for proper purpose, that it be relevant, that probative value not be outweighed by potential for unfair prejudice, and that jury is instructed on proper purpose for which evidence is to be considered.

[6] CRIMINAL LAW ⊜ 1169.1(1)
110k1169.1(1)
District court's erroneous admission of evidence does not require reversal if error was harmless.

[7] CRIMINAL LAW ⊜ 1139
110k1139
In determining whether trial court's error in admission of evidence was harmless, Court of Appeals reviews entire record de novo.

[8] CRIMINAL LAW ⊜ 1169.11
110k1169.11
Erroneous admission of defendant's two previous convictions for battery on law enforcement officer was harmless in prosecution for assault on federal officer, in light of significant evidence against defendant; while defendant claimed that passenger in car defendant was driving shot gun and then jumped out during chase, four police officers testified that they saw no one jump from defendant's car during chase, and that car was traveling too fast to allow person to jump out without injury, officer testified that he saw defendant holding gun during chase, two officers testified that defendant made incriminating statements after arrest, and prosecutor was able to discredit much of defendant's version of events through cross-examination and other testimony. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[9] CRIMINAL LAW ⊜ 1139
110k1139
In defendant's appeal of sentence determined under Sentencing Guidelines, Court of Appeals reviews factual findings by district court for clear error and interpretations of guidelines de novo. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.App.

[9] CRIMINAL LAW ⊜ 1158(1)
110k1158(1)
In defendant's appeal of sentence determined under Sentencing Guidelines, Court of Appeals reviews factual findings by district court for clear error and interpretations of guidelines de novo. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.App.

[10] CRIMINAL LAW ⊜ 1245(4)
110k1245(4)
Defendant's placement into custody of state secretary of social and rehabilitation services at time defendant was juvenile was "confinement" within meaning of Sentencing Guideline providing for assessment of criminal history points for juvenile convictions. U.S.S.G. § 4A1.2(d)(2)(A), 18 U.S.C.A.App.

See publication Words and Phrases for other judicial constructions and definitions.

[11] CRIMINAL LAW ⊜ 1245(4)
110k1245(4)
Orders committing defendant, when juvenile, to custody of state secretary of social and rehabilitation services were properly considered sentences to confinement of "at least 60 days," for purposes of Sentencing Guideline providing for assessment of

criminal history points for juvenile sentences to confinement of at least 60 days, even though commitment orders lacked release date; defendant actually served more than 60 days and, thus, maximum time he could have been confined exceeded 60 days. U.S.S.G. §§ 4A1.2(d)(2)(A), 4A1.2, comment. (n. 2), 18 U.S.C.A.App.

See publication Words and Phrases for other judicial constructions and definitions.

[12] CRIMINAL LAW ⚷ 1245(4)
110k1245(4)
Although actual time served should not be considered "sentence to confinement" for purposes of Sentencing Guideline providing for assessment of criminal history points for juvenile sentences of confinement of at least 60 days, time served is evidence of maximum sentence of imprisonment in cases of indeterminate sentencing. U.S.S.G. §§ 4A1.2(d)(2)(A), 4A1.2, comment. (n. 2), 18 U.S.C.A.App.

See publication Words and Phrases for other judicial constructions and definitions.

***1091** Cyd Gilman, Asst. Federal Public Defender for the Dist. of Kansas, Wichita, KS, for defendant-appellant.

Kim M. Fowler (Randall K. Rathbun, U.S. Atty., with her on the brief), Asst. U.S. Atty., Dist. of Kansas, Kansas City, KS, for plaintiff-appellee.

Before TACHA, LOGAN, and EBEL, Circuit Judges.

TACHA, Circuit Judge.

Bernard C. Birch, Jr. was convicted by a jury of assault on a federal officer and possession of a firearm during a violent crime. He appeals both his convictions and his sentence. Defendant alleges in his appeal that the district court erred in (1) allowing the prosecution to conduct a demonstration during cross-examination of defendant, (2) admitting evidence of defendant's prior convictions under Federal Rule of Evidence 404(b), and (3) assessing two criminal history points for each of two prior juvenile convictions of defendant. This court has jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742 and affirms.

I. Background

On April 28, 1993, Special Agent Randy O'Dell of the Bureau of Alcohol, Tobacco and Firearms, and Lieutenant Aaron Harrison of the Wichita Police Department were conducting surveillance of a residence occupied by defendant's girlfriend and their two children from Agent O'Dell's unmarked car. The officers observed defendant arrive at and enter the house. Defendant was driven to the house by a friend; several other friends accompanied him as well. After checking on the well-being of the occupants, defendant left the residence. Rather than leave with the friend who had brought him to the house, defendant drove away in his girlfriend's car, which had been parked in the driveway.

Meanwhile, the officers drove by the house, circled the block, and followed defendant's vehicle as he left the house. When defendant noticed he was being followed, he turned his car around and drove back towards the officers' car. As the cars passed one another, a shot was fired from defendant's car, wounding Agent O'Dell.

Defendant fled the scene in the vehicle from which the shot was fired. Agent O'Dell and Lieutenant Harrison gave chase, calling other units in as back-up. Two to three minutes later, defendant lost control of his vehicle and crashed the car into a tree. He fled on foot and was apprehended shortly thereafter.

After his arrest and at trial, defendant claimed that, although he was driving the car at the time of the shooting, there was a passenger in the car who fired the shot that wounded Agent O'Dell. According to defendant, this individual [FN1] leaped from the car during the car chase, leaving his weapon in the car with defendant.

> FN1. Defendant identified this individual as "Mike Bradford." Apparently neither police investigators nor defendant have been able to locate Mr. Bradford.

Defendant testified in his own defense at trial. On cross-examination by the prosecution, and over defense counsel's objection, defendant was asked to demonstrate his version of the shooting. Two courtroom chairs were placed side by side, simulating the front seat of the car, and defendant

was asked to show how the shooting occurred. During ***1092** this demonstration, the prosecutor asked defendant to show the jury the position of the gun when it was fired. The prosecution then called witnesses who testified that defendant's version of the shooting was impossible. These witnesses testified that a bullet fired from a gun in the position demonstrated by defendant could not possibly have the trajectory of the bullet that wounded Agent O'Dell.

II. Courtroom Demonstration

[1] This court examined the use of demonstrative evidence that purports to reenact events at trial in United States v. Wanoskia, 800 F.2d 235 (10th Cir.1986). In Wanoskia, a defendant on trial for murdering his wife maintained that his wife had shot herself. Id. at 236-37. The prosecution attempted to discredit the defendant's story by showing that it would have been impossible for the victim to shoot herself. The medical examiner testified that, based on the powder burns on the victim, the fatal shot was fired from approximately eighteen inches from the victim. Id. at 237. The prosecution then presented a demonstration to show that the victim could not have shot herself from this distance. Id. at 236.

Recognizing the highly persuasive nature of evidence purporting to reenact actual events, we declared in Wanoskia that the trial court "must take special care to ensure that the demonstration fairly depicts the events at issue." Id. at 238 (citation omitted). To ensure that such care is taken by trial courts, we announced a threshold requirement for the admission of demonstrative evidence, which we adopted from the Jackson v. Fletcher standard for experimental evidence:

> "Where ... an experiment purports to simulate actual events and to show the jury what presumably occurred at the scene ..., the party introducing the evidence has a burden of demonstrating substantial similarity of conditions. They may not be identical but they ought to be sufficiently similar so as to provide a fair comparison."

Wanoskia at 238 (quoting Jackson v. Fletcher, 647 F.2d 1020, 1027 (10th Cir.1981)).

Despite this threshold requirement for admissibility, "a trial court's decision to admit or exclude such evidence will be reversed only if the court abused its discretion." Wanoskia, 800 F.2d at 238 (citation omitted). We therefore review the district court's decision to allow the demonstration with deference.

The purpose of the demonstration in the instant case was to illustrate and clarify testimony already given by defendant on direct examination. Defendant himself participated in the demonstration. Courtroom chairs were used to simulate seating in the car; defendant sat in one chair while an ATF agent sat in the other. Defendant demonstrated his version of the events. Nothing in the record indicates that the jury was led to believe that the chairs represented anything other than the car seats. Moreover, the defense could have conducted a redirect examination to correct any part of the demonstration that was potentially misleading to the jury. Although only a limited foundation was laid by the prosecution, the prosecution nonetheless met its burden of demonstrating substantial similarity between the courtroom demonstration and the seating in defendant's car.

Defendant's argument that the demonstration here is similar to that found improper in Jackson v. Fletcher fails. In Jackson, the evidence at issue was testimony describing the results of an out-of-court reenactment of a vehicle accident. We found this evidence unduly prejudicial because the experiment lacked a substantial similarity of circumstances. Id. at 1026-28. Here, in contrast, the evidence consisted of an in-court demonstration by defendant that was sufficiently similar to actual events to provide a fair comparison.

[2] Defendant argues that the district court's failure to take the protective measures taken by the district court in Wanoskia resulted in unfair prejudice to defendant. In Wanoskia, we noted with approval that the trial court had first viewed the demonstration outside the presence of the jury and that the jury was instructed to disregard the demonstration if it determined that the testimony lacked an adequate foundation. Wanoskia, ***1093** 800 F.2d at 239. In the instant case, however, the defense neither requested that the court view the demonstration outside the jury's presence nor requested that a limiting instruction be given to the jury. As a result, the defense cannot now allege that the trial court erred in failing to take these steps.

See Robinson v. Audi NSU Auto Union, 739 F.2d 1481, 1485 (10th Cir.1984).

The courtroom demonstration, combined with the testimony regarding the bullet's trajectory, was indeed damaging to the defense. Evidence that is prejudicial to the defense is inadmissible, however, only if its probative value is substantially outweighed by its unfair prejudice to the defendant. See Fed.R.Evid. 403. [FN2] We conclude that the district court did not abuse its discretion in allowing the prosecution to conduct the demonstration using courtroom chairs to represent the front seat of defendant's car.

FN2. Cf. United States v. Gaskell, 985 F.2d 1056, 1061 (11th Cir.1993) (probative value of demonstration in which adult male witness repeatedly shook a representation of an infant was substantially outweighed by unfair prejudicial effect to defendant on trial for involuntary manslaughter of his infant daughter).

III. Rule 404(b) Evidence

[3] Defendant also alleges that the district court erred in allowing the prosecution to present evidence of defendant's two previous convictions for battery on a law enforcement officer. Defendant argues that this evidence was inadmissible under Federal Rule of Evidence 404(b). We review the district court's decision to admit evidence under Rule 404(b) for an abuse of discretion. United States v. Record, 873 F.2d 1363, 1373 (10th Cir.1989).

Rule 404(b) governs the admissibility of evidence of other criminal acts of the defendant:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The district court must make a threshold determination that the offered evidence is " 'probative of a material issue other than character' " before admitting evidence under Rule 404(b). United States v. Martinez, 890 F.2d 1088, 1093 (10th Cir.1989) (quoting Huddleston v. United States, 485 U.S. 681, 686, 108 S.Ct. 1496, 1499, 99 L.Ed.2d 771 (1988)), cert. denied, 494 U.S. 1059, 110 S.Ct. 1532, 108 L.Ed.2d 771 (1990).

[4] In order to aid the district court's determination of whether evidence is offered to prove an issue other than character, the government must precisely articulate the purpose of the proffered evidence. United States v. Kendall, 766 F.2d 1426, 1436 (10th Cir.1985), cert. denied, 474 U.S. 1081, 106 S.Ct. 848, 88 L.Ed.2d 889 (1986); see also United States v. Porter, 881 F.2d 878, 884 (10th Cir.), cert. denied, 493 U.S. 944, 110 S.Ct. 348, 107 L.Ed.2d 336 (1989). Kendall further requires the trial court to "specifically identify the purpose for which such evidence is offered," noting that "a broad statement merely invoking or restating Rule 404(b) will not suffice." Kendall, 766 F.2d at 1436.

In this case, the government failed to articulate with precision the evidentiary purpose of the Rule 404(b) evidence it offered. Although the government filed a pretrial Notice of Intent to Introduce Evidence Pursuant to Rule 404(b), the Notice stated only that the evidence's purpose was "to prove the defendant's knowledge, identity and absence of mistake or accident." The Notice does not articulate "the relevant purpose and specific inferences to be drawn from ... [the] evidence of other acts" offered by the government. Kendall, 766 F.2d at 1436. At trial, evidence of defendant's prior convictions, as well as evidence of the acts that resulted in the convictions, was admitted without a more specific articulation of its purpose. Moreover, the trial court did not identify the specific permissible purpose for which the evidence was admitted.

[5] Our analysis does not end here, however. Even when the requirements of Kendall are not adhered to, the 404(b) evidence ***1094** is nevertheless admissible if the decision to admit fulfills the requirements set out by the Supreme Court in Huddleston v. United States, 485 U.S. 681, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988). United States v. Record, 873 F.2d 1363, 1375 n. 7 (10th Cir.1989). In Huddleston, the Supreme Court noted that the Federal Rules of Evidence contain four sources of protection to prevent the introduction of unduly prejudicial evidence under Rule 404(b):

> first, from the requirement of Rule 404(b) that the evidence be offered for a proper purpose; second,

> from the relevancy requirement of Rule 402--as enforced through Rule 104(b); third, from the assessment the trial court must make under Rule 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice ...; and fourth, from Federal Rule of Evidence 105, which provides that the trial court shall, upon request, instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted.

Huddleston, 485 U.S. at 691-92, 108 S.Ct. at 1502. To reconcile the strict requirements of Kendall with Huddleston 's logic, this court noted that if the purpose for allowing the evidence is apparent from the record and the decision to admit the evidence was correct, " 'any failure to adhere to Kendall will necessarily be harmless.' " Record, 873 F.2d at 1375 n. 7 (quoting United States v. Orr, 864 F.2d 1505, 1511 (10th Cir.1988)); see also Porter, 881 F.2d at 885. Thus, we must examine the record to determine if the specific purpose for admitting the evidence is apparent.

We are unable to find an apparent purpose, permissible under Rule 404(b), for the evidence at issue. A review of the record reveals no more specific reasoning than that already mentioned. Admission of the evidence of defendant's prior convictions was, therefore, an abuse of the trial court's discretion.

[6] Although we conclude that the admission of the evidence was error, a district court's erroneous admission of evidence does not require reversal if the error was harmless. United States v. Flanagan, 34 F.3d 949, 954-55 (10th Cir.1994). "A non-constitutional error is harmless unless it had a 'substantial influence' on the outcome or leaves one in 'grave doubt' as to whether it had such effect." United States v. Rivera, 900 F.2d 1462, 1469 (10th Cir.1990) (quoting Kotteakos v. United States, 328 U.S. 750, 765, 66 S.Ct. 1239, 1248, 90 L.Ed. 1557 (1946)). Accordingly, the question in this case is whether the admission of evidence of defendant's prior battery convictions had a substantial influence on "the jury's verdict in the context of the entire case against him." United States v. Short, 947 F.2d 1445, 1455 (10th Cir.1991), cert. denied, --- U.S. ----, 112 S.Ct. 1680, 118 L.Ed.2d 397 (1992).

[7][8] In determining whether a trial court's error was harmless, we review the entire record de novo. United States v. Perdue, 8 F.3d 1455, 1469 (10th Cir.1993). Our review of the record here reveals substantial evidence of defendant's guilt. Defendant claimed that he was driving the car but did not shoot the gun; rather, the shot was fired by a companion in the car who jumped out of the car while it was racing away from the officers. Four police officers involved in the chase testified that they saw no one jump from defendant's car during the three minute car chase which followed the shooting. These officers also testified that defendant's car was travelling too fast to allow a person to jump out without injury. An officer also testified that he saw defendant holding a gun during the car chase. Furthermore, at least two officers testified that defendant made incriminating statements after he was arrested. Finally, when defendant testified in his own defense, the prosecutor was able to discredit much of defendant's version of the events through cross- examination and other testimony.

Because of the significant amount of evidence against defendant in the record, we find that the improperly admitted evidence of defendant's prior convictions did not substantially influence the outcome of the trial. Accordingly, we conclude that the district court's error in admitting evidence of defendant's ***1095** prior battery convictions was harmless. [FN3]

> FN3. Defendant also argues that the effect of the improper admission of the rule 404(b) evidence was cumulatively prejudicial to defendant when added to the prejudicial effect of the admission of the courtroom demonstration. Because the courtroom demonstration was properly admitted, there could be no cumulative prejudice in this case.

## IV. Sentencing

[9] Defendant appeals his sentence on the basis that the district court erred in assessing two criminal history points for each of defendant's two previous juvenile convictions. He argues that under the United States Sentencing Guidelines (U.S.S.G.), the district court should have assessed only one point for each of these convictions. [FN4] In a defendant's appeal of a sentence determined under the Guidelines, this court reviews factual findings by the district court for clear error and interpretations of the Guidelines de novo. United

States v. Miller, 987 F.2d 1462, 1465 (10th Cir.1993).

> FN4. The applicable provision of the Guidelines reads: (d) Offenses Committed Prior to Age Eighteen (1) If the defendant was convicted as an adult and received a sentence of imprisonment exceeding one year and one month, add 3 points under § 4A1.1(a) for each such sentence. (2) In any other case, (A) add 2 points under § 4A1.1(b) for each adult or juvenile sentence to confinement of at least sixty days if the defendant was released from such confinement within five years of his commencement of the instant offense; (B) add 1 point under § 4A.1.1(c) for each adult or juvenile sentence imposed within five years of the defendant's commencement of the instant offense not covered in (A). U.S.S.G. § 4A1.2(d). Defendant contends that his previous juvenile offenses fall under subsection (2)(B) instead of (2)(A) of this provision.

Defendant was placed on probation on December 11, 1990, for two counts of battery of a law enforcement officer. His probation was revoked in March 1991, at which time he was ordered into "the custody of the state secretary of social and rehabilitation services." The secretary ordered defendant transported to the Youth Center at Larned, Kansas, where he was confined until January 10, 1992.

[10] Defendant first argues that placement into the custody of the state secretary of social and rehabilitation services is not a "confinement" within the meaning of U.S.S.G. § 4A1.2(d)(2)(A). Section 4A1.2(d)(2)(A) requires the addition of two points "for each adult or juvenile sentence to confinement of at least sixty days." Although "sentence of confinement" is not defined in the Guidelines, "sentence of imprisonment" is defined as "a sentence of incarceration and refers to the maximum sentence imposed." U.S.S.G. § 4A1.2(b).

While this court has not yet addressed the issue, the Sixth and Eleventh Circuits have held that commitment to the custody of the state's juvenile authority constitutes "confinement" within the meaning of U.S.S.G. § 4A1.2(d)(2)(A). United States v. Fuentes, 991 F.2d 700, 702 (11th Cir.1993); United States v. Kirby, 893 F.2d 867, 868 (6th Cir.1990); United States v. Hanley, 906 F.2d 1116 (6th Cir.), cert. denied, 498 U.S. 945, 111 S.Ct. 357, 112 L.Ed.2d 321 (1990). In each case, the defendant's criminal history included a juvenile adjudication at which the defendant was committed to the custody of the appropriate state agency. The state agency then placed each defendant in a confinement facility.

Here, defendant's situation is materially indistinguishable from the circumstances in Fuentes and Kirby. Defendant was confined to the Larned Youth Center by order of the secretary, in whose custody he was placed by the court. His confinement was involuntary, so that he was not free to leave the Youth Center. We therefore hold that defendant's placement into the custody of the state secretary of social and rehabilitation services was a "confinement" within the meaning of U.S.S.G. § 4A1.2(d)(2)(A).

[11] Defendant next argues that because the orders committing him to the secretary's custody lacked a release date, they cannot be considered sentences to confinement of "at least sixty days" under U.S.S.G. § 4A1.2(d)(2)(A). Defendant bases this argument on the commentary to section 4A1.2, ***1096** which states that the "length of a sentence of imprisonment is the stated maximum.... [C]riminal history points are based on the sentence pronounced, not the length of time actually served." U.S.S.G. § 4A1.2, comment. (n. 2). The application note to section 4A1.2 gives several examples to clarify the meaning of "stated maximum":

> [I]n the case of a determinate sentence of five years, the stated maximum is five years; in the case of an indeterminate sentence of one to five years, the stated maximum is five years; in the case of an indeterminate sentence for a term not to exceed five years, the stated maximum is five years; in the case of an indeterminate sentence for a term not to exceed the defendant's twenty-first birthday, the stated maximum is the amount of time in pretrial detention plus the amount of time between the date of sentence and the defendant's twenty-first birthday.

Id. The application note does not include an example which mirrors the sentence that defendant received. Clearly, the list of examples is meant to be illustrative rather than exclusive.

In defendant's case, the orders placing him into the secretary's custody lacked a maximum sentence.

Under Kansas law, however, a juvenile committed to the custody of the secretary must be released upon reaching twenty-one years of age. Kan.Stat.Ann. § 38-1675 (1993). The maximum sentence was thus for a term not to exceed defendant's twenty-first birthday.

[12] Defendant's reliance on the application note's admonition against using the length of time actually served is misplaced. The Guidelines contemplate offenses for which a defendant is sentenced to more time than is actually served. Although the actual time served should not be considered the "sentence to confinement," the time served is evidence of the maximum sentence of imprisonment in cases of indeterminate sentencing. Here, defendant actually served more than sixty days. Thus, the maximum time defendant could have been confined exceeded sixty days. Cf. Fuentes, 991 F.2d at 702. Consequently, the district court properly adopted the presentence investigation report's finding that defendant received a "sentence to confinement of at least sixty days."

V. Conclusion

For these reasons, the judgment of the district court is AFFIRMED.

END OF DOCUMENT

UNITED STATES of America,
v.
Richard I. JOHNSON, Sr., Richard I. Johnson, Jr., Joseph Rosinski and Joan Chuba, Defendants.
92-CR-39A.
United States District Court, W.D. New York
Aug. 09, 1994.

Patrick H. NeMoyer, U.S. Atty., Martin J. Littlefield, Asst. U.S. Atty., of counsel, Buffalo, NY, for U.S.
Rodney O. Personius, Buffalo, NY, for defendant Johnson, Sr.
Robert L. Boreanaz, Buffalo, NY, for defendant Johnson, Jr.
Mark J. Mahoney, Buffalo, NY, for defendant Rosinski.
David G. Jay, Buffalo, NY, for defendant Chuba.

ORDER

ARCARA, District Judge.

***1** This case was referred to Magistrate Judge Leslie G. Foschio, pursuant to 28 U.S.C. s 636(b)(1), on March 11, 1992. Defendants filed motions for pretrial discovery, including further particulars, for severance, to strike





The Government acknowledges its responsibility under Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 405 U.S. 150 (1972). The court directs that all Brady material, including impeachment material, be disclosed to the defense no later than thirty days prior to the commencement of trial.

(f) Jencks Act material.

The Jencks Act provides that a defendant in a federal criminal trial, after a government witness has testified on direct examination, is entitled to receive, for purposes of cross-examination, any statements of the witness, in the government's possession which relate to the subject matter on which the witness has testified. See 18 U.S.C. s 3500(b). The district court may not, over the government's objection, compel early disclosure of Jencks Act material. See United States v. Percevault, 490 F.2d 126, 131 (2d Cir.1974); United States v. Washington, 819 F.Supp. 358, 367 (D.Vt.1993). In this case, the Government has stated that it will disclose Jencks Act material shortly before trial, and the court cannot order disclosure at an earlier or more definite time. Defendants' motion for early disclosure of Jencks material is DENIED.

(g) Rule 404(b) Evidence.

The Defendants seek disclosure of all evidence that the Government intends to offer pursuant to Fed.R.Evid. 404(b). The Government has stated that it does not intend to offer any such evidence in its direct case, but reserves the

right to respond to any defense propounded through cross-examination or by direct evidence. The Defendants regard this response as a Government attempt to evade its disclosure responsibility.

Rule **404(b)** requires the prosecution in a criminal case to provide reasonable **notice** in advance of trial of the general nature of any evidence of other crimes, wrongs, and acts it intends to introduce at trial. The Advisory Committee Notes to the 1991 amendment to the rule state that such **notice** is required "regardless of how [the Government] intends to use the extrinsic act evidence at trial, i.e., during its case-in-chief, for impeachment, or for possible rebuttal." Accordingly, the court directs the Government to **disclose** all Rule **404(b)** evidence which it intends to offer against the Defendants to the defense no later than thirty days prior to the commencement of trial or no later than the date of the pretrial conference with Judge Arcara whichever is earlier in sufficient **detail** to permit defense counsel to prepare and file appropriate motions in limine on the issue of admissibility, if counsel is so inclined. To the extent provided above, the motion for **disclosure** of Rule **404(b)** evidence is GRANTED.

2. Severance.

The Government has consented to a severance of the "bankruptcy" counts (Counts XVI-XXI) from the "hazardous waste" counts (Counts I-XV), and will try the two conspiracies separately from this Indictment. Accordingly, the motions for

Citation | Rank(R) | Page(P) | Database | Mode
Not Reported in F.Supp. | R 141 OF 392 | P 1 OF 53 | DCT | P LOCATE
**(Cite as: 1992 WL 371640 (D.Kan.))**

UNITED STATES of America, Plaintiff,
v.
Perl Glen VAN PELT, Edith Wacker, aka "Edie", Edith T. Wacker, aka "Louie", John Lee Wacker, Susan Mary Boyle, aka "Van Pelt", Leroy Allen Cooley and Michael L. Lipp, aka "Mike", Defendants.
Nos. 92-40042-01-SAC to 92-40042-07-SAC.
United States District Court, D. Kansas.
Dec. 1, 1992.

Lee Thompson, U.S. Atty., Gregory G. Hough, Asst. U.S. Atty., for U.S.
Wendell Betts, Frieden, Haynes & Forbes, Topeka, Kan., for Perl Glen Van Pelt.
Allan A. Hazlett, Topeka, Kan., for Lewis T. Wacker.
F.G. Manzanares, Topeka, Kan., for John Lee Wacker.
Matthew B. Works, Works, Works & Works, P.A., Topeka, Kan., for Susan Mary Boyle.
Alex Boyle, Lawrence, Kan., Custodian.
James G. Chappas, James G. Chappas, Chtd., Topeka, Kan., for Leroy Allen Cooley.
John J. Ambrosio, John J. Ambrosio, Chtd., Topeka, Kan., for Michael L. Lipp.

MEMORANDUM AND ORDER





Notwithstanding that ruling, the government is required to disclose all favorable material evidence relevant to the defendant's guilt or punishment. [FN10] The government is reminded of its continuing obligation under Brady. In accordance with that duty, the government shall furnish any favorable material evidence relevant to the guilt or punishment of the defendant, including impeachment evidence (such as evidence of bias or motive) that it possesses as a result of the plea negotiation process.

Motions for disclosure of 404(b) evidence (Dk. 27 and 36):

Leroy Cooley seeks an order requiring the government to disclose whether or not it intends to introduce any 404(b) evidence. Michael Lipp requests that the United States provide all material which will be offered pursuant to Rule 404(b) ten days before trial.

The government indicates that it intends to produce evidence in its case in chief of certain drug offense convictions of the defendants. See Government's brief, page 16. The government has apparently given each defendant a copy of the "rap sheets" of all defendants. The government then specifically lists the prior convictions of Van Pelt, Boyle, Cooley and Lipp that it plans to introduce in its case in chief. In addition, the governments' amended notice (Dk. 92) indicates that it intends to offer certain statements arising from Van Pelt's misdemeanor conviction for possession of marijuana in Jewell County, Kansas, on September 15, 1977. At the time of sentencing, Van Pelt apparently

stated that "[i]n the days of prohibition, bootleggers used water to dilute the liquor. In the world of marijuana today, I provide the water."

***13** The government otherwise opposes the defendants' motion for pretrial disclosure of 404(b) evidence that it plans to produce at trial. The government contends that the defendants are not entitled to pretrial disclosure of either 404(b) evidence.

Rule 404(b) provides:

(b) Other crimes, wrongs, or acts.

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial. (As amended Mar. 2, 1987, eff. Oct. 2, 1987; Apr. 30, 1992, eff. Dec. 1, 1991.)

The 1991 Amendment "adds a pretrial notice requirement in criminal cases and is intended to reduce surprise and promote early resolution of the issue of admissibility." 1991 Amendment Advisory Notes. "The Rule expects that counsel for both the defense and the prosecution will submit the necessary request and





information in a reasonable and timely fashion." Id.

The government correctly argues that it is not required to fully disclose all 404(b) evidence prior to trial. In United States v. Williams, 792 F.Supp. 1120 (S.D.Ind.1992), the defendants requested that the government provide the specific evidence which it intended to offer under Rule 404(b). The court commented:

In the present case, the Defendants have requested that the Government provide the specific evidence which it intends to offer under Rule 404(b). Again, the Rules of Evidence are not rules of discovery. The purpose of the Rule 404(b) notice provision, to prevent surprise during trial, does not support providing a defendant with materials which the Government possesses and plans to offer at trial. Instead, the Defendants need only receive sufficient notice "to apprise the defense of the general nature of the evidence of extrinsic acts." Fed.R.Evid. 404 (Notes of Senate Committee on the Judiciary on the 1991 Amendment). Nothing in the rule indicates that the defendant is entitled to receive documents or other evidence from which the Government derives the prior bad act evidence. The Government merely need provide the Defendants with information sufficient to indicate the general nature of the evidence. In this instance, the court was not presented with specific facts from which to determine what reasonable notice might entail. In the absence of such specific circumstances, only these general guidelines come into play.

792 F.Supp. at 1134.

Other courts, relying on the language of the Rule and the advisory comments have also concluded that the Government only need supply the defense with the general nature of the evidence of extrinsic acts. See United States v. Alex, 791 F.Supp. 723, 728 (N.D.Ill.1992) (defendant's demand for specific evidentiary **detail** including dates, times, places and persons involved is wholly overbroad; Rule **404(b)** only requires the government to **disclose** the general nature of such evidence it intends to introduce at trial); United States v. Sims, No. 92-CR-166, 1992 WL 295672, 1992 U.S.Dist. Lexis 14619, at *2-4 (N.D.Ill. September 28, 1992) (same); United States v. Swano, No. 91-CR-477-02-03, 1992 WL 137588, 1992 U.S.Dist. Lexis 7554, at *16-17 (N.D.Ill. May 29, 1992) (Rule **404(b)** not a tool for discovery; defendants' requests for specific dates, times, places, persons, etc ..., well beyond scope of Rule **404(b)**); but see United States v. Melendez, No. 92 Crim. 047 (LMM), 1992 WL 96327, 1992 U.S.Dist. LEXIS 5616, at *1 (S.D.New York April 24, 1992) ("Rule **404(b)** will be satisfied if the **notice** to be given by the government identifies each crime, wrong or act by its specific nature (e.g., sale of cocaine), place (e.g., New York City), and approximate date (e.g., July 1986) to the extent known by the government.").

***14** The government has apparently supplied the defendants with fairly detailed descriptions of the 404(b) evidence it plans to introduce at trial,





thereby satisfying the notice requirements of 404(b). The government is apparently aware of its obligation to provide the defendants general notice of the type of 404(b) evidence it plans to introduce at trial.

During oral argument and in his brief, counsel for Michael Lipp requested that the government be given a day certain by which it would provide notice of 404(b); thereafter the government would be precluded from introducing any new 404(b) evidence not previously disclosed. This request is denied. The defendant correctly notes that late disclosure of 404(b) evidence can potentially hamper the defendant's ability to prepare a defense to that evidence. Rule 404(b) requires the prosecution upon request to "provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown...." Therefore, if the government can demonstrate good cause the court may allow previously undisclosed 404(b) evidence even during trial. In addition, in determining the admissibility of any evidence the court may consider the unfair prejudice to the defendant. See Fed.R.Evid. 403.

The defendants' motions for pretrial disclosure of 404(b) evidence is granted in part and denied in part.

Motions for disclosure of grand jury minutes (Dk. 48 and 24:

Pursuant to Fed.R.Crim.P. 6(e), John Wacker and Leroy Cooley seek a copy of the grand jury minutes in this case. The defendants contend that a copy of the

Also, 606 mentioned.



Citation | Rank(R) | Page(P) | Database | Mode
Not Reported in F.Supp. | R 14 OF 392 | P 1 OF 53 | DCT | P LOCATE
**(Cite as: 1995 WL 221883 (N.D.Ill.))**

UNITED STATES of America, Plaintiff,
v.
Marco DAMICO, et al., Defendants.
No. 94 CR 723.
United States District Court, N.D. Illinois, Eastern Division.
April 10, 1995.
MEMORANDUM AND ORDER

MANNING, District Judge.

***1** Defendants [FN1] were charged by indictment in the action USA v. Damico et al., 94 CR 723 (N.D.Ill.1994). The 10-count indictment alleges that defendants Marco Damico, Anthony R. Dote, Robert M. Abbinanti, and unknown others were engaged in an enterprise referred to as the "Damico Enterprise." The indictment further alleges that the Enterprise obtained income for the defendants through illegal activities which affected interstate commerce. More specifically, the alleged racketeering activity consisted of:

(a) operation of illegal gambling businesses, in violation of Title 18 U.S.C. s 1955;

(b) Extortion, attempt to commit extortion, and conspiracy to commit





agreed to tender all material relating to Mr. Cooley no later than April 17, 1995.

Defendant A. Dote's Motion to Require Notice of Intention of Use (sic) Other Crimes, Wrongs or Acts Evidence.

Defendant M. Damico's Motion For Notice of 404(b) Material Sixty Days in Advance of Trial.

Defendant Anthony Dote requests that the government be required to give notice of its intention to offer evidence at trial under Rule 404(b) Other Crimes Wrongs or Acts which provides the following:

"... (b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, ... the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence if it intended to introduce at trial."

***4** Fed.R.Evid. 404. The government in its consolidated response replies that during the Rule 2.04 Conference, it offered to give the defendant notice of any 404(b) evidence intended to be used against him two weeks prior to trial, in accordance with the reasonable notice requirements of the rule. However, at the March-9 hearing the government agreed to provide the material

by April 24, 1995.

Pursuant to Rule **404(b)** the government shall provide reasonable **notice** ... on good cause shown, of the general nature of any such evidence it intends to introduce at trial. The defendant suggests that **404(b)** should be extended not only to the general nature of any "other acts" evidence, but also specific evidentiary **detail,** to include dates, times, locations, participants, etc. The plain language of the rule gives no specific form of **notice.**

The Advisory Committee considered and rejected a requirement that the **notice** satisfy the particularity requirements normally required of language used in a charging instrument. Fed.R.Evid. **404(b),** Advisory Committee Notes. The Committee opted for a generalized **notice** provision which requires the prosecution to apprise the defense of the general nature of the evidence of extrinsic acts. Id. The committee did not intend for the Rule to supersede other rules of admissibility or **disclosure** such as the Jencks Act, 18 U.S.C. s 3500, et seq. "nor require the prosecution to **disclose** directly or indirectly the names and addresses of its witnesses." This court agrees with the government that the plain language of the rule itself, precludes the evidentiary **detail** the defendant seeks. Furthermore, the government has represented to the defendants and the court that it will provide the Rule **404(b)** evidence which it intends to use in its case-in-chief through the submission of its Rule **404(b)** proffer by April 24, 1995.





Additionally, this court is not precluded from examining in camera the specific **404(b)** evidence which the government intends to offer before it is offered or even mentioned during trial. Fed.R.Evid. **404(b).** Senate Judiciary Committee. This court may require the government to **disclose** to it the specifics of such evidentiary **detail** which the court must consider in determining admissibility. Id. Hence, this court denies this portion of Dote's request for evidentiary specificity because he is not entitled to such information, and grants the remainder of in part his motion as set forth above, with directions to the government that these materials be provided no later than April 24, 1995. This ruling applies to all defendant's.

Damico also seeks an order from the Court requiring the government to give notice of its intent to offer 404(b) evidence sixty days in advance of trial. The government states that during the Rule 2.04 Conference, it offered to give defendant notice of any 404(b) evidence it intended to use against him two weeks prior to trial, in accordance with the reasonable notice requirements of the rule. As indicated above, the motion is allowed and the government is directed (and has agreed) to provide the material by April 24, 1995.

***5** Anthony Dote seeks disclosure of "specific instances of conduct" of any defendant according to Rule 608(b). [FN4] In response, the government argues that under the law no pretrial disclosure is necessary or appropriate. United States v. Alex, 791 F.Supp. 723, 728, 728-29 (N.D.Ill.1992). The

UNITED STATES of America, Plaintiff,
v.
David A. AGUNLOYE, Defendant.

No. 95 CR 45.

United States District Court, N.D. Illinois.

June 1, 1995.

MEMORANDUM OPINION AND ORDER

ALESIA

***1** In this case, the defendant is charged in a five count indictment with various offenses, including conspiracy to launder the proceeds of narcotics trafficking. The defendant has filed four pretrial motions. The court addresses each in turn.

A. Motion to Require the Government to Disclose Whether It Will Rely on Evidence of Similar Crimes, Wrongs or Acts

Defendant moves this court to require the government to provide notice of intention to use other crimes, wrongs or acts as evidence pursuant to Federal Rule of Evidence 404(b). [FN1] Specifically, the defendant requests production of the following information: the dates, times, places, and persons involved in said other crimes, wrongs, or acts; the statements of each participant; the documents which contain such evidence, including when the documents were prepared, who prepared them, and who has possession of them; and the issue or issues to which the government believes such evidence may be relevant. The government, meanwhile, agrees to comply with the notice requirement no later than two weeks before trial but objects to the specificity of the information sought by the defendant.

The law is clear that Rule **404(b)** imposes a duty on the government only to "provide reasonable **notice** in advance of trial ... of the general nature of any such evidence ..." and is not a tool for open ended discovery. FED. R. EVID. **404(b)** (emphasis added); United States v. Sims, 808 F.Supp. 607, 611 (N.D. Ill.1992). As far as the amount of **notice** that the government must give, the court finds that, in this case, two weeks does constitute reasonable **notice.** Meanwhile, with respect to the content of the **notice,** the court holds that Agunloye's demand for specific evidentiary **detail** is wholly overbroad. Sims, 808 F.Supp. at 611. Therefore, insofar as the government has agreed to abide by the **notice** requirements of Rule **404(b),** the motion is denied as moot. To the extent the defendant requests **notice** beyond the requirements of **404(b),** defendant's motion is denied.

B. Motion to Disclose

In this motion, the defendant seeks to have the government divulge all evidence that the government may attempt to introduce under Federal Rules of Evidence 803 and 804. The defendant cites no authority, however, for this broad-sweeping request. Furthermore, the court is aware of no such authority. See United States v. Russo, 87 CR 501, 1988 WL 58594 (N.D. Ill. June 1, 1988). Therefore, defendant's motion is denied with one exception. The government is directed to comply with the notice provisions of Rules 803(24) and 804(b)(5) by August 18, 1995, in the event it intends to admit such evidence.

C. Motion for Preservation of Agent's Notes

The defendant also moves the court to enter an order directing the government agents, police officers, and all federal or state informants involved in the case to retain and preserve all of their typed or handwritten notes made in relation to the case. The motion is denied as moot given that the government has instructed the agents to preserve their notes. Government's Consolidated Response to Defendant Agunloye's Pretrial Motions, at 3.

D. Motion for Statements of the Defendant

***2** In this motion, the defendant seeks the substance of all statements, written, oral, and recorded, that the government will seek to admit under Federal Rule of Evidence 801(d)(2). Based on the government's representation that it has already provided the defendant with a full set of transcripts made from undercover tapes, the defendant's motion is denied as moot. See Government's Consolidated Response, at 4.

The defendant also seeks disclosure of any statements made by any co-defendant or alleged co-

conspirator, co-schemer, or witness to any government agent or any other person, which the government will seek to admit as evidence under any rule or theory of evidence. Again, the defendant cites no authority for such an order and the court cannot find any. Unless these statements are exculpatory or impeaching material under Brady v. Maryland, 373 U.S. 83 (1963), they are not discoverable under Rule 16. Accordingly, this portion of the defendant's motion is denied.

CONCLUSION

Defendant's motion to require the government to disclose whether it will rely on evidence of similar crimes, wrongs, or acts is denied in part and denied in part as moot. Defendant's motion to disclose is granted in part and denied in part. Defendant's motion for preservation of agent's notes is denied as moot. Defendant's motion for statements of the defendant is denied in part as moot and denied in part.

FN1. Rule 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial." FED. R. EVID. 404(b).

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850 F.Supp. 1481 | R 75 OF 392 | P 1 OF 166 | DCT | P LOCATE
**(Cite as: 850 F.Supp. 1481)**

UNITED STATES of America, Plaintiff,
v.
Mark M. JACKSON, and Robert Martinez, Jr., Defendants.
Nos. 94-40001-01-SAC, 94-40001-02-SAC.
United States District Court,
D. Kansas.
March 30, 1994.

Defendants, who worked for private psychiatric hospital, were charged with conspiring to defraud federal government of the faithful services of Postal Service employee, bribery, aiding and abetting employee's salary supplementation, and obstruction of federal grand jury investigation. Defendants filed various pretrial motions. The District Court, Crow, J., held that: (1) defendants were not entitled to severance of their trials; (2) defendants were entitled to 30 days' notice of intent to use prior bad acts evidence; (3) aiding and abetting salary supplementation was not lesser included offense of bribery; (4) indictment was sufficient to state offenses of aiding and abetting salary supplementation and obstruction of justice; (5) indictment was not multiplicitous; (6) conspiracy could be charged under "defraud" clause of general conspiracy statute; (7) witness tampering could be charged under obstruction of justice clause of statute proscribing influencing



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attempts to conceal the crime." United States v. Silverstein, 737 F.2d 864, 867 (10th Cir.1984) (citations omitted). The defendant is wrong in assuming that Martinez' statement is inadmissible against him simply because it was made after the last payment to Garcia. A statement made after the original conspiracy ends may still be admissible as a statement made under a separate and distinct conspiracy to obstruct justice. See, e.g., United States v. Townsley, 843 F.2d 1070, 1084, modified on other grounds, 856 F.2d 1189 (8th Cir.1988), cert. dismissed, 499 U.S. 944, 111 S.Ct. 1406, 113 L.Ed.2d 461 (1991). Statements are admissible under 801(d)(2)(E) even when the particular conspiracy is not charged in the indictment. United States v. Beckham, 968 F.2d 47, 51 n. 2 (D.C.Cir.1992); United States v. Coppola, 526 F.2d 764, 770 (10th Cir.1975). " '[C]oncealment is sometimes a necessary part of a conspiracy, so that statements made solely to aid the concealment are in fact made during and in furtherance of the ... [original] conspiracy.' " United States v. Esacove, 943 F.2d 3, 5 (5th Cir.1991). The propriety of admitting this challenged statement against Jackson is not a resolved issue.

JOINT MOTION TO COMPEL NOTICE AND DISCLOSURE OF RULE 404(B) EVIDENCE (Dk. 26). The defendants seek an order compelling the United States to provide at least

thirty days before trial notice and disclosure of the nature of any evidence of other crimes, wrongs or acts it intends to introduce at trial in its case-in-chief, for impeachment, or for possible rebuttal pursuant to Rule 404(b). The government objects to placing itself in "the impossible position of speculating about" possible impeachment or rebuttal evidence. At the hearing, the government represented that the arrangement between Louis Garcia and Bowling Green Hospital is the only evidence the government intends to use that arguably falls under Rule 404(b).

[19][20][21] The pretrial **notice** requirement was recently added and became effective December 1, 1991. It was "intended to reduce surprise and promote early resolution of the issue of admissibility." Fed.R.Evid. **404(b)** Advisory Notes to 1991 Amendment. The Notes also indicate that the **notice** need not take a specific form and need only inform the defendant of the "general nature of the evidence of extrinsic acts." Id. The **notice** "need not provide precise **details** regarding the date, time, and place of the prior acts," but it must characterize the prior conduct to a degree that fairly apprises the defendant of its general nature. United States v. Long, 814 F.Supp. 72, 74 (D.Kan.1993). The **notice** requirement "is not a tool for open ended discovery." United States v. Sims, 808 ***1494** F.Supp. 607, 610-11 (N.D.Ill.1992). Nor does it require the government to produce documents or specific evidence from which the government has learned or will introduce the





bad acts. United States v. Williams, 792 F.Supp. 1120, 1134 (S.D.Ind.1992); see United States v. Alex, 791 F.Supp. 723, 728 (N.D.Ill.1992) (Defendant's "demand for specific evidentiary **detail** including dates, times, places and persons involved is wholly overbroad.") Finally, the Advisory Notes make clear that the prosecution must "provide **notice,** regardless of how it intends to use the extrinsic act evidence at trial, i.e., during its case-in-chief, for impeachment or for possible rebuttal."

[22] If it has not done so already, the government is ordered to comply with the notice requirement of Rule 404(b) as interpreted above. The court grants the defendants' motion for disclosure at least thirty days prior to trial.

JOINT MOTION TO DISMISS (Dk. 28).

Pursuant to Rule 12(b) of the Federal Rules of Criminal Procedure, the defendants move to dismiss some or all of the counts on the following grounds:

(1) The charge of supplementing a government employees' salary, 18 U.S.C. s 209, is a lesser included offense of bribing a government employee, 18 U.S.C. s 201(b)(1)(A);

(2) The indictment fails to state an offense of violating 18 U.S.C. s 209;

(3) Count one improperly charges a conspiracy to violate a postal service code of conduct;

(4) Counts one through thirty-one are multiplicitous because they charge defendants with conspiring to bribe a government employee thirty one times;

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**(Cite as: 819 F.Supp. 358)**

UNITED STATES of America
v.
Jacob P. WASHINGTON, Robert Hickman and Jerome Washington.
Crim. A. Nos. 92-63-01, 92-63-02 and 92-63-05.
United States District Court,
D. Vermont.
March 5, 1993.

Three defendants charged with conspiring to distribute cocaine filed motions to sever and discovery motions. The District Court, Parker, Chief Judge, held that: (1) spillover effect of retaliation charge against one defendant, and related murder, were not so highly prejudicial to codefendants charged with drug and weapons offenses so as to warrant severance; (2) defendant failed to establish antagonistic defense so as to justify severance; (3) procedural devices would prove sufficient and effective in protecting defendant's right to fair trial despite joinder of ex-felon weapons charges against codefendant; and (4) weapon possession offense and witness intimidation offense were part of series of act related to drug trafficking offenses justifying joinder.

Motions granted in part; denied in part.



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**(Cite as: 819 F.Supp. 358, *367)**

to the defendants in this case one day before the witness to which the material pertains is scheduled to testify. Under Percevault, this Court does not have authority to compel earlier disclosure.

B. Rule **404(b)** Disclosure

[29] Two of the defendants, Robert Hickman and Jacob Washington, have moved this Court to direct the Government to provide notice as contemplated by Rule **404(b)** of the Federal Rules of Evidence. Robert Hickman requests an in camera disclosure to the ***368** defendant of Rule **404(b)** evidence with specific requests for the names, addresses, reports, and statements of witnesses the Government intends to call to offer such evidence. Jacob Washington requests that the Government specify the accusations that will be made and disclose the identity of witnesses it will rely on to offer the Rule **404(b)** evidence. In response, the Government simply states that it will comply with the dictates of the rule.

To the extent that the defendants are constructing an alternative means of obtaining witness statements prior to trial, the Court refers them to section II(A) above. Also, no specific time for disclosure was requested by the defendants. The rule provides only that the Government provide "reasonable notice in advance of trial." Fed.R.Evid. **404(b)**. Upon the Government's representation that it intends to comply with the dictates of Rule **404(b)**, the Court notes that this motion is not ripe and is therefore denied.

Citation | Rank(R) | Page(P) | Database | Mode
Not Reported in F.Supp. | R 111 OF 392 | P 1 OF 34 | DCT | P LOCATE
**(Cite as: 1993 WL 270504 (D.Kan.))**

UNITED STATES of America, Plaintiff,
v.
Steve E. WILLIAMS, Bobby Lee Williams, Kimberly D. Gray, Timothy Michael Cott, Chad Stang, and Joseph Schwiebinz, aka "Joseph Bentor", Defendants.
Nos. 93-40001-01-SAC to 93-40001-06-SAC.
United States District Court, D. Kansas.
June 16, 1993.

Lee Thompson, U.S. Atty., Thomas G. Luedke, Asst. U.S. Atty., for U.S.
David R. Gilman, Overland Park, KS, J. Richard Lake, Marilyn M. Trubey, Asst. Federal Public Defender, Mark W. Works, Rene M. Netherton, Jeanine Herron, Wendell Betts, John Ambrosio, Topeka, KS, for defendants.

MEMORANDUM AND ORDER

CROW, District Judge.

***1** By the court's count, the defendants have filed thirty-four pretrial motions in this case. Having received the government's response to them and having heard oral argument on them, the court is ready to rule. A summary of the charges provides a necessary context.

On April 22, 1993, a ten-count superseding indictment was filed. Count one



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detailed discovery of the government's factual proof behind the alleged conspiracy. That the defendants feel hampered by the limited discovery available under Rule 16 and Brady principles does not empower this court to legislate alternative discovery devices. The defendants' arguments go more to the perceived injustices with discovery in all criminal cases rather than any inequitable circumstances unique to this case. The mere desire for more discovery is not a legitimate reason by itself for granting a bill of particulars. The defendants' motions for a bill of particulars are denied.

Motion for 404(b) Disclosure (Dk. 38, 40, 52, and 96).

Steve Williams, Tim Cott, Kim Gray and Joseph Schwiebinz ask for the government to disclose the prior or subsequent convictions, bad acts or criminal conduct which is not charged in the indictment and which the government intends to introduce as evidence at trial.

Rule 404(b) of the Federal Rules of Evidence provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the

dx 608(b)



| Citation | Rank(R) | Page(P) | Database | Mode |
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| 791 F.Supp. 723 | R 171 OF 392 | P 1 OF 33 | DCT | P LOCATE |

**(Cite as: 791 F.Supp. 723)**

UNITED STATES of America, Plaintiff,
v.
Gus ALEX, et al., Defendants.
No. 91 CR 727.
United States District Court, N.D. Illinois, E.D.
April 17, 1992.

Defendant was indicted for RICO conspiracy based upon acts of extortion, intimidation, and arson filed various pretrial motions. The District Court, Alesia, J., held that: (1) defendant was not entitled to production of government witness list; (2) defendant was not entitled to production of government witness statements; (3) government was required to tender all rough notes not previously produced to court for in camera inspection; (4) defendant was entitled to advance notice of other crimes evidence which government intended to use at trial; (5) defendant was entitled to scientific reports produced by government experts; and (6) government was required to provide defendant with Brady and Giglio materials.

So ordered.

See also 788 F.Supp. 359.





**(Cite as: 791 F.Supp. 723, *728)**

Kendall, 665 F.2d at 135. Against this backdrop, we briefly address each of Alex's requests.

[8] As an initial matter, Alex cites no case law in support of his request for the names of all persons "known" and "unknown" to the grand jury with respect to Count One of the indictment. Equally telling, the government represents that "[t]here are no co-conspirators who were unknown to the grand jury but who have been subsequently discovered by the government." (Government's Response, p. 9.) Accordingly, the court denies Alex's first and second requests.

Similarly, in request number six, Alex demands the names of individuals referred to in paragraphs 21 and 24 of Count One. Once again, Alex cites no case law in support of his request for the names of unindicted co-conspirators. The government has identified unindicted co-conspirator James LaValley. In our view, Alex can adequately prepare for trial without the names of the other co-conspirators. Alex's sixth request is accordingly, denied.

[9] In three of his requests Alex seeks, among other things, detailed information regarding dates, places and parties present when he allegedly received a share of extortion proceeds and street tax proceeds collected by the Lenny Patrick Street Crew. In addition, he requests specific information on all occasions when he and others are alleged to have taken acts in furtherance of the conspiracy. In this court's view, Alex seeks evidentiary details

exceeding the proper scope of a bill of particulars. We are satisfied that the indictment provides sufficient factual details to adequately inform Alex of the charges he faces. United States v. McAnderson, 914 F.2d 934, 946 (7th Cir.1990). Alex's third, fourth and fifth requests are denied.

Finally, in his seventh request Alex seeks the names of all the alleged victims of the extortionate acts allegedly committed by Alex and his co-defendants. This portion of Alex's motion is denied as moot because the government has filed a bill of particulars specifically identifying the names and businesses of the alleged victims.

VII. Motion for Pretrial Production of Material Pursuant to the Federal Rules of Evidence

Alex requests that the court order the government to produce a variety of information in advance of trial as required by the Federal Rules of Evidence. The court addresses each category of documents in turn.

A. Motion for Disclosure of "Other Acts" Evidence

Alex filed a motion which seeks notice of the government's intention to use evidence during cross-examination, its case-in-chief and rebuttal, which is admissible at trial pursuant to Federal Rules of Evidence 404(b) and 608(b). See Federal Rule of Criminal Procedure 12(d)(2). Alex requests that such notice be provided sixty days prior to trial.

[10] Federal Rule of Evidence **404(b)** provides, in relevant part, that "upon





request by the accused, the prosecution in a criminal case shall provide reasonable **notice** in advance of trial, or during trial if the court excuses pretrial **notice** on good cause shown, of the general nature of any such evidence it intends to introduce at trial." Fed.R.Evid. **404(b).** By its terms, Rule **404(b)** only requires the government to **disclose** the general nature of such evidence in intends to introduce at trial. Alex's demand for specific evidentiary **detail** including dates, times, places and persons involved is wholly overbroad.

[11] In its consolidated response, the government represents that it will disclose to the defense no later than seven days before the trial of this case the "other acts" evidence it intends to introduce at trial. The government makes no mention of whether it intends to introduce any evidence under Rule 608(b). We disagree with Alex's assertion that the amendment to Rule 404(b) may be read to require the government to give notice of "specific instances of conduct" evidence under Rule ***729** 608(b) it intends to offer for impeachment purposes. Accordingly, the government is ordered to inform the defendants and the court of Rule 404(b) evidence, if any, it intends to use at trial on or before April 22, 1992.

B. Data Forming the Basis for Opinion Testimony

[12] Alex requests that the court order the government to provide him with information relating to lay and expert witnesses, including production of

UNITED STATES of America, Plaintiff,
v.
Clarence E. LONG and Joseph A. LUGO,
Defendants.

Crim. A. Nos. 92-40040-01DES, 92-40040-02DES.

United States District Court,
D. Kansas.

March 1, 1993.

Defendant moved to exclude other crimes evidence. The District Court, Saffels, Senior District Judge, held that government's notice of intent to use other crimes evidence was insufficient.

Ordered accordingly.

[1] CRIMINAL LAW ⇐ 374
110k374
"Generalized notice provision" of rule governing admissibility of extrinsic acts evidence requires prosecution to apprise defense of general nature of evidence of extrinsic acts. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[2] CRIMINAL LAW ⇐ 374
110k374
Trial court has discretion to determine whether particular notice that government will introduce extrinsic acts evidence is not reasonable due to incompleteness. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[3] CRIMINAL LAW ⇐ 374
110k374
Requirement that government provide defendant with notice that it will admit extrinsic acts evidence is prerequisite to admissibility of that evidence. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[4] CRIMINAL LAW ⇐ 374
110k374
Government's notice of its intent to use other crimes evidence was insufficient; although notice named witness who would testify against defendant, it did not describe nature of conduct government intended to introduce through witness. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[5] CRIMINAL LAW ⇐ 374
110k374
Although government's notice of intent to use other crimes evidence did not comply with rule governing admissibility of other crimes evidence, government was not precluded from introducing the evidence at trial; sufficient time remained before trial for government to amend notice to provide defendant with sufficient information regarding intended evidence to enable defendant to file motion in limine to contest its admissibility if he chose to do so. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[6] CRIMINAL LAW ⇐ 374
110k374
Although rule governing admissibility of extrinsic acts does not require government to do so, it should consider including in its notice specific purpose, among those listed in rule, for which evidence is intended to be introduced at trial. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[7] CRIMINAL LAW ⇐ 374
110k374
Government seeking to use extrinsic acts evidence has ultimate burden of showing how defendant's past acts are relevant to disputed issue in case. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[8] CRIMINAL LAW ⇐ 374
110k374
While government seeking to use extrinsic acts evidence need not provide precise details regarding date, time, and place of prior acts it intends to introduce, or source of evidence, it must characterize conduct to sufficient degree to apprise defendant of its general nature. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

***73** Lee Thompson, U.S. Atty., Gregory G. Hough, Asst. U.S. Atty., for plaintiff.

Frank Y. Hill, Jr., Boerne, TX, Thomas D. Haney, Topeka, KS, for Clarence E. Long.

William J. Skepnek, Stevens, Brand, Golden, Winter & Skepnek, Lawrence, KS, for Joseph A. Lugo.

MEMORANDUM AND ORDER

SAFFELS, Senior District Judge.

This matter is before the court on the motion of defendant Lugo to exclude Rule 404(b) evidence (Doc. 70).

On January 8, 1993, Defendant Lugo, through his counsel, sent a written request to the United States Attorney's office, pursuant to Fed.R.Evid. 404(b), seeking reasonable notice of the government's intent to introduce evidence of other crimes, wrongs, or acts. The government had previously orally advised defendant Lugo's counsel that it might use such evidence on cross-examination of either defendant, or on rebuttal. On February 18, 1993, the Assistant United States Attorney wrote to Lugo's counsel, advising that:

> pursuant to 404(b), the Government will introduce evidence of all of the matters disclosed to you, your client, Mr. Haney and his client during discovery in this matter. Particularly, be advised that Mr. Messineo will testify consistent with his prior statement, a copy of which has been previously provided to you.

The defendant contends that this notice is inadequate because it is overbroad and unduly general. Specifically, he argues that the notice provides him insufficient information on which to base a motion in limine to determine the admissibility of the evidence the government intends to introduce. In addition, he contends that the statement referring to Mr. Messineo fails to describe the acts to which he will testify, or how they might be material to this case. As a remedy, defendant Lugo seeks an order of this court precluding the government from introducing any evidence of prior crimes, wrongs, or acts.

In response, the government contends that Lugo's counsel was previously provided a copy of Messineo's statement. The government argues that it is not required to disclose before trial all evidence it intends to introduce under Rule 404(b). Rather, it need only provide the defense with the general nature of the evidence of extrinsic acts.

Rule 404(b) was amended effective December 1, 1991, to require the government, upon request by the defendant, to provide

> reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

[1][2][3] The purpose of the 1991 amendment is to reduce surprise and promote early resolution of the issue of admissibility. The "generalized notice provision" requires the prosecution to "apprise the defense of the general nature of the evidence of extrinsic acts." See Advisory Committee Note to 1991 Amendments, reprinted in 22 Charles A. Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5231, at 341-42 (Supp.1992) (hereinafter "Advisory Committee Notes"). The court has the discretion to determine whether a particular notice is not reasonable due to incompleteness. Id. The notice requirement is a prerequisite to admissibility of the Rule 404(b) evidence. Id. Hence the offered evidence is inadmissible if the court determines that the notice requirement has not been met. Id.; see United States v. Williams, 792 F.Supp. 1120, 1134 n. 19 (S.D.Ind.1992). Although the amendment itself does not prescribe sanctions for failure to provide notice, the court in its discretion may enter appropriate orders. See Advisory Committee Notes.

[4] In this case, the court finds that the government's notice is inadequate to comply with the notice prerequisite to the admissibility of Rule 404(b) evidence. The notice does not provide the defendant information concerning the general nature of the evidence the government intends to introduce, as the rule expressly requires. At best, the notice simply forewarns the defendant that the government intends to introduce evidence of other crimes, wrongs, or acts. Although the government's notice states the name of a ***74** government witness who will testify consistent with his prior statement, the notice itself does not describe the nature of the defendant's prior conduct the government intends to introduce through Mr. Messineo. [FN1]

> FN1. The notice provision does not require the government to disclose the names of its witnesses. See Advisory Committee Notes. The fact that the prosecution did so in this case, however, does not eliminate its obligation to notify the defendant concerning the general nature of the evidence the government intends to introduce pursuant to Rule 404(b).

[5] Although the notice does not comply with Rule 404(b), the court does not agree with the

plaintiff's argument that the government should be precluded from introducing Rule 404(b) evidence at trial. The court finds that sufficient time remains before trial for the government to amend its notice to provide the defendant with sufficient information regarding the intended evidence to enable the defendant to file a motion in limine to contest its admissibility if he chooses to do so.

Contrary to the government's arguments, the defendant does not seek unduly detailed information concerning the prior acts the government intends to introduce under Rule 404(b). Compare United States v. Alex, 791 F.Supp. 723, 728 (N.D.Ill.1992) (defendant's demand for specific evidentiary detail, including dates, times, places, and persons involved, determined wholly overbroad). Rather, the defendant simply seeks notice of the general nature of such evidence to permit pretrial resolution of the issue of its admissibility. This is exactly what the amended rule requires.

[6][7] The government shall provide information to the defendant regarding the general nature of the evidence it intends to introduce pursuant to Rule 404(b). Although the rule does not require the government to do so, it should consider including in its notice the specific purpose, among those listed in the rule, for which the evidence is intended to be introduced at trial. The government, of course, has the ultimate burden of showing how the defendant's past acts are relevant to a disputed issue in this case. See United States v. Harrison, 942 F.2d 751, 759 (10th Cir.1991).

[8] While the government need not provide precise details regarding the date, time, and place of the prior acts it intends to introduce, or the source of the evidence, it must characterize the conduct to a sufficient degree to apprise the defendant of its general nature. See, e.g., United States v. Van Pelt, Nos. 92-40042-01-SAC to -07-SAC, 1992 WL 371640, at *14 (D.Kan. December 1, 1992) (government provided "fairly detailed descriptions" of the evidence, thereby satisfying the notice requirement); but cf. Advisory Committee Notes (notice need not satisfy the particularity requirements normally required of language used in a charging document). The government must give enough information in the notice to apprise the defendant of the kind of prior conduct the government intends to use in evidence against him at trial.

IT IS BY THE COURT THEREFORE ORDERED that the government shall provide defendant Lugo the notice required by Rule 404(b), as further described in this order, on or before March 8, 1993.

IT IS FURTHER ORDERED that such notice shall provide sufficient information concerning the nature of the evidence the government intends to introduce pursuant to Rule 404(b) to permit the defendant to prepare a motion in limine to contest its admissibility, if defendant desires to do so.

IT IS FURTHER ORDERED that the defendant's request for an order precluding the government from introducing any evidence of prior crimes, wrongs, or acts (Doc. 70) is hereby denied at this time as premature, with leave to renew if the government fails to comply with this order in every respect.

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Citation | Page(P) | Database | Mode
808 F.Supp. 607 | FOUND DOCUMENT | P 1 OF 58 | DCT | Page
**(Cite as: 808 F.Supp. 607)**

UNITED STATES of America, Plaintiff,
v.
Rufus SIMS, et al., Defendants.
No. 92 CR 166.
United States District Court,
N.D. Illinois, E.D.
Sept. 28, 1992.

Defendants charged in indictment with various offenses including conspiracy to possess with intent to distribute heroin and cocaine, "money laundering," criminal racketeering and murder filed various pretrial motions. The District Court, Alesia, J., held that: (1) defendants were not entitled to bill of particulars; (2) defendants were not entitled to list of government witnesses; and (3) defendant charged only with "money laundering" was not entitled to severance.

Motions granted in part, and denied in part.



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**(Cite as: 808 F.Supp. 607, *610)**

[hereinafter Government's Consolidated Response], at 5.

C. Motion to Require Notice of Intention to Use Other Crimes, Wrongs or Acts as Evidence

Defendant Delwin Langston moves this court to require the government to provide notice of intention to use other crimes, wrongs or acts as evidence pursuant to 404(b) and 608(b). Insofar as the government has agreed to abide by the notice requirements of Rule 404(b), [FN1] the motion is ***611** denied as moot. See Government's Consolidated Response, at 7. Rule 404(b) only requires a statement of the general nature of 404(b) evidence the government will seek to introduce. With respect to requests seeking information more specific than Rule 404(b) requires, Langston's motion is denied as overbroad. The purpose of the disclosure requirement is to "reduce surprise and promote early resolution on the issue of admissibility." FED.R.EVID. 404(b) advisory committee's note. It is not a tool for open ended discovery. United States v. Swano, No. 91 CR 477-02-03, 1992 WL 137588, *6, 1992 U.S.Dist. LEXIS 7554, * 16 (N.D.Ill. June 1, 1992).

FN1. Rule 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes ... provided that upon request by the accused, the prosecution in

a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial." FED.R.EVID. 404(b).

[2] The defendant seeks production of the following information pursuant to Rule 404(b): the dates, times, places and persons involved in the specific crimes or acts; the statements of each participant; the documents which contain such evidence; and a statement of the issues to which the government believes such evidence may be relevant. The government objects to the specificity of the information sought by the defendant. The Senate Judiciary Committee "considered and rejected a requirement that the notice satisfy the particularity requirements normally required of language used in a charging document." FED.R.EVID. 404(b) advisory committee's note. Instead, the Advisory Committee "opted for a generalized notice provision which requires the prosecution to apprise the defense of the general nature of the evidence of extrinsic acts." Id. No language in the rule or the Committee Notes supports the discovery of the type of specific information Langston seeks. Therefore, to the extent Langston requests notice beyond the requirements of 404(b), Langston's motion is denied.

[3] Defendant Langston also seeks disclosure before trial of the





government's intent to use "specific instances of conduct" or Rule 608(b) material. [FN2] Rule 608(b) restricts the use of specific instances of conduct of a witness to the cross-examination of that witness and even then at the discretion of the trial judge. FED.R.EVID. 608(b). Rule 12(d)(2) of the Federal Rules of Criminal Procedure allows the "defendant [to] request notice of the government's intention to use (in its evidence in chief at trial ) any evidence which the defendant may be entitled to discover under Rule 16 subject to any relevant limitations in Rule 16." FED.R.CRIM.P. 12(d)(2) (emphasis added). By its terms, Rule 608(b) evidence may not be used by the government in its case-in-chief and therefore such evidence is not discoverable under Rule 12 of the Federal Rules of Criminal Procedure. See United States v. Hartmann, 958 F.2d 774, 789 n. 5 (7th Cir.1992) ("defendants are not entitled access to Rule 608(b) materials which are not discoverable under FED.R.CRIM.P. 16"); United States v. Cerro, 775 F.2d 908, 914-15 (7th Cir.1985); United States v. Swano, No. 91 CR 477-02-03, 1992 WL 137588, *6-7, 1992 U.S.Dist. LEXIS 7554, *16-17 (N.D.Ill. June 1, 1992); United States v. Santillanes, 728 F.Supp. 1358, 1360 (N.D.Ill.1990). Therefore, Langston's request for notice of the government's intent to use Rule 608(b) evidence is denied.

FN2. Rule 608(b) provides that "[s]pecific instances of conduct of a

witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified."

In summary, Langston's motion is denied in part as moot since the government has agreed to provide notice as required under Rule 404(b) and denied in part insofar as Langston requests information more specific than the notice the government is required to provide under Rule 404(b) and ***612** specific instances of conduct pursuant to Rule 608(b).

D. Motion for a Bill of Particulars

[4] Defendants Ruby Chambers and Estella Sims have each filed a Motion for a Bill of Particulars pursuant to Rule 7(f) of the Federal Rules of Criminal Procedure. Chambers requests the dates, times and locations regarding counts of the indictment that relate to her. Estella Sims seeks the names of any witnesses the government intends to call to establish the allegations in the indictment pertaining to Sims along with the time, place, and persons present.

Citation | Page(P) | Database | Mode
792 F.Supp. 1120 FOUND DOCUMENT P 1 OF 67 DCT P LOCATE
**(Cite as: 792 F.Supp. 1120)**

UNITED STATES of America, Plaintiff,
v.
GARY D. WILLIAMS, Sheila J. Williams, Defendants.
Nos. IP 91-145-CR-01, IP 91-145-CR-02.
United States District Court,
S.D. Indiana,
Indianapolis Division.
April 9, 1992.

Defendants moved to compel discovery in criminal case. The District Court, Tinder, J., held that: (1) statements by coconspirators or codefendants were not discoverable; (2) defendants were not entitled to pretrial discovery of exculpatory material; and (3) "reasonable notice" of general nature of evidence of other crimes, wrongs, or acts that prosecution intends to introduce at trial is at least ten days prior to start of trial.

Motion granted in part and denied in part.



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**(Cite as: 792 F.Supp. 1120, *1133)**

available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.
Fed.R.Evid. 1006.

Request No. 7

[16] Defendants next ask that this court order the Government to produce:

All evidence of similar crimes, wrongs, or acts, allegedly committed by either defendant, upon which the government intends to rely to prove motive, scheme, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, including all documents relating to any such alleged "similar acts."

To support this request, the Defendants offer Federal Rule of Evidence **404(b)** which regulates the use of evidence of other crimes, wrongs, or acts. [FN17] The rule, regarding the materials requested by the Defendants, requires the prosecution in a criminal case to "provide reasonable notice in advance of trial, or during trial if the court excuses pre-trial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial." Fed.R.Evid. **404(b)**. The Government states that should it seek the admission of such evidence, "the defendants will be given reasonable notice of the Government's intent to use said evidence prior to trial." In essence, the

dispute concerns the precise meaning of the term "reasonable notice" as used in Rule **404(b)**.

> FN17. This rule, as amended and effective December 1, 1991, states: Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.
> Fed.R.Evid. **404(b)**.

The purpose of the pre-trial notice requirement of Rule **404(b)** is "to reduce surprise and promote early resolution on the issue of admissibility." Fed.R.Evid. **404(b)** (Notes of Senate Committee on the Judiciary on the 1991 Amendment). Further, no specific time limits are stated in the rule and instead "what constitutes a reasonable request or disclosure will depend largely on the circumstances." Id. Rule **404(b)** clearly requires that the





Government provide notice to the defendant in "advance of trial." Id. This Court could, and in certain circumstances may, undertake to weigh and evaluate each particular situation of **404(b)** notice presented to determine the content of "reasonable notice." However, the need of a defendant to have notice that **404(b)** evidence will be offered seems somewhat similar regardless of the particular case.

Because of this similarity, when a defendant requests the Government to provide the general nature of any evidence which the Government intends to admit for the purposes outlined in Rule **404(b)**, the Government shall give such notice to the defendant no later than ten days prior to start of the trial. By receiving notice of the general nature of **404(b)** evidence ten days before trial, surprise is avoided and the defendant has an adequate opportunity to challenge the admissibility of the information. However, some cases might present facts which necessitate an earlier disclosure of the use of **404(b)** evidence. In such a case, a defendant is free to offer to the Court any reason why a deviation from the presumptive ten-day rule is warranted. [FN18] If the Court finds that "reasonable notice" requires greater than ten days, the Court may order the Government to notify the defendant of the general nature of **404(b)** evidence earlier than ten days before trial. Similarly, if the Court finds that less than ten days is sufficient or required by ***1134** the circumstances of the case, a downward deviation from the presumptive notice is

allowable.

FN18. Likewise, the Government may seek to convince the Court that pre-trial notice should be excused. Under rule **404(b)**, the Court may excuse pre-trial notice "on good cause shown." Fed.R.Evid. **404(b)**.

[17] In the present case, the Defendants have requested that the Government provide the specific evidence which it intends to offer under Rule **404(b)**. Again, the Rules of Evidence are not rules of discovery. The purpose of the Rule **404(b)** notice provision, to prevent surprise during trial, does not support providing a defendant with materials which the Government possesses and plans to offer at trial. Instead, the Defendants need only receive sufficient notice "to apprise the defense of the general nature of the evidence of extrinsic acts." Fed.R.Evid. 404 (Notes of Senate Committee on the Judiciary on the 1991 Amendment). Nothing in the rule indicates that the defendant is entitled to receive documents or other evidence from which the Government derives the prior bad act evidence. The Government merely need provide the Defendants with information sufficient to indicate the general nature of the evidence. [FN19] In this instance, the court was not presented with specific facts from which to determine what reasonable notice might entail. In the absence of such specific circumstances, only these general guidelines come into





play.

FN19. The notes of the Senate Judiciary Committee on the 1991 Amendment indicate that reasonable notice is a condition precedent to the admissibility of **404(b)** evidence. If it is determined that the Government failed to comply with the notice requirements of rule **404(b)**, a court would seemingly have the discretion to refuse to admit such evidence.

With these specific limits, the Defendants' Request No. 7 will be GRANTED, and the Government is ordered to provide the Defendants notice, as defined above, of any evidence which they intend to introduce under Fed.R.Evid. **404(b)** no later than ten days prior to the start of trial.

Request No. 8

[18] In their eighth request, Defendants seek:

A list of the witnesses the government intends to call at trial, with any changes in the list of witnesses to be communicated as they are made. With respect to any expert witnesses the government intends to call, the name, address, qualifications, and subject of testimony of such expert, together with a copy of any report prepared by or for him or her, as well as copies of financial, accounting, scientific, technical, or other documents uses as backup by said expert.

Citation | Page(P) | Database | Mode
855 F.Supp. 725 FOUND DOCUMENT | P 1 OF 44 | DCT | P LOCATE

**(Cite as: 855 F.Supp. 725)**

UNITED STATES of America,
v.
Ronald J. GOLDBERG, Defendant.
No. 4:CR-94-0039.
United States District Court,
M.D. Pennsylvania.
June 21, 1994.

Defendant was charged with falsifying court order. Defendant's court-appointed attorney moved to withdraw. The District Court, McClure, J., held that motion would be granted without allowing for substitution of counsel. Motion granted.



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**(Cite as: 855 F.Supp. 725, *731)**

[13] (10) Motion to review all witnesses' statements even if not used at trial by the government. There is no legal authority for this motion, absent Brady, which requires disclosure only of exculpatory evidence, and does not require disclosure of all evidence for defense review.

[14] (11) Motion to produce employment files of Bureau of Prisons personnel and to produce the government's witness list. The defense is not entitled to the government's list of witnesses. Also, staff employment records are confidential, and Goldberg states no legal reason entitling him to have access to such files.

[15] (12) Motion to dismiss the indictment for an illegally constituted grand jury. The grand jury is selected from the same pool of jurors as are petit juries, see generally 28 U.S.C. ss 1861 et seq., in a manner consistent with 28 U.S.C. s 1863. See Jury Selection Plan for the Middle District of Pennsylvania, adopted March 17, 1989, docketed to Misc. No. 89-069.

(13) Motion to produce materials pursuant to Fed.R.Evid. **404(b).** These materials are produced pursuant to request directed to the government, not by motion. Regardless, notice was provided by the government on the record. See United States' Notice of Intention to Use Proof of Other Crimes as Evidence (record document no. 24).

[16][17] (14) Motion to dismiss indictment based upon selective prosecution. In order to establish a claim of selective or discriminatory

UNITED STATES of America,
v.
Frank P. ALTIMARI, a/k/a "Alti," Joseph Dinapoli, a/k/a "Joe D.," Julius Ciancola, a/k/a "Junior," and Cynthia Schott, a/k/a "Cindy," Defendants.
No. 93 Cr. 650 (LMM).
United States District Court, S.D. New York.
March 25, 1994.
MEMORANDUM AND ORDER

McKENNA, District Judge.

I.

***1** The indictment in this case, returned on August 4, 1993, charges all defendants with conspiring from January of 1983 through October of 1991 to violate 18 U.S.C. s 893 (financing extortionate extensions of credit) (Count One), and defendants Altimari and DiNapoli with conspiring from March of 1990 through October of 1991 to violate 18 U.S.C. s 894 (collections of extensions of credit by extortionate means) (Count Two).

Defendants have made various motions, which are disposed of as follows.

II.





The property whose return Ms. Schott seeks is the "Disputed Property" also sought by Mr. Altimari. Her motion is granted along with his, for the reasons set forth in Section II.5., above.

VI.

Defendants and counsel will appear on March 31, 1994 at 9:30 A.M. for a conference at which the Court will set a trial date.

SO ORDERED.

FN1. The indictment does, however, allege overt acts--two meetings--in which Mr. Altimari is said to have participated in 1990. P 4(1) and (m).

FN2. He also asks that the government be required to furnish "those acts to be considered as similar act evidence under [Fed.R.Evid. **404(b)** ]." Id. at 12-13. As to this category of information, Rule **404(b)** supplies the answer to his motion: "upon request by the accused [which the Court finds to have been made], the prosecution in a criminal case shall provide reasonable notice in advance of trial ... of the general nature of any such evidence it intends to introduce at trial." Fed.R.Evid. **404(b)**. The government will, not less than 15 days before trial, advise all defendants, in writing and in an understandable manner, of the specific prior act evidence it intends to offer as to each.

Citation | Page(P) | Database | Mode
837 F.Supp. 570 FOUND DOCUMENT P 1 OF 25 DCT P LOCATE
**(Cite as: 837 F.Supp. 570)**

UNITED STATES of America
v.
Elgin RICHARDSON, a/k/a "David Lee," Defendant.
No. 93 Cr. 717 (CSH).
United States District Court,
S.D. New York.
Nov. 17, 1993.

Defendant was charged with mail theft, armed assault of mail carrier, possession of stolen mail, and use of firearm during and in relation to crime of violence. On motion to suppress, the District Court, Haight, J., held that: (1) evidentiary hearing would be conducted on factual disputes raised in motion to suppress statements; (2) pretrial identification procedure was not unduly suggestive; (3) handwriting exemplars were admissible; and (4) government would not be required to provide defendant with detailed notice of other acts evidence to be introduced at trial.

Ordered accordingly.



837 F.Supp. 570 FOUND DOCUMENT P 23 OF 25 DCT P LOCATE
**(Cite as: 837 F.Supp. 570, *575)**

connection is the fact that defendant's alleged possession of forged documents led to his arrest on the federal charges.

I conclude that because defendant had not yet been indicted or arraigned on the federal offenses, defendant's right to counsel had not attached at the time of the request for handwriting exemplars notwithstanding defendant's representation by counsel on pending unrelated state charges. Therefore, defendant's right to counsel was not violated by the postal inspectors' request for provision of handwriting exemplars without first notifying his counsel on the state charges. Defendant's motion to suppress the handwriting exemplars is accordingly denied, as is his request for an evidentiary hearing.

Defendant requests that in the event the Court declines to suppress the exemplars, the Court direct the government to provide defendant with any reports concerning his handwriting exemplars. The government does not object to this request. See Government's Memorandum at 10. Accordingly, the government is directed to provide any such reports in a timely fashion.

Rule **404(b)** Notice of Introduction of Defendant's Extrinsic Acts

[10] Defendant finally moves this Court to direct the government to provide defendant notice of any prior bad acts of defendant it intends to introduce at trial. The government notes that defendant appears to seek notice under Fed.R.Evid. **404(b)**. Rule **404(b)** requires that "upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance

of trial ... of the general nature of any [evidence of other crimes, wrongs, or acts of the accused] it intends to introduce at trial." The government has agreed to comply with the requirements of Rule **404(b)** and represents that it will provide defendant with such notice within at least 10 days of trial if it intends to seek the admission of evidence contemplated by that rule. Government's Memorandum at 10. Defendant objects to the government's agreement to provide notice of only the "general nature" of the extrinsic act evidence it intends to admit and requests that the government be directed to provide notice of the "specifics of prior bad acts."

I will not direct that the government provide more than notice of the "general nature" of the extrinsic acts evidence it will seek to admit because that is all that is required by the specific language of Rule **404(b)** and it is ***576** sufficient to allow the defendant to adequately prepare for trial. See e.g. United States v. Williams, 792 F.Supp 1120, 1134 (S.D.Ind.1992) (Rule **404(b)** requires only provision of "information sufficient to indicate the general nature of the evidence.")

Accordingly, since the government does not object to the request, the government is directed to provide any such notice within 10 days of trial, which is a reasonable amount of time. See id.

CONCLUSION

For the reasons stated above, defendant's motion is denied in its entirety.





It is SO ORDERED.

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UNITED STATES of America,
v.
Alvin MELENDEZ, Defendant.

No. 92 CRIM. 047 (LMM).

United States District Court, S.D. New York.

April 24, 1992.

MEMORANDUM AND ORDER

McKENNA, District Judge.

***1** Defendant's pretrial motions are disposed of as follows:

1. The government will advise defendant in writing not later than 14 days before trial of the "general nature" of evidence it intends to offer as to other crimes, wrongs, or acts, whether during the government's direct case, during cross-examination of defendant should he testify, or during the government's rebuttal case. Fed.R.Ev. 404(b) (amended effective December 1, 1991).

Neither Rule 404(b) as amended nor the Advisory Committee note is particularly helpful as to what is meant by "general nature." The parties have not cited case law construing the phrase as used in the amended Rule, nor has research disclosed any. The amendment, according to the Advisory Committee, "is intended to reduce surprise and promote early resolution on the issue of admissibility." At the same time, the Advisory Committee does not appear to contemplate that a Rule 404(b) notice need include "the specifics of such evidence which the court must consider in determining admissibility," since it refers to such specifics as something the Court may require to be disclosed in ruling in limine, a step to follow upon the notice. In the Court's view, Rule 404(b) will be satisfied if the notice to be given by the government identifies each crime, wrong or act by its specific nature (e.g., sale of cocaine), place (e.g., New York City), and approximate date (e.g., July 1986), to the extent known to the government.

2. The government states that, as far as its direct case is concerned, it intends to offer "the January 1990 tapes; evidence of occasions (on or about June 25, 1990, and July 2, 1990) on which the defendant asked the confidential informant to hold or deliver guns for him; and testimony from the informant that he saw guns in the defendant's apartment on or about June 28, 1990." Gov't Letter Brief at 2 (footnote omitted).

It appears to be defendant's position that "the CI was an agent provocateur and that everything he did on July 2, 1990 [the date of the charged offense], including the receipt of money, was done at the behest of the CI and as an accommodation to him." Ostrow Aff. at 6. See also Def's. Mem. at 3. It seems entirely possible that, once raised, such a defense--essentially of lack of intent to possess the weapon--could render admissible under Rule 404(b) the evidence cited in the government's Letter Brief. The Court cannot, however, at this time, determine precisely when and how the issue will be raised, if it is. On the present record, the evidence will not be admitted on the government's direct case, but the Court will discuss the issue with counsel prior to the commencement of trial. Defendant's intended opening is, among other things, relevant to whether the evidence might become admissible on the government's direct case.

3. All applications to exclude evidence during the cross-examination of defendant should he testify, or during the government's rebuttal case, if any, are reserved until the close of the government's direct case, when they can be considered in the context of an actual record.

***2** 4. The government has agreed to stipulate "without identifying the nature of the felony conviction, that the defendant has been convicted of a felony." Letter brief at 6. In the Court's view, the information contained in the stipulation offered by the government (to which defendant may, if he wishes, add the date of the conviction) must be put to the jury. See Francis v. Franklin, 471 U.S. 307, 313, 105 S.Ct. 1965, 1970 (1988).

SO ORDERED.

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Citation | Rank(R) | Page(P) | Database | Mode
144 F.R.D. 631 | R 4 OF 4 | P 1 OF 63 | ALLFEDS | Page
**(Cite as: 144 F.R.D. 631)**

UNITED STATES of America
v.
Donald GREEN, Norman Workman, Clayton Green, Judy Spidell Green, Anita Workman, Mia Ayers, Marilyn Barnes, John Bolden, Clyde Brooks, Lamar Brown, Howard Doran, Robert Felder, Jackie Fuller, Kevin Green, Carlos Herrera, Darryl Johnson, Nesbit E. Lee, Jose Lopez, Joe Mathews, Angelo Martinez, Lisa Medina, Doris Parker, Derwin Rodgers, Harold Smallwood, Terrence Taylor, Patricia Thomas, Defendants.
No. 92-CR-159C.
United States District Court,
W.D. New York.
Oct. 30, 1992.

In prosecution of 26 defendants for various offenses relating to alleged narcotics and racketeering conspiracy, defendants filed joint motion for discovery. The District Court, Heckman, United States Magistrate Judge, held that: (1) counsel for each defendant were entitled to their own set of documents, exceptional circumstances justified order that government bear costs of copying full set of documents, including transcripts, for the defendants who were indigent, and government was to reimburse lead defense counsel for costs of copying tape recordings government intended to use at trial in proportion to





Giglio material is of such significance that it must be provided to the defendant well in advance of the trial so as "to allow the defense to use the favorable material effectively in the preparation and presentation of its case." United States v. Pollack, 534 F.2d at 973; see United States v. Bejasa, 904 F.2d at 140-41; Grant v. Alldredge, 498 F.2d at 381-82. Other Brady and Giglio material should be disclosed with the 3500 material, which in the context of this case is at least 30 days prior to jury selection. United States v. Feola, 651 F.Supp. at 1135-36; see also, United States v. Bestway Disposal Corporation, 681 F.Supp. 1027, 1130 (W.D.N.Y.1988).

XII. PRETRIAL DISCLOSURE OF 404(b) EVIDENCE

[23][24] Defendants have moved for pretrial disclosure of any evidence the government intends to use pursuant to Rule 404(b) of the Federal Rules of Evidence. Specifically, defendants seek evidence of "any alleged criminal or immoral conduct on the part of any defendant intended to be used against any defendant on the government's direct or rebuttal case or an examination of any defendant who might testify at trial." The government has agreed to provide this evidence two weeks before commencement of trial and at an earlier date when possible.

Rule 404(b) requires the prosecution in a criminal case to provide "reasonable notice in advance of trial, or during trial if the court excuses pretrial

evidence that might be used to impeach Watson. The Assistant U.S. Attorney, however, did not disclose the content of Pate's statements to Watson about the earlier underweight drug shipment.

Later that morning, while Watson was on the witness stand, the prosecutor asked about the conversation with Pate. Watson responded, "We was talking about drugs coming through the UPS and that it was hard to trust people that was far away sending you drugs, and he stated that the last package he'd received was short. It was supposed ..." At that point, the trial judge called counsel to the bench. Defense counsel then objected to the testimony as involving "other crimes or wrongs" evidence about which it had received no prior notice from the government.

The trial judge reprimanded the Assistant U.S. Attorney for attempting to introduce evidence under Fed.R.Evid. 404(b) without giving advance notice to the court in accordance with local practice. The judge questioned, however, whether defense counsel had properly requested notice as required by the Rule. After making various findings, the trial judge ruled that the evidence was "intrinsically related" to the acts charged in the indictment and also that the evidence was admissible under Rule 404(b), although he was troubled by the government's failure to give notice of its intention to introduce Pate's admission to Watson.

Barnes was convicted of possession with intent to distribute methamphetamine in violation of 21 U.S.C. § 841(a)(1) and of carrying a firearm during the commission of a drug trafficking crime in violation of 18 U.S.C. § 924(c). Pate, too, was convicted on the drug charge but was acquitted on the count alleging possession of a firearm during the commission of a drug trafficking offense. However, Pate was convicted on an additional count asserting that he violated 18 U.S.C. § 922(g)(1) (possession of a firearm by a convicted felon).

Barnes was sentenced to consecutive sentences aggregating 181 months. Because of his prior conviction for a felony narcotics offense, Pate received the mandatory minimum sentence of 240 months on the drug possession charge. Additionally, Pate received a concurrent sentence of 120 months on the count charging firearm possession by a convicted felon.

Both defendants have appealed the trial court's ruling on Watson's testimony. Pate has also appealed his sentence, contending that because the jury acquitted him of possessing a firearm during the commission of the drug offense, he should not have been given a two-level enhancement in calculating his sentence under U.S.S.G. § 2D1.1(b)(1) (1992).

***1147** I.

Federal Rule of Evidence 404(b), with certain exceptions, prohibits the admission of evidence of other crimes or wrongs "to prove the character of a person in order to show action in conformity therewith." In 1991, the Rule was amended to provide that if evidence is admissible for other reasons, such as proof of motive, opportunity, intent, preparation, plan, identity, etc., "upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial." Fed.R.Evid. 404(b).

The Advisory Committee explained that the amendment "is intended to reduce surprise and promote early resolution on the issue of admissibility. The notice requirement thus places Rule 404(b) in the mainstream with notice and disclosure provisions in other rules of evidence." Id. Advisory Committee's note (1991 amendment).

Although it does not call for any specific form of notice, "[t]he Rule expects that counsel for both the defense and the prosecution will submit the necessary request and information in a reasonable and timely fashion." Id. The court has the discretion to determine reasonableness under the circumstances, but the Committee note cautioned that "[b]ecause the notice requirement serves as [a] condition precedent to admissibility of 404(b) evidence, the offered evidence is inadmissible if the court decides that the notice requirement has not been met." Id.

A respected commentary points out that the amendment provides no specific sanction for the failure to give notice, that the notice must be of a "general nature," and that compliance can be delayed until trial if the court finds "good cause." 22 Charles A. Wright & Kenneth W. Graham, Jr.,

Federal Practice & Procedure § 5249, at 580 (Supp.1994). "This was apparently as much notice as the Justice Department was willing to tolerate; it remains to be seen if it will be of much use to criminal defendants." Id. The amendment, but another small step toward improving the discovery process in criminal trials, has not been in effect for very long and, understandably, has received little appellate scrutiny.

In United States v. Tuesta-Toro, 29 F.3d 771 (1st Cir.1994), the Court of Appeals for the First Circuit concluded that a request for notification "must be sufficiently clear and particular, in an objective sense, fairly to alert the prosecution that the defense is requesting pretrial notification...." Id. at 774. In that case, an omnibus defense motion requesting "confessions, admissions and statements ... that in any way exculpate, inculpate or refer to the defendant" was held to be insufficient to comply with Rule 404(b). Id.

In United States v. Matthews, 20 F.3d 538, 551 (2d Cir.1994), the Court of Appeals for the Second Circuit concluded that the government was not required to furnish pretrial notice of its intention to introduce testimony about a defendant's prior assault on one of its witnesses. In that case, the evidence was introduced on re-direct examination by the government to bolster the credibility of a witness whose character had been vigorously attacked during cross-examination. However, it is questionable whether Rule 404(b) even applied in that instance.

The Court commented that the witness was a confidential informant and that Rule 404(b) did not require disclosure of her name to the defense. Revealing the "other crimes or wrongs" testimony would have unmistakably identified the witness, and notice before trial, therefore, would have disclosed the name of the informant. In that situation, pretrial disclosure should have been a matter for the trial court's discretion in weighing all the pertinent factors.

Probably because the point was not raised, Matthews did not discuss the applicability of the Rule 404(b) notice requirement after the trial had begun and the confidential informant had already taken the stand. Although the opinion on the notice requirement is vague, it would seem that once the identity of the witness had become known, no further reason would exist to excuse the government's obligation to disclose the "other crimes" evidence.

***1148** Rule 404(b) does not discuss at what point, in ordinary circumstances, notice must be given and a response filed. In United States v. Kern, 12 F.3d 122, 124 (8th Cir.1993), the magistrate judge directed the government at a pretrial conference to furnish Rule 404(b) information at least fourteen days before trial. However, because the government was unable to obtain the necessary records until one week before the trial began, the court found that the notification at that point to the defense was reasonable.

In United States v. French, 974 F.2d 687, 694-95 (6th Cir.1992), the government notified the defense one week before trial of its intent to produce "other crimes" evidence. Although the trial apparently had taken place before the adoption of the 1991 amendment to Rule 404(b), we concluded that the district court's approval of a one-week notice to the defense did not amount to an abuse of discretion under the circumstances. See also United States v. Sutton, 41 F.3d 1257, 1258-59 (8th Cir.1994); United States v. Perez-Tosta, 36 F.3d 1552, 1560-63 (11th Cir.1994).

[1][2] Rule 404(b) does not recite whether there is a continuing obligation to disclose "other crimes" evidence that the government discovers after it has initially either provided or denied its intent to use such information. However, Fed.R.Crim.P. 16(c), referring to discovery in criminal cases, has long required a party to disclose additional evidence discovered after a previous request for information has been answered. Although Fed.R.Crim.P. 16(c) refers to evidence or material "subject to discovery or inspection under this rule," we believe that for reasons of efficiency and fairness, a similar continuing obligation to disclose applies to Fed.R.Evid. 404(b). [FN1] A contrary reading would force the defense to make numerous, periodic requests until the trial has been completed--surely a wasteful procedure.

FN1. See also Fed.R.Evid. 102 (rules of evidence should be construed to promote fairness and efficiency); Fed.R.Evid. 412(c)(1) (written notice required 15 days in advance of trial); Fed.R.Evid. 609(b) (written notice required to be given to

adverse party with a fair opportunity to contest the use of such evidence); Fed.R.Evid. 803(24) (advance notice required to give adverse party a fair opportunity to meet the evidence); Fed.R.Evid. 804(b)(5) (same).

In Tuesta-Toro, 29 F.3d at 775 n. 1, the Court speculated in a footnote that Rule 404(b), as drafted, might be read as requiring the government to provide information only as of the time the response was made. The Court, however, expressly did not decide the point.

After due consideration, we conclude that Rule 404(b) does place an initial duty on the defense to request the prosecution to furnish "other crimes" evidence. The request need not be in technical terms, but it must be such as to be, in an objective sense, reasonably understandable. Once made, the request imposes a continuing obligation on the government to comply with the notice requirement of Rule 404(b) whenever it discovers information that meets the previous request.

[3] The trial court must exercise its discretion in determining whether the government is excused from submitting a timely response or whether the circumstances are such that compliance must await further events. Factors for consideration might include a concern about the identification of a confidential informant or a credible belief that the protection of a witness is required.

In the case at hand, we are troubled--as was the trial judge--by the government's failure to disclose the asserted Rule 404(b) evidence before the witness was questioned in front of the jury. Although we credit the government's position that it did not learn of the specific evidence until the trial was already in progress, the defense and the trial court could nevertheless have been notified before Watson took the stand.

There is also difficulty with the defense's contention that it submitted a suitable request under Rule 404(b). Although we do not insist on a request that specifically cites Rule 404(b), cf. United States v. Williams, 792 F.Supp. 1120, 1133-34 (S.D.Ind.1992), United States v. Alex, 791 F.Supp. 723, 728-29 (N.D.Ill.1992), we agree with Tuesta-Toro that an overly broad and generalized discovery request does not comply with the Rule.

[4] By the same token, however, the government's notice must characterize the prior ***1149** conduct to a degree that fairly apprises the defendant of its general nature. United States v. Birch, 39 F.3d 1089, 1093-94 (10th Cir.1994); **United States v. Jackson, 850 F.Supp. 1481, 1493 (D.Kan.1994).** Moreover, the notice given to the defense regarding "other crimes" evidence must be sufficiently clear so as "to permit pretrial resolution of the issue of its admissibility." United States v. Long, 814 F.Supp. 72, 74 (D.Kan.1993). See generally Colleen A. O'Leary et al., Project, Eighth Survey of White Collar Crime: Discovery, 30 Am.Crim.L.Rev. 1049, 1075-78 (1993). The notice requirement is now firmly embedded in Rule 404(b), and courts should rebuff efforts to nullify the Rule's aim of enhancing fairness in criminal trials.

In this case, the defense simply asked for a list of witnesses the government intended to call and their anticipated testimony. That request was so broad that it is questionable that it should have fairly alerted the government to supply evidence under Rule 404(b). We do note, however, that the government represented in its pretrial statement that it was "unaware of any specific trial problems which should be anticipated by the Court." Although we might expect Rule 404(b) admissibility to fall into such a category, the lesson that might be gleaned from this case is that it is more prudent for defense counsel to include a reference to Rule 404(b) in the boilerplate request for discovery under Fed.R.Crim.P. 16.

[5][6] Although the defendants have vigorously pressed this case on the basis of the government's failure to supply Rule 404(b) information, we prefer to follow another route--that the disputed testimony was not within the scope of the Rule. In United States v. Torres, 685 F.2d 921, 924 (5th Cir.1982) (per curiam), the Court of Appeals explained that Rule 404(b) does not apply where the challenged evidence is "inextricably intertwined" with evidence of the crime charged in the indictment.

When the other crimes or wrongs occurred at different times and under different circumstances from the offense charged, the deeds are termed "extrinsic." "Intrinsic" acts, on the other hand, are those that are part of a single criminal episode. Rule 404(b) is not implicated when the other crimes or wrongs evidence is part of a continuing pattern of

illegal activity. When that circumstance applies, the government has no duty to disclose the other crimes or wrongs evidence.

The 1991 Advisory Committee note to Rule 404(b) is in agreement: "The amendment does not extend to evidence of acts which are 'intrinsic' to the charged offense, see United States v. Williams, 900 F.2d 823 (5th Cir.1990)...." For similar holdings, see United States v. Dozie, 27 F.3d 95, 97 (4th Cir.1994) (per curiam), United States v. Nicholson, 17 F.3d 1294, 1298 (10th Cir.1994), United States v. Sparks, 2 F.3d 574, 581 (5th Cir.1993), and United States v. Lambert, 995 F.2d 1006, 1007-08 (10th Cir.1993).

In this case, there was a direct connection between the earlier "short" drug shipment and the receipt of the one for which defendants were charged. The trial court concluded that the evidence could stand for the proposition that the drugs which were the subject of the indictment were "to make up for a prior shipment which was short." We agree that the challenged testimony was intrinsic to the conduct alleged in the indictment, and consequently, Rule 404(b) was not implicated. We therefore reject the defendants' contention that the introduction of Watson's testimony was erroneous. [FN2]

> FN2. We also find no merit in the defendants' contention that Watson's testimony was inadmissible under Fed.R.Evid. 403.

II.

[7] Defendant Pate has raised an additional issue, a challenge to his sentence. As noted earlier, Pate was acquitted of the charge of using or carrying a firearm during the commission of a drug trafficking offense, 18 U.S.C. § 924(c), but was found guilty of being a convicted felon in possession of a firearm, 18 U.S.C. § 922(g)(1).

During the sentencing hearing, the trial judge stated that he intended to apply a two-level increase to the Guideline computation ***1150** pursuant to U.S.S.G. § 2D1.1(b)(1). The judge pointed out that he was not sentencing under the count on which defendant had been acquitted, but "with the evidence that I have in front of me on this matter, I will find that he did possess this weapon in the commission of this offense ...," and accordingly, the enhancement was proper.

Section 2D1.1(b)(1) provides that "[i]f a dangerous weapon (including a firearm) was possessed [during the commission of a drug offense], increase by 2 levels." In United States v. Duncan, 918 F.2d 647, 652 (6th Cir.1990), a case similar to the one before us, we held that the sentencing judge properly applied the enhancement notwithstanding the fact that the jury had found the defendant not guilty of the charge of violating 18 U.S.C. § 924(c), the same section pertinent here. Hence, it is clear that Duncan controls, and we must reject Pate's attack on his sentence.

[8][9] Even if we were to conclude that Duncan is not dispositive on this issue, we observe that the district court properly sentenced Pate to 240 months imprisonment. When the maximum Guideline sentence is less than the statutorily required mandatory minimum, the latter is the effective sentence. U.S.S.G. § 5G1.1(b) (1992); see also United States v. Goff, 6 F.3d 363, 366-67 (6th Cir.1993). Because Pate had previously been convicted of a felony drug violation and the current offense involved more than one kilogram of a methamphetamine substance, the district court was required to apply the 20-year mandatory minimum in 21 U.S.C. § 841(b)(1)(A)(viii). Even assuming that the enhancement should not have been applied, the applicable Guideline range would have been less than the mandatory minimum, and consequently, even if considered to be an error, adding the enhancement had no effect on Pate's sentence.

Accordingly, the judgments of the district court will be affirmed.

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Citation 30 AMCRLR 1049 (Cite as: 30 Am. Crim. L. Rev. 1049) FOUND DOCUMENT Page(P) P 1 OF 85 Database AMCRLR Mode P LOCATE

American Criminal Law Review
Spring, 1993

# Eighth Survey of White Collar Crime
## Procedural Issues

## *1049 DISCOVERY

Colleen A. O'Leary
Kelly G. LaPorte
Jacob Schatz








of materials the government seeks will produce information relevant to the general subject of the grand jury's investigation." [FN216]

A trial court has wide discretion in deciding whether to grant a motion to quash or modify a Rule 17(c) subpoena, and the court's decision is not immediately appealable. [FN217] Appellate review is limited to whether the trial *1075 court abused its discretion. [FN218]

Along with the Jencks Act and Rules 16 and 26.2 of the Federal Rules of Criminal Procedure, Rule 17 provides an additional means for the production of evidentiary material in any criminal proceeding. The rule implicates a number of constitutional safeguards which ensure a defendant's access to witnesses and documents and protect a defendant from unreasonable or oppressive government subpoenas.

### V. FEDERAL RULE OF EVIDENCE 404(b)

More than a decade after the District of Columbia Court of Appeals suggested "that in future cases the Government exercise the discretion given it by Fed. R. Crim. P. 12(b)(1) and notify the defense before trial of its intention to introduce any evidence of prior bad acts," [FN219] Federal Rule of Evidence 404(b) was amended to mandate such pretrial notification, now allowing evidence of other acts "be admissible ..., provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance

of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial." [FN220]

Because Rule **404(b)** is one of the most cited Rules of Evidence, [FN221] the notice requirement adds a crucial step in criminal proceedings with the intent "to reduce surprise and promote early resolution on the issue of admissibility." [FN222] To fulfill this intent, the amended rule requires the accused to first request that notice be given in order to trigger the requirement of notice. [FN223] Failure to make a request may operate as a pre-waiver by the defendant. With the introduction of the amended Rule **404(b)** pre-trial notice requirement, the following four issues may arise as to whether the evidence offered under Rule **404(b)** is admissible: (1) Was notice given at all? (2) If notice was given in advance of trial, was the notice "reasonable?" (3) If the notice was given during trial, did the court excuse pre-trial notice on "good cause shown?" (4) Did the notice include the "general nature" of the evidence offered at trial?

Other Federal Rules of Evidence, Rule 412 (written motion of intent ***1076** required to offer evidence under rule), Rule 609(b) (written notice of intent required to offer conviction older than ten years), and Rules 803(24) and 804(b)(5) (notice of intent required to use residual hearsay exceptions) have similar pre-notice requirements which Rule **404(b)** may ultimately parallel.







A. Remedial Exclusion

The most contentious issue to arise from the newly amended rule is the admissibility of evidence offered by the prosecution when notice has not been given. Although Rule **404(b)** may implicate exclusion, federal courts are split on how rigidly to apply similar notice requirements. The First Circuit took a strict view in United States v. Benavente Gomez, stating "[i]t seems to us clear that, in a criminal case, where no explanation for failing to meet the notice requirement [in Federal Rule of Evidence 803(24)] has been made ... a party may not avoid the requirements of the specific rule ... simply by reading the notice requirement out of existence." [FN224] Other federal appellate courts have taken a similarly literal view of notice requirements, such as the Second Circuit in United States v. Ruffin [FN225] and United States v. Oates [FN226] and the Fifth Circuit in United States v. Davis. [FN227]

On the other hand, several circuits have argued that a flexible approach should be taken in considering whether or not to admit evidence when no required notice was given. This approach has been taken by the First Circuit in United States v. Doe, [FN228] the Second Circuit in United States v. Iaconetti, [FN229] and the Fifth Circuit in United States v. Leslie. [FN230] The courts in these cases have tended to be more flexible in admitting evidence prior to trial.

***1077** B. "Reasonable Notice"

The reasonableness of notice given depends upon the timing of the notice and the manner in which notice was given. The Ninth Circuit, in United States v. Brown, held that the required notice for Rule 803(24) must be given "sufficiently in advance of trial or hearing to provide the adverse party with a fair opportunity to meet it." [FN231] In Mutuelles Unies v. Kroll and Lindstrom, the same court viewed notice given three days prior to trial as adequate. [FN232] For notice given during trial, the First Circuit held in United States v. Panzardi-Lespier that sufficient notice was given after the initiation of proceedings but seven days before the specific evidence was introduced at trial. [FN233]

Though the timing of the notice may be sufficient, the manner of notification given might be unsatisfactory. The Third Circuit held in both United States v. Furst [FN234] and in United States v. Pelullo [FN235] that the notice provision requires "the proponent to give notice of its intention specifically to rely on the rule as grounds for admissibility." [FN236] In Pelullo, the government gave documents to Pelullo months before trial but did not state that the evidence would be introduced under Rule 803(24) as the basis for admissibility; [FN237] the Third Circuit barred admission of the evidence: "Although the Federal Rules of Evidence are to be liberally





construed in favor of admissibility, this does not mean that we may ignore requirements of specific provisions ...." [FN238] However, the First Circuit in United States v. Benavente Gomez [FN239] held that notification of the existence of the evidence alone constituted sufficient notification.

C. "Good Cause" Shown for Notice Given During Trial

The standard adopted by the First Circuit in admitting evidence with ***1078** notice given during trial is enunciated in United States v. Doe, where the court stated that a "flexible approach is warranted only when pretrial notice is wholly impractical." [FN240]

For notice given during trial, there still must be adequate time for the adverse party to challenge the proposed evidence; in Doe, the First Circuit stated that "even under a flexible approach, evidence should be admitted only when the proponent is not responsible for the delay and the adverse party has an adequate opportunity to examine and respond to the evidence." [FN241]

D. "General Notice" of the Evidence

Another manner in which notice may fail to satisfy the requirements of Rule **404(b)** is when the notification is not specific enough to allow the accused to identify the content of the evidence sought to be introduced. In United States v. Chu Kong Yin, the Ninth Circuit held that notice under Rule 803(24) which

did not include the identity and the addresses of declarants of the hearsay evidence made the notice unsatisfactory and barred introduction of that evidence. [FN242]

FN1. Weatherford v. Bursey, 429 U.S. 545, 559 (1977) (noting that the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded).

FN2. 373 U.S. 83 (1963).

FN3. Id. at 87-88 (suppression by prosecution of evidence favorable to accused violates due process); see also United States v. Bagley, 473 U.S. 667, 675 (1985) (Blackmun, J.) (prosecutor is required only to disclose evidence that, if suppressed, would deprive defendant of a fair trial).

FN4. 18 U.S.C. s 3500 (1982).

FN5. FED. R. CRIM. P. 16, 17, 26.2

FN6. In addition, the Freedom of Information Act may provide a useful tool for compelling disclosure of federal agency records. 5 U.S.C. s 552 (1988).





FN218. See United States v. Arditti, 955 F.2d 331, 345 (5th Cir. 1991) (trial court did not abuse its discretion in quashing the Rule 17(c) subpoena).

FN219. United States v. Foskey, 636 F.2d 517, 526 n.8 (D.C. Cir. 1980) (evidence of prior arrest for possession of drugs inadmissible in illegal possession of drugs trial).

FN220. FED. R. EVID. **404(b)**.

FN221. See generally EDWARD IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE (1984) (discussing the importance and heavy reliance on Rule **404(b)**).

FN222. SENATE COMM. ON JUDICIARY, FED. RULES OF EVIDENCE, S. REP. NO. 1277, 93d Cong., 2d Sess. 24 (1974) (committee comment on amended Rule **404(b)**).

FN223. A notice request may, therefore, become a standard element of defendants' discovery requests.

FN224. United States v. Benavente Gomez, 921 F.2d 378, 384-85 (1st Cir. 1990) (cocaine conspiracy case where admission into evidence of telephone

records under residual hearsay exception was error).

FN225. 575 F.2d 346, 357-58 (2d Cir. 1978) (income tax evasion case where Internal Revenue Service printout was inadmissible hearsay).

FN226. 560 F.2d 45, 72 n.30 (2d Cir. 1977) (possession with intent to distribute heroin case where United States Customs chemist's statement deemed inadmissible hearsay).

FN227. 571 F.2d 1354, 1360 n.11 (5th Cir. 1978) (illegal possession of firearm case where form documents from a government bureau were not admissible within hearsay exception).

FN228. 860 F.2d 488, 491-92 (1st Cir. 1988) (rape shield case which reiterated importance of notice requirement).

FN229. 540 F.2d 574, 578, n.6 (2d Cir. 1976) (bribe solicitation case where a business partner's account of what was said to the company president deemed not inadmissible hearsay), cert. denied, 429 U.S. 1041 (1977).

FN230. 542 F.2d 285, 291 (5th Cir. 1976) (transportation of stolen






automobile case where statements previously given to the FBI by accomplices were admissible).

FN231. United States v. Brown, 770 F.2d 768, 771 (9th Cir. 1985) (drug offense case where defendant's passports were admissible under the general exception to the hearsay rule).

FN232. Mutuelles Unies v. Kroll and Lindstrom, 957 F.2d 707, 713 (9th Cir. 1992) (French corporation's legal malpractice action against American law firm where unavailable witness's statement deemed admissible).

FN233. United States v. Panzardi-Lespier, 918 F.2d 313 (1st Cir. 1990) (conspiracy to possess with intent to distribute heroin case where tape recordings made by informant held admissible).

FN234. 886 F.2d 558, 574 (3d Cir. 1989) (embezzlement case where evidentiary ruling errors held harmless).

FN235. 964 F.2d 193, 202 (3d Cir. 1992) (wire fraud and racketeering case where documents not admissible under residual hearsay exception).

FN236. Id.

FN237. Id.; see also United States v. Tafollo-Cardenas, 897 F.2d 976, 980 (9th Cir. 1990) (prosecutor must give notice of Rule 803(24) as basis for admissibility).

FN238. United States v. Pelullo, 964 F.2d at 204.

FN239. 921 F.2d 378, 384 (1st Cir. 1990) (cocaine conspiracy case where error of admitting evidence of phone records did not require reversal).

FN240. United States v. Doe, 860 F.2d 488, 492 n.3 (1st Cir. 1988).

FN241. Id.

FN242. United States v. Chu Kong Yin, 935 F.2d 990, 1000 (9th Cir. 1991) (immigration case where government's introduction of Hong Kong records were inadmissible hearsay).

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Citation | Page(P) | Database | Mode
813 F.Supp. 294 FOUND DOCUMENT P 1 OF 37 FED3-ALL Page
36 Fed. R. Evid. Serv. 1523
**(Cite as: 813 F.Supp. 294)**

UNITED STATES of America, Plaintiff,
v.
Mark EVANGELISTA, et al., Defendants.
Crim. No. 92-503.
United States District Court,
D. New Jersey.
Jan. 7, 1993.

Defendants moved for severance and for production of evidence. The District Court, Irenas, J., held that: (1) defendant's confession could be sufficiently redacted to be admissible without violating confrontation rights of codefendants; (2) defendants were not entitled to production of list of government's witnesses; and (3) production of Jencks Act material on the eve of trial was soon enough.

Ordered accordingly.





At oral argument, the government offered to provide defendants with all Jencks Act material on the eve of trial. While the government was clearly under no legal obligation to do so, the court is persuaded that this offer strikes an appropriate balance and will order production of Jencks Act material on Friday, January 8, 1992.

D. Federal Rule of Evidence 404(b) Material

[8] Federal Rule of Evidence 404(b) was amended effective December 1, 1991 to require the prosecution in a criminal case to "provide reasonable notice in advance of trial" of any such evidence it intends to introduce at trial. Cases interpreting the phrase "reasonable notice" are few in number so far.

In U.S. v. Williams, 792 F.Supp 1120, 1133 (S.D.Ind.1992), the court held that ten days prior to trial would be the reasonable period for advance notice required under the amendment. In U.S. v. Alex, 791 F.Supp. 723, 729 (N.D.Ill.1992), the court held seven days would be reasonable advance notice.

At oral argument the government offered to provide this information to defendants 7 or 10 days in advance of trial. Because the alleged incidents occurred more than five years ago, defendants' preparation to respond to the government's Rule 404(b) material may require more effort than if the incidents had occurred more recently. The court will order the government to provide this information to defendants and the court on Monday, December 28, 1992 (10

business days prior to trial, excluding weekends but not excluding New Year's Day).

E. Witness List and Tape Recording

[9][10] It is well established that criminal defendants have no right in advance of trial to see a list of witnesses the prosecution will or may call. Government of the Virgin Islands v. Martinez, 847 F.2d 125, 128 (3d Cir.1988) (government is not required to disclose names of witnesses in non-capital cases, but trial court in its discretion may order such discovery); United States v. White, 750 F.2d 726, 728 (8th Cir.1984) (defendants have no right to such pretrial discovery, but in its discretion district court may order it); U.S. v. Zolp, 659 F.Supp 692 (D.N.J.1987); U.S. v. Vastola, 670 F.Supp 1244, 1268 (D.N.J.1987) (witness lists and statements of non-testifying witnesses not required to be disclosed as Brady material). The court will not order the government to disclose its list of prospective witnesses.

The court need not rule on defendant's request for a copy of the tape recording of a consensually recorded conversation between defendant, Mark Evangelista, and one David Pachucki because the government has provided defendants with a copy which defense counsel stated was audible. [FN12]

FN12. Additionally the court instructed counsel that transcripts of any





recorded conversations that any party intends to use at trial must be prepared well in advance of trial, and the transcript of the Evangelista and Pachucki recording must be delivered to the court by close of business on December 24, 1992.

The court will enter an appropriate order in conformance with this opinion.

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855 F.Supp. 955 CITING CASE | P 1 OF 68 | FED7-ALL | Page

**(Cite as: 855 F.Supp. 955)**

UNITED STATES of America, Plaintiff,
v.
Christopher R. MESSINO, Clement A. Messino, Michael Homerding, Donald Southern, William Underwood, Christopher B. Messino, Blaise Messino, Paul Messino, Thomas Hauck, Gary Chrystall, Daniel Shoemaker, and Lawrence Thomas, Defendants.

No. 93 CR 294.

United States District Court,
N.D. Illinois,
Eastern Division.

June 24, 1994.

Defendants charged with drug and money laundering conspiracy filed various pretrial motions. The District Court, Alesia, J., held that: (1) hearing was required on motion to suppress evidence seized and removed from defendant's home pursuant to warrant obtained ex parte pursuant to civil forfeiture proceeding; (2) grand juror's misconduct did not require dismissal of indictment; and (3) defendants were not entitled to severance.

Motions granted in part, denied in part, and referred in part.





Thereof is granted.

11. Defendant Christopher Richard Messino's Motion for Access to Original Tape-recordings and Physical Evidence

The government has agreed to comply with defendant's request. Accordingly, Defendant Christopher Richard Messino's Motion for Access to Original Tape-recordings and Physical Evidence is denied as moot.

12. Defendant Christopher Richard Messino's Motion to Compel MCC to Make a Tape-recorder Available to Defendant and Counsel

The government represents that the MCC (Metropolitan Correctional Center) is complying with defendant's request. Accordingly, Defendant Christopher Richard Messino's Motion to Compel MCC to Make a Tape-recorder Available to Defendant and Counsel is denied as moot.

13. Motions for Notice of Government's Intention to Introduce Certain Specified Categories of Evidence

Defendant Michael Homerding has moved for an order that the government reveal any intention to introduce Rule 404(b) evidence. Defendants Clement Messino, Donald Southern, Thomas Hauck, and Daniel Shoemaker have filed similar motions, with the added element of seeking evidence under Rule 608. Finally Christopher Richard Messino and William Underwood have filed a motion seeking Rule 404(b) evidence, Rule 608 evidence, and other various categories of evidence.

A. Rule 404(b) Evidence

Rule 404(b) of the Federal Rules of Evidence establishes that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." FED.R.EVID. 404(b). The rule provides, however, that evidence of "other crimes, wrongs, or acts" may be admissible for other specified purposes. But to invoke a Rule 404(b) exception the government must meet the rule's disclosure requirement: "[U]pon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial ... of the general nature of any such evidence it intends to introduce at trial." FED.R.EVID. 404(b).

Defendants' motions constitute a "request by the accused." The prosecution is therefore required to provide reasonable notice in advance of trial, an obligation the government acknowledges. (Government's Consolidated Response at 22.) As far as the amount of notice the government will give, it has agreed to provide notice at least 30 days before trial, an amount of time the court views as reasonable. Indeed, that period of time is approximately that requested by one of the defendants. (See Defendant Michael Homerding's Motion for Notice of Intention to Use Evidence of Other Crimes, Acts and Wrongs of Any Defendant at 2 ("[D]efendant requests reasonable notice before trial, and thus requests notice four weeks prior to trial.").)

As far as the content of the notice is concerned, the government is correct in





noting that Rule 404(b) only requires that the notice inform defendants of the "general nature" of the evidence. The level of specificity called for by some of the defendants is simply not contemplated by Rule 404(b).

B. Rule 608 Evidence

[11] Defendants Christopher Richard Messino, Clement Messino, Donald Southern, Thomas Hauck, William Underwood, and Daniel Shoemaker also seek notice of intended use of Rule 608(b) evidence, or evidence of specific instances of conduct. This court has previously held that defendants generally are not entitled to special pretrial notice of the introduction of Rule 608(b) evidence, and the court reaffirms that holding for the reasons then given. See **United States v. Sims, 808 F.Supp. 607, 611** (N.D.Ill.1992).

C. Data Forming the Basis for Opinion Testimony

Defendants Christopher Richard Messino and William Underwood seek information behind ***966** any expert opinion the government intends to offer. The government acknowledges its Rule 16(a)(1)(E) obligations in that regard. Defendants' detailed requests do, as the government argues, exceed those obligations. The court, on the government's representation, assumes that the government's stated intent to follow Rule 16 will be fulfilled. However, the court adds that it is troubled by the following statement by the government: "The United States herein agrees to disclose to defendants prior to trial whether it will rely upon expert testimony, but defendants' request for

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46 F.3d 1369 | R 3 OF 148 | P 1 OF 124 | ALLFEDS | P LOCATE

**(Cite as: 46 F.3d 1369)**

UNITED STATES of America, Plaintiff-Appellee,
v.
Darrell A. TOMBLIN, Defendant-Appellant.
No. 93-8679.
United States Court of Appeals,
Fifth Circuit.
Feb. 24, 1995.

Defendant was convicted in the United States District Court for the Western District of Texas, H.F. Garcia, J., of bribery, extortion and related offenses, and he appealed. The Court of Appeals, Emilio M. Garza, J., held that: (1) any deficiencies in affidavits in support of wiretap authorization did not **require** suppression; (2) bribery instruction was adequate; (3) evidence was sufficient to support bribery conviction; (4) extortion instruction was adequate; (5) because defendant was not a public official, his conviction for extortion had to be reversed; (6) introduction of evidence of defendant's character did not **require** reversal; (7) prosecutor was not **required** to give **notice** of intent to use other-acts evidence; and (8) upward departure in base offense level for bribery was warranted.

Affirmed in part, vacated in part and remanded.



46 F.3d 1369 | R 3 OF 148 | P 112 OF 124 | ALLFEDS | P LOCATE

**(Cite as: 46 F.3d 1369, *1388)**

FN49. We note that, had we addressed Tomblin's Rule 608(b) good faith argument, we would have reached the same conclusion.

2

[37][38] Tomblin also argues that, because the prosecutor did not provide advance notice, the introduction of evidence of other bad acts when cross-examining Tomblin violated Federal Rule of Evidence 404(b). [FN50] The government contends that the other-acts evidence was proper under Rule 608(b) because it was introduced only to impeach Tomblin and was not offered in the prosecutor's case in chief. [FN51] Whether Rule 404(b) or Rule 608(b) applies to the admissibility of other-act evidence depends on the purpose for which the prosecutor introduced the other-acts evidence. United States v. Schwab, 886 F.2d 509, 511 (2d Cir.1989), cert. denied, 493 U.S. 1080, 110 S.Ct. 1136, 107 L.Ed.2d 1041 (1990). Rule 404(b) applies when other-acts evidence is offered as relevant to an issue in the case, such as identity or intent. Id. Rule 608(b) applies when other-acts evidence is offered to impeach a witness, "to show the character of the witness for untruthfulness," or to show bias. Id. The prosecutor contends that his cross-examination questions were probative of Tomblin's character for truthfulness.

directed at Tomblin's alleged acts of fraud, bribery, and embezzlement. [FN52] As such, the prosecutor's questions were probative of Tomblin's character for truthfulness and were permissible under Rule 608(b). Accordingly, we conclude that the provision of Rule 404(b) that **requires** the prosecutor to give **notice** of his intention to use other-acts evidence does not apply here. [FN53]

FN52. Rule 608(b) does require a good-faith basis for the questions. Tomblin, however, did not raise lack of good faith in a contemporaneous objection. Further, the record shows that the prosecutor gathered his foundation from the wiretaps.

FN53. In a pretrial hearing, Tomblin stated that if the prosecutor intended to introduce Rule 404(b) evidence, Tomblin would seek to limit its use through his motion in limine. The prosecutor responded that he did not intend to introduce Rule 404(b) evidence, but he reserved the right to introduce evidence of other misconduct to impeach Tomblin should Tomblin testify. It is not clear that the judge gave a ruling on this part of the motion. Because we find the evidence permissible under Rule 608(b), we do not address Tomblin's argument that the evidence violated his 404(b) motion.

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649 F.2d 471 FOUND DOCUMENT P 1 OF 41 CTA Page
80-2 USTC P 9679, 7 Fed. R. Evid. Serv. 975
**(Cite as: 649 F.2d 471)**

UNITED STATES of America, Plaintiff-Appellee,
v.
Roger S. BASKES, Defendant-Appellant.
No. 77-2178.
United States Court of Appeals,
Seventh Circuit.
Argued April 28, 1978.
Decided Sept. 18, 1980.

Defendant was convicted in the United States District Court for the Northern District of Illinois, Bernard M. Decker, J., of conspiring with others to defraud the United States by impeding and obstructing the assessment and collection of income and gift taxes and he appealed. The Court of Appeals, Fairchild, Chief Judge, held that: (1) defendant lacked standing to suppress documents seized from a third party not before the court; (2) witnesses' hopeful expectation that they could avoid criminal or civil proceedings by disclosing to government attorneys what they knew about the transactions in issue, even when supplemented by evidence that a government attorney used language concerning possibility of granting informal immunity, did not amount to a promise of leniency such that witnesses' denial that they had received





[2] In the present case the defendant has not established the required undisclosed agreement of leniency.[FN3] Defendant has not offered any direct evidence of promises of leniency in exchange for testimony. Instead, defendant asks us to infer promises from Schoenberg's hope that his clients could, if necessary, avoid exposure to criminal or civil fraud proceedings by disclosing what they knew of the transactions. Such a hopeful expectation even when supplemented by evidence that a government attorney ***477** used language concerning the possibility of granting informal immunity is not sufficient to warrant a new trial under the rationale of Giglio. See United States v. Ramirez, 608 F.2d 1261, 1266-67 (9th Cir. 1979); United States v. Piet, 498 F.2d 178, 182 (7th Cir.), cert. denied, 419 U.S. 1069, 95 S.Ct. 655, 42 L.Ed.2d 664 (1974). The situation is too equivocal to deem the witnesses' answers false and the government under a duty to correct or qualify them.

FN3. In cases in which courts have ordered a new trial based on Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104, an undisclosed agreement of leniency between the government and the witness prior to the testimony was clearly established. See Giglio, 405 U.S. at 152-53, 92 S.Ct. at 765; Campbell v. Reed, 594 F.2d 4, 7 (4th Cir. 1979); United States v. Butler, 567 F.2d 885, 888 (9th Cir. 1978); United States v. Harris, 498 F.2d 1164, 1169 (3d Cir.), cert. denied,

419 U.S. 1069, 95 S.Ct. 655, 42 L.Ed.2d 665 (1974); United States v. Gerard, 491 F.2d 1300, 1304 (9th Cir. 1974).

IV. Court's Refusal to Require Disclosure of Intended Cross-Examination

Defendant argues that the district court erred in not compelling the government to disclose the specific instances of defendant's conduct which it intended to use in cross-examination of defense character witnesses, prior to the time they were to testify. As a result, defendant claims he was forced to withhold significant character testimony rather than risk its impeachment by undisclosed and unverified conduct.

We find no rule which mandates such disclosure. This circuit requires the trial judge to consider the truth of the basis for impeaching questions prior to cross-examination of a character witness. United States v. Jordan, 454 F.2d 323, 325 (7th Cir. 1971).[FN4] However, the purpose of the inquiry is to prevent improper questioning which might have a prejudicial impact on the jury and which cannot be adequately cured by instructions. Disclosure is merely ancillary to verification of the conduct to be incorporated in the questions. No rule or rationale guarantees the defense advance knowledge of legitimate impeachment before it calls a witness.

FN4. We note that there is some conflict among the circuits on this issue.





Jordan was decided on the basis of Gross v. United States, 394 F.2d 216, 223 (8th Cir. 1968), on appeal after new trial, 416 F.2d 1205 (8th Cir. 1969), cert. denied, 397 U.S. 1013, 90 S.Ct. 1245, 25 L.Ed.2d 427 (1970). However, the Eighth Circuit has since drawn into question its holding in Gross. Mullins v. United States, 487 F.2d 581 (8th Cir. 1973). In Mullins the Eighth Circuit found that the propriety of impeaching questions need not be decided "either before trial or before questioning if the matter is satisfactorily resolved during trial." Id. at 588.

The scope of character testimony is generally left to the discretion of the trial court since it is in the best position to consider the context in which it is to be presented.

(C)ourts of last resort have sought to overcome danger that the true issues will be obscured and confused by investing the trial court with discretion to limit the number of (character) witnesses and to control cross-examination. Both propriety and abuse of hearsay reputation testimony, on both sides, depend on numerous and subtle considerations difficult to detect or appraise from a cold record, and therefore rarely and only on clear showing of prejudicial abuse of discretion will Courts of Appeals disturb rulings of trial courts on this subject. (Footnote omitted.)

Michelson v. United States, 335 U.S. 469, 480, 69 S.Ct. 213, 220, 93 L.Ed.

168 (1948). Among these considerations are concerns for fairness and efficiency as they emerge from the conduct of the trial. Normally the judge will be free to exercise his discretion in weighing these concerns and deciding when to rule on a specific issue.

[3] Accordingly, we find no abuse of discretion in the trial court's refusal to rule on the scope of cross-examination without benefit of having heard the direct testimony. While there may be some advantages to deciding the matter before the witnesses take the stand, there are also compelling reasons for waiting to hear them first. "(U)nless the judge has a grasp of how much ground has been . . . traversed by the offering on good character, he cannot define the ground which the cross-examination may cover in attempting to discredit that testimony." United States v. Lewis, 482 F.2d 632, 644 (D.C.Cir.1973). The trial court must decide for itself when it has enough information to make a proper ruling. While the court had much of the information found lacking in Lewis, we cannot find it unreasonable in having required more, particularly in light of the absence of prejudice to defendant's right to prior consideration.

***478** The defense asked for a ruling on this issue at the close of the government's case. While the court declined to rule at that time, it made it clear that it would fully consider the matter after a witness had testified and before the cross-examination began. Furthermore, it indicated that this consideration would take place outside the hearing of the jury. Given these





precautions, the defendant would have been amply protected from the likelihood of improper questioning of his witnesses. The decision by the defense to withhold character testimony was freely made and based on no greater risk than that inherent in all trial proceedings. The defendant is bound by the consequences of that decision.

V. Restrictions on Cross-Examination

The defendant next claims that the trial court erred in refusing to permit him to ask a question of a key prosecution witness.

Alan Hammerman, an attorney practicing in the same law firm as the defendant, was named in the indictment as a co-conspirator. At the government's request, Hammerman was severed for trial from defendant with the understanding that if Hammerman testified consistently with a prior statement his indictment would be dismissed. Hammerman testified that he worked under defendant's supervision in structuring and implementing the Cavanaugh transaction and he also testified to various aspects of the sales transaction.

On cross-examination defendant's counsel asked Hammerman:

Mr. Hammerman, did you unlawfully, knowingly and wilfully conspire to defraud the United States together with Sam Zell, Roger Baskes and/or Burton Kanter?

Mr. Hammerman, did you unlawfully, knowingly and wilfully combine and agree together with Roger Baskes, Burton Kanter and Sam Zell to defraud the United States of America?

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| 45 F.3d 933 | R 4 OF 148 | P 1 OF 64 | ALLFEDS | P LOCATE |

**(Cite as: 45 F.3d 933)**

UNITED STATES of America, Plaintiff-Appellee,
v.
Albert G. BUSTAMANTE, Defendant-Appellant.
No. 93-8705.
United States Court of Appeals,
Fifth Circuit.
Feb. 13, 1995.

Rehearing and Suggestion for Rehearing En Banc Denied April 5, 1995.

Former United States Representative was convicted in the United States District Court for the Western District of Texas, Edward C. Prado, J., of violating Racketeer Influenced and Corrupt Organizations Act (RICO), and he appealed. The Court of Appeals, W. Eugene Davis, Circuit Judge, held that evidence supported conviction.

Affirmed.



| Citation | Rank(R) | Page(P) | Database | Mode |
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| 45 F.3d 933 | R 4 OF 148 | P 57 OF 64 | ALLFEDS | P LOCATE |

**(Cite as: 45 F.3d 933, *945)**

B. Improper closing argument

[15] Bustamante argues that, during its closing argument, the government improperly suggested that Jaffe, Garcia and Heard were guilty of criminal conduct and called attention to Bustamante's decision not to call them as witnesses. However, as the government points out, Bustamante's own counsel had already repeatedly highlighted the fact that the government did not call these witnesses. The district court overruled Bustamante's objection to this argument. The district court did not err in permitting the government to respond to Bustamante's own argument suggesting that the jury draw unfavorable inferences from the government's failure to call these witnesses.

C. Improper cross-examination of Bustamante

[16] Bustamante first complains that the government suggested that he had received other uncharged illegal gratuities by asking him twice "You've never gotten anything from Doug Jaffe?" At trial, Bustamante's attorney objected on the ground that the government was trying to introduce evidence of extraneous bad acts prohibited by Federal Rule of Evidence (FRE) 404(b). The government responded that these inquiries were directly relevant to the Falcon bribe, in addition to being fair impeachment questions. The district court apparently agreed, but limited the government's questioning to Jaffe's involvement in the $35,000 payment Bustamante received from Garcia. Bustamante now argues that the question itself was improper because it implied Bustamante had received

other gratuities from Jaffe. We disagree. The record leads us to conclude that a reasonable jury would interpret this question as referring to the gratuity with which Bustamante had been charged, a matter which the government was entitled to explore.

[17] Bustamante next complains that the government twice asked questions intimating that Bustamante had done other improper things in his past, then stated in the jury's presence that it had outside evidence to support these questions. Bustamante contends that the government thus gave unsworn testimony about his prior bad acts. However, the record reveals that the government made these statements after Bustamante's attorney suggested in front of the jury that the government asked these questions in bad faith. In this context, the government's statements were not improper. In any event, these statements certainly do not amount to plain error, which is the applicable standard given that Bustamante never objected to them.

[18] Bustamante also complains about two series of questions the government asked regarding two other specific instances of uncharged prior conduct: Bustamante's failure to report or pay taxes on certain income, and Bustamante's solicitation of an unrelated bribe in 1987. At trial, Bustamante objected that the government was introducing FRE 404(b) evidence without first **disclosing** it to the defense as **required** by a pretrial order. The government correctly responded that, because it was using this evidence to impeach





Bustamante's credibility, FRE 404(b) did not apply. United States v. Tomblin, 42 F.3d 263, 282-83 (5th Cir.1994). The district court allowed both lines of questioning. Bustamante now contends that these questions were highly prejudicial.

Bustamante's argument places the cart before the horse. We assess the prejudicial quality of these questions only if we conclude that they were improper. United States v. MMR Corp., 907 F.2d 489, 501 (5th Cir.1990), cert. denied, 499 U.S. 936, 111 S.Ct. 1388, 113 L.Ed.2d 445 (1991). They were ***946** not. FRE 608(b) allows the government to inquire into specific instances of conduct relevant to Bustamante's character for truthfulness. Both the failure to report income and the solicitation of bribes are relevant to the issue of honesty. E.g., Tomblin, 42 F.3d at 282-83. The record reveals that, prior to embarking on each series of questions, the government informed the district court of the factual support for its inquiries, thus establishing a good faith basis for its questions. We conclude that the district court did not err in permitting these questions.

Lastly, Bustamante asserts that the government commented on his assertion of his fifth amendment rights before the grand jury. At the start of his direct examination, Bustamante stated "I've been waiting a long time for this day to come." On cross-examination, the government asked "You were given an opportunity to come in and tell the government your version [of the facts],

weren't you?" and "I sent your attorney a letter inviting you to come in to the grand jury and tell your story under oath, at that time, didn't I?" The district court sustained Bustamante's objections to both questions.

[19] [20] On appeal, the government argues that these questions were properly designed to impeach Bustamante's earlier testimony. We disagree. The rule is well established that a witness generally may not be cross-examined about her choice to invoke the fifth amendment privilege in grand jury proceedings. United States v. Robichaux, 995 F.2d 565, 568 (5th Cir.), cert. denied, --- U.S. ----, 114 S.Ct. 322, 126 L.Ed.2d 268 (1993). We need not consider the relationship between this rule and the government's right to impeach a witness, because in Bustamante's case the government was not fairly impeaching his earlier statement. Bustamante's general introductory remark that he had been waiting a long time for his trial date to arrive cannot be interpreted as a complaint that he had never before had a chance to speak to the government or the grand jury. The government's remarks were thus improper.

This, however, is not the end of the inquiry. We will only find reversible error if the government's improper comments cast serious doubt on the jury's verdict. United States v. Rocha, 916 F.2d 219, 234 (5th Cir.1990), cert. denied, 500 U.S. 934, 111 S.Ct. 2057, 114 L.Ed.2d 462 (1991). In making this evaluation, we consider (1) the likelihood and degree that the jury was prejudiced by the remarks; (2) the effectiveness of any

UNITED STATES of America, Appellee,
v.
Philip SCHWAB, Defendant-Appellant.

No. 1360, Docket 89-1048.

United States Court of Appeals,
Second Circuit.

Argued June 1, 1989.

Decided Sept. 28, 1989.

Defendant was convicted in the United States District Court for the Eastern District of New York, Eugene H. Nickerson, J., of bribery and offering to bribe a public official, and he appealed. The Court of Appeals, Jon O. Newman, J., held that (1) it was error to permit cross-examination of defendant about prior misconduct which had resulted in acquittal, but (2) error was harmless.

Affirmed.

[1] CRIMINAL LAW ⇐ 369.15
110k369.15
Evidence of misconduct may be relevant to an issue in the case such as identity or intent and, when offered for that purpose, it is governed by rule relating to evidence of prior misconduct. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[1] CRIMINAL LAW ⇐ 371(1)
110k371(1)
Evidence of misconduct may be relevant to an issue in the case such as identity or intent and, when offered for that purpose, it is governed by rule relating to evidence of prior misconduct. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[2] WITNESSES ⇐ 344(2)
410k344(2)
Evidence of misconduct may be relevant to impeachment of a witness, including the defendant, because it tends to show the character of the witness for untruthfulness; when offered for that purpose, prior misconduct is governed by rule which precludes proof by extrinsic evidence and limits the inquiry to cross-examination of the witness. Fed.Rules Evid.Rule 608(b), 28 U.S.C.A.

[2] WITNESSES ⇐ 352
410k352
Evidence of misconduct may be relevant to impeachment of a witness, including the defendant, because it tends to show the character of the witness for untruthfulness; when offered for that purpose, prior misconduct is governed by rule which precludes proof by extrinsic evidence and limits the inquiry to cross-examination of the witness. Fed.Rules Evid.Rule 608(b), 28 U.S.C.A.

[3] WITNESSES ⇐ 374(1)
410k374(1)
Evidence of prior misconduct may be relevant to impeachment of a witness on some ground other than character of a witness for truthfulness, such as to show bias of a witness; when offered for that purpose, misconduct is not limited by rule which precludes proof of extrinsic evidence and limits the inquiry to cross-examination of the witnesses. Fed.Rules Evid.Rule 608(b), 28 U.S.C.A.

[4] WITNESSES ⇐ 337(4)
410k337(4)
Even if fact that defendant has been acquitted on charges of misconduct does not estop the prosecution from eliciting the fact of the prior misconduct to impeach the defendant, it will normally alter the balance between probative force and prejudice for purposes of determining the admissibility of the evidence. Fed.Rules Evid.Rule 403, 28 U.S.C.A.

[5] WITNESSES ⇐ 337(4)
410k337(4)
It was error to permit cross-examination of defendant as to whether he had ever engaged in tax evasion where the matter had arisen 18 years prior to trial and defendant had been acquitted. Fed.Rules Evid.Rule 608(b), 28 U.S.C.A.

[6] WITNESSES ⇐ 337(4)
410k337(4)
It was error for prosecutor to cross-examine defendant about alleged prior misconduct without alerting the court of his intended course, where defendant had been tried and acquitted on the matter.

[7] CRIMINAL LAW ⇐ 11701/2(6)
110k11701/2(6)

Error in allowing cross-examination of defendant about prior misconduct which had resulted in acquittals was harmless where defendant denied the misconduct, no evidence was introduced to dispute his denials, and the trial judge issued appropriate instructions.

[8] CRIMINAL LAW ⇐ 671
110k671
It was not error to permit cross-examination of defense witness concerning criminal charges against him, even though it was determined during cross-examination that charges against him had been dropped, where prosecutor had not learned the identity of the witness until trial and had only then been able to initiate an investigation of him.

[8] WITNESSES ⇐ 350
410k350
It was not error to permit cross-examination of defense witness concerning criminal charges against him, even though it was determined during cross-examination that charges against him had been dropped, where prosecutor had not learned the identity of the witness until trial and had only then been able to initiate an investigation of him.

[9] WITNESSES ⇐ 350
410k350
It was not error to permit cross-examination of defense witness about prior charges against him, even though defense counsel informed the court that the charges had resulted in an acquittal, where there was nothing in the record to support that claim and prosecutor had only learned while the witness was testifying that there was a "rap" sheet indicating criminal charges against the witness.

***510** Michael Washor, New York, N.Y. (Washor, Greenberg & Washor, New York City, Leonard W. Yelsky, Angelo F. Lonardo, Yelsky & Lonardo Co., Cleveland, Ohio, on the brief), for defendant-appellant.

George B. Daniels, Asst. U.S. Atty. (Andrew J. Maloney, U.S. Atty., John Gleeson, Asst. U.S. Atty., Brooklyn, N.Y., on the brief), for appellee.

Before KAUFMAN, NEWMAN and MINER, Circuit Judges.

JON O. NEWMAN, Circuit Judge:

The principal issue on this appeal is whether a prosecutor may seek to impeach a defendant's credibility by asking the defendant on cross-examination about prior misconduct that the prosecutor knows has been the subject of a trial and an acquittal. The issue arises on an appeal by Philip B. Schwab from a judgment of the District Court for the Eastern District of New York (Eugene H. Nickerson, Judge), convicting him, upon a jury verdict, of bribing and offering to bribe a public official, in violation of 18 U.S.C. § 201(b)(1)(A) (Supp. V 1987). We conclude that the cross-examination was improper but harmless error under the circumstances of this case. We therefore affirm.

The evidence overwhelmingly established that Schwab paid $25,000 to a compliance officer of the United States Environmental Protection Agency and offered to pay him an additional $25,000. Schwab paid the money to the EPA officer to overlook the fact that Schwab's demolition company had not complied with regulations governing asbestos removal. The evidence included tape recordings of conversations between Schwab and the EPA officer.

On appeal, Schwab contends that he should receive a new trial because of the prosecutor's cross-examination of himself and two defense witnesses. On cross-examination, the prosecutor asked Schwab: "[I]sn't it a fact that you committed income tax fraud in 1970?" and "Isn't it a fact that you committed perjury in October of 1965?" Schwab answered "No" to both questions. At a sidebar conference after these questions were asked and answered, defense counsel informed Judge Nickerson that the defendant had been tried and acquitted on the tax fraud and perjury charges and moved for a mistrial. Counsel also reported that he had previously informed the prosecutor of the acquittals. The perjury charge in fact had resulted in a dismissal. See People v. Schwab, 62 Misc.2d 786, 310 N.Y.S.2d 436 (Erie County Ct.1970). [FN1] The Government has not denied, ***511** either at trial or on appeal, that it had previously been informed that both charges had been resolved favorably to Schwab. The judge then said to the prosecutor, "You never told me that he was acquitted of the income tax fraud." The prosecutor replied that he did not think it was "significant." [FN2] Judge Nickerson denied the mistrial motion, but promptly instructed the jury that, though there had been questions asked about tax fraud and

perjury, "[t]here's no evidence in the record of that at all. Please disregard that. Remember the questions aren't evidence."

FN1. In the state court case, Schwab was indicted for three counts of perjury, two concerning allegedly false testimony given in March 1963 in a civil suit and one concerning allegedly false testimony given before a county grand jury in October 1963. The first two counts were dismissed in 1970 because Schwab had unlawfully been required to waive immunity before the grand jury that indicted him. People v. Schwab, supra. The third count was dismissed in 1972 on motion of the district attorney because of the "time lapse and trial history," which included two mistrials. People v. Schwab, No. 30,893 A & B, order dismissing action at 2 (Sup.Ct. Feb. 8, 1972).

FN2. The prosecutor's view that the acquittal lacked significance evidently persists on appeal: In arguing that cross-examination concerning the tax fraud charge was proper, the Government's brief makes no mention of the acquittal. Indeed, the Government does not distinguish itself by stating, "Schwab had a criminal record indicating tax fraud and perjury." Brief for Appellee at 15.

Rule 608(b) of the Federal Rules of Evidence provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness....

In the Government's view, the prosecutor was entitled to ask the defendant whether he had committed tax fraud and perjury, notwithstanding the acquittal on the first charge and the dismissal of the second. The Government acknowledges that the prosecutor would be bound by the answers in the sense that he could not dispute denials with extrinsic evidence.

[1][2][3] In analyzing the issue, it will be helpful to distinguish among the various purposes for which prior misconduct may have evidentiary value. First, the misconduct may be relevant to an issue in the case, such as intent or identity. When offered for that purpose, prior misconduct is governed by Fed.R.Evid. 404(b). Second, the misconduct may be relevant to impeachment of a witness, including the defendant, because it tends to show the character of the witness for untruthfulness. When offered for that purpose, prior misconduct is governed by Fed.R.Evid. 608(b), which precludes proof by extrinsic evidence and limits the inquiry to cross-examination of the witness. Third, the misconduct may be relevant to impeachment of a witness on some ground other than the character of a witness for untruthfulness. The most typical example is misconduct offered to show bias of the witness. When offered for that purpose, misconduct is not limited by the strictures of Rule 608(b). See United States v. James, 609 F.2d 36, 45-46 (2d Cir.1979), cert. denied, 445 U.S. 905, 100 S.Ct. 1082, 63 L.Ed.2d 321 (1980). The pending case falls within the second category, but unlike the typical situation where a witness, including a defendant, is cross-examined about uncharged misconduct, Schwab was cross-examined about alleged misconduct--tax fraud--for which he had been charged, tried, and acquitted.

An acquittal establishes that the defendant's perpetration of the charged misconduct has not been proven beyond a reasonable doubt. It is therefore arguable that whether the misconduct occurred may be inquired about within the constraints of Rule 608(b) and Rule 403 since the reasonable doubt standard applies to the jury's ultimate determination of guilt and does not apply to its assessment of each subsidiary fact that may contribute to that determination, such as the credibility of the defendant. See United States v. Viafara-Rodriguez, 729 F.2d 912, 913 (2d Cir.1984); United States v. Valenti, 134 F.2d 362, 364 (2d Cir.), cert. denied, 319 U.S. 761, 63 S.Ct. 1317, 87 L.Ed. 1712 (1943). This argument ***512** has had a mixed reception in the various contexts in which it has been made.

Where prior misconduct has been offered to prove a fact significant to the establishment of guilt, the cases are divided as to whether a prior acquittal bars the evidence. Compare United States v. Dowling, 855 F.2d 114, 120-22 (3d Cir.1988) (barring evidence but error harmless), cert. granted, --- U.S. ----, 109 S.Ct. 1309, 103 L.Ed.2d 579 (1989);

United States v. Keller, 624 F.2d 1154 (3d Cir.1980) (barring evidence); United States v. Mespoulede, 597 F.2d 329 (2d Cir.1979) (same); United States v. Day, 591 F.2d 861 (D.C.Cir.1979) (same); Wingate v. Wainwright, 464 F.2d 209 (5th Cir.1972) (same); and United States v. Kramer, 289 F.2d 909, 913-18 (2d Cir.1961) (same), with United States v. Van Cleave, 599 F.2d 954, 956-57 (10th Cir.1979) (allowing evidence); Oliphant v. Koehler, 594 F.2d 547, 550-55 (6th Cir.) (same), cert. denied, 444 U.S. 877, 100 S.Ct. 162, 62 L.Ed.2d 105 (1979); United States v. Etley, 574 F.2d 850, 852-53 (5th Cir.) (same), cert. denied, 439 U.S. 967, 99 S.Ct. 458, 58 L.Ed.2d 427 (1978); United States v. Rocha, 553 F.2d 615 (9th Cir.1977) (same); United States v. Kills Plenty, 466 F.2d 240, 243 (8th Cir.1972) (same), cert. denied, 410 U.S. 916, 93 S.Ct. 971, 35 L.Ed.2d 278 (1973); United States v. Castro-Castro, 464 F.2d 336 (9th Cir.1972) (same), cert. denied, 410 U.S. 916, 93 S.Ct. 971, 35 L.Ed.2d 278 (1973); and United States v. Feinberg, 383 F.2d 60, 71-72 (2d Cir.1967) (same), cert. denied, 389 U.S. 1044, 88 S.Ct. 788, 19 L.Ed.2d 836 (1968). Cf. Lee v. United States, 368 F.2d 834 (D.C.Cir.1966) (reversing conviction where extrinsic evidence was introduced to impeach defendant's denial of prior misconduct for which he had been tried and acquitted).

Some of the cases do not stand in quite the stark opposition that the above listing might indicate since particular circumstances, rather than a general rule, contributed to the outcomes. See, e.g., United States v. Feinberg, supra (collateral estoppel inapplicable because prosecuting sovereigns were different and uncertainty existed as to whether prior acquittal had conclusively established the fact subsequently sought to be proved). We have cast considerable doubt on the pertinence of the difference in standards of proof in the prior and subsequent proceedings, see United States v. Kramer, 289 F.2d at 913, although the Supreme Court case relied upon, Coffey v. United States, 116 U.S. 427, 6 S.Ct. 432, 29 L.Ed. 681 (1886), was accorded perhaps more weight than was warranted. But see United States v. Etley, 574 F.2d at 853 (allowing evidence of prior crime resulting in acquittal because of difference in standards of proof). It is not entirely clear whether the decisions precluding use of prior acts resulting in an acquittal are grounded on technical application of collateral estoppel, which might limit the preclusion to instances where the same sovereign prosecuted both cases, or rest on more general considerations of fairness, see, e.g., United States v. Mespoulede, 597 F.2d at 335 ("simply ... inequitable"); Wingate v. Wainwright, 464 F.2d at 215 ("fundamentally unfair and totally incongruous with our basic concepts of justice").

In the context of sentencing, where prior misconduct is offered not to prove guilt but solely to determine the extent of punishment, we have ruled that a sentencing judge may take into account evidence of a defendant's prior misconduct established by a preponderance of the evidence, notwithstanding an acquittal. See United States v. Sweig, 454 F.2d 181 (2d Cir.1972). But the sentencing context is entirely different from the context of cross-examination of a defendant during trial. At sentencing, the facts concerning the prior misconduct may be developed by extrinsic evidence, and the judge may take evidence of the misconduct into account if satisfied that it has been established by a preponderance of the evidence, despite the fact that a jury was not persuaded beyond a reasonable doubt. However, when witnesses are cross-examined as to alleged prior misconduct for which they have been tried and acquitted, there is no opportunity to present extrinsic evidence bearing on whether the misconduct occurred.

The trial context, in which prior misconduct is offered to prove a fact relevant to a ***513** subsequent prosecution, is more pertinent to the issue in this case than is the sentencing context. Though the prior misconduct was sought to be elicited in this case to impeach the defendant's credibility rather than prove a fact such as intent or knowledge, there is a strong argument that the same considerations that precluded the evidence in Mespoulede should bar it here.

[4] However, we need not rest decision on collateral estoppel nor on more general considerations of fundamental fairness since the evidence is inadmissible under the standards of Rules 608(b) and 403. Rule 608(b) provides that specific instances of misconduct may be inquired into on cross-examination "in the discretion of the court, if probative of truthfulness or untruthfulness." Rule 403 obliges the trial judge to exclude relevant evidence "if its probative value is

substantially outweighed by the danger of unfair prejudice," among other factors. Both rules thus require the exercise of discretion with respect to admission of prior acts of misconduct. Whether or not an acquittal technically estops the prosecution from eliciting the fact of prior misconduct, it will normally alter the balance between probative force and prejudice, which is already a close matter in many cases where prior misconduct of a defendant is offered. See United States v. Phillips, 401 F.2d 301 (7th Cir.1968). Moreover, there is the blunt reality that a witness who has been acquitted will almost certainly deny the misconduct, either because he did no wrong or because he may understandably believe that when asked about it after an acquittal, he is entitled to have the law regard him as innocent. Thus, the only purpose served by permitting the inquiry is to place before the jury the allegation of misconduct contained in the prosecutor's question, an allegation the jury will be instructed has no evidentiary weight. To permit the inquiry risks unfair prejudice, which is not justified by the theoretical possibility that the witness, though acquitted, will admit to the misconduct. When the witness is the defendant, the significance of the prejudice is magnified.

[5] In the pending case, not only had the alleged prior misconduct concerning the tax charge resulted in an acquittal, but the matter had arisen eighteen years prior to the trial at which it was sought to be probed on cross-examination. Moreover, the prosecutor had no information in his possession to indicate that Schwab was guilty of the misconduct. Under these circumstances, cross-examination concerning the tax matter was beyond the discretion confided in the trial judge by Rules 608(b) and 403.

[6] The prosecutor was at fault in this case not only for cross-examining as to matters for which the defendant had been tried and acquitted but also for pursuing the inquiry without alerting the trial court, either by pretrial memorandum or sidebar conference, of his intended course. Since, as far as we can ascertain, no decision has approved cross-examination of this sort, it was extremely imprudent for the prosecutor to preempt the trial judge's opportunity to consider, before any damage might be done, whether to allow such novel questioning. The failure to alert the trial judge is especially serious since the prosecutor had been told about the acquittal and had no contrary information. Had the prosecutor known only of the charges and not the outcome, it would still have been prudent to raise the matter at sidebar so that the trial judge could decide whether to conduct a voir dire inquiry as to the outcome of the charges.

The significance of the prosecutor's omission is compounded still further by the fact that the matters the prosecutor inquired about were charges made twenty-three and eighteen years prior to the trial. If these matters had resulted in convictions, the fact that such convictions would have been more than ten years old would have **required** the prosecutor to give the defendant **notice** of his intent to use them, Fed.R.Evid. 609(b), and the trial judge could have admitted them only upon an explicit finding that their probative value substantially outweighed their prejudicial effect, id. Though Rule **608(b)** has no ten-year rule comparable to Rule 609, the discretion that ***514** trial judges are obliged to use in deciding whether to permit cross-examination concerning ancient misconduct cannot be exercised before the well has been poisoned unless the prosecutor alerts the judge by an offer of proof out of the hearing of the jury. [FN3]

FN3. In enacting Rule 608(b), Congress deleted the limitation in the rule as submitted by the Supreme Court that the prior misconduct not be "remote in time," and instead left the matter of timeliness to "the discretion of the court." H.R.Rep. No. 650, 93d Cong., 1st Sess. 10 (1973).

[7] Though the cross-examination of the defendant was improper, we are satisfied that the error was harmless. Schwab denied the misconduct, and no evidence was introduced to dispute his denials. Moreover, the trial judge promptly issued appropriate instructions. Most significantly, the evidence of guilt, which included Schwab's recorded incriminating conversations, was overwhelming.

[8] Appellant's objection to the cross-examination of two defense witnesses is not cause for concern. With respect to the first witness, Martin Haitz, the prosecutor, not previously alerted to the identity of the witness, initiated an investigation while Haitz was testifying and learned that criminal charges of fraud and larceny had been brought against him; the investigation did not ascertain the ultimate disposition. The prosecutor alerted the trial judge to his proposed cross-examination and received

approval to inquire pursuant to Rule 608(b). Haitz testified that fraud charges based on the issuance of bad checks had been brought against him, but that the charges were dropped after he explained that the checks were issued by a corporation after he had sold it. Though it might have been preferable for the District Judge to have elicited the testimony out of the presence of the jury so that the judge could make the Rule 403 assessment before permitting the cross-examination, we cannot say that it was error not to do so.

[9] With respect to the second witness, Robert Gibbs, the prosecutor also learned, apparently while the witness was testifying, that an FBI "rap" sheet indicated criminal charges, including mail fraud, arising out of Gibbs' alleged embezzlement from a bank. At a sidebar conference, the prosecutor, who had not yet obtained a fax copy of the "rap" sheet, said there "may" be a conviction; defense counsel said there had been an acquittal. Judge Nickerson permitted cross-examination. Gibbs denied embezzling funds from a Florida bank that had employed him, admitted agreeing to a judgment to repay some $253,000 to a different Florida bank, and said that the repayment had nothing to do with his bank employment. He denied committing mail fraud in connection with either bank. On redirect, Gibbs said he had never been convicted of any federal or state crime. Nothing in the record supports defense counsel's claim at sidebar that Gibbs had been tried for a banking crime and found not guilty.

As with the cross-examination of Haitz, we see no error. The prosecutor had a plausible basis for cross-examining as to prior misconduct and did so within the limits of Rule 608(b).

Appellant's remaining contentions, which do not warrant discussion, are without merit.

The judgment of the District Court is affirmed.

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**(Cite as: 1995 WL 12300 (N.D.Ill.))**

UNITED STATES of America, Plaintiff,
v.
Sherman OLLISON, Defendant.
No. 92 CR 365.
United States District Court, N.D. Illinois, Eastern Division.
Jan. 10, 1995.

MEMORANDUM OPINION AND ORDER

LEINENWEBER, District Judge.

***1** Defendant requests the court to grant several pretrial motions arising from his detention and the search of his luggage by federal officials in May of 1992. After a brief recitation of the facts, the court will address defendant's motions seriatim.

FACTS

The parties offer competing characterizations of the events leading up to defendant's arrest for narcotics possession in violation of 21 U.S.C. s 841(a)(1) (1988). According to defendant, on May 6, 1992, he was approached by two Drug Enforcement Agency ("DEA") agents as he disembarked from Amtrak Train No. 22, which had just arrived at Chicago's Union Station from Houston, Texas.



Not Reported in F.Supp. | R 41 OF 148 | P 17 OF 24 | ALLFEDS | P LOCATE
**(Cite as: 1995 WL 12300, *7 (N.D.Ill.))**

at an appropriate time.

IV. Motion to Require Notice of Intention to Use Other Crimes, Wrongs or Acts Evidence

This motion consists of two parts. The first part requests an order **requiring** the government to provide **notice** of its intention to introduce at trial evidence of defendant's other crimes or wrongs as those terms are used in Fed.R.Evid. 404(b). The second part asks for the same notice with respect to specific instances of defendant's conduct the government may wish to use to impeach his credibility under Fed.R.Evid. **608(b).**

A. Defendant's Rule 404(b) motion.

The court orders the government to produce the Rule 404(b) information it will use no later than 10 business days before trial. In its response, the government argues that "Rules 12(d) and 16, and case law provid[e] that Rule 404(b) evidence need not be disclosed prior to trial." (Gov't. resp. at 10.) From this premise, the government states that it will voluntarily disclose the information requested, but reserves the right to choose when it will disclose the Rule 404(b) information it plans to use. (See id.)

The government's assertion that Rule 404(b) permits it to choose whether or not it will disclose Rule 404(b) information, however, is incorrect. Rule 404(b) was amended in 1991 in order to align it with other evidentiary rules containing notice and disclosure provisions. See Fed.R.Evid. 412; Fed.R.Evid.

609; Fed.R.Evid. 803(24); Fed.R.Evid. 804(b)(5). The rule now contains a pretrial notice provision which states that "upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial ... of the general nature of any such evidence it intends to introduce at trial." Fed.R.Evid. 404(b). In choosing to obscure such an elementary, and indeed codified, point, the government has forfeited any discretion it may have had concerning voluntary disclosure. Beyond the specific ruling relating to time for disclosure, defendant's Rule 404(b) motion is moot.

B. Defendant's Rule 608(b) motion.

***8** Defendant's Rule **608(b)** motion is denied. In contradistinction to Rule 404(b), Rule **608(b)** has no self-contained notice provision. Moreover, Rule 12(d)(2) of the Fed.R.Crim.P. limits a defendant's pretrial discovery under Rule 16 to evidence that the government will offer in its case in chief--precisely the situation governed by Fed.R.Evid. 404(b). See Fed.R.Crim.P. 12(d)(2); Fed.R.Evid. 404(b). Rule **608(b)**, however, is focused on impeachment. Thus, it is well-settled that the "government is not **required** to **disclose** evidence of past crimes or misconduct that will be used on cross-examination...." U.S. v. Padilla, 744 F.Supp. 1425, 1427 (N.D.Ill.1990); accord U.S. v. Alex, 791 F.Supp. 723, 728-29 (N.D.Ill.1992).

V. Motion to Unseal File No. 92 M 245

The government has agreed to this request and thus defendant's motion is moot.

UNITED STATES of America
v.
Tadeusz ZEGLEN, et al., Defendants.

No. 93 Cr 862.

United States District Court, N.D. Illinois, Eastern Division.

Oct. 18, 1994.

MEMORANDUM OPINION AND ORDER

NORDBERG, District Judge.

***1** Before the Court are Defendants Tadeusz Zeglen's, Andrew Walkosz's and Dorothy Walkosz's Pre-trial Motions.

1. Motion for Favorable Evidence/Motion for Disclosure Regarding Emotional Illness Disorders and Drug and Alcohol Abuse

Defendants file their Motion for Favorable Evidence pursuant to Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 405 U.S. 150 (1972). Under Brady, the Government is required to disclose all evidence that is both favorable to the accused and material to either guilt or punishment. According to Giglio, exculpatory evidence includes evidence that the defense might use to impeach a government witness by showing bias or interest. As the Government is aware of its obligation under Brady, and has disclosed all exculpatory information of which it is aware, and has agreed to make further disclosures if and when it acquires additional exculpatory evidence, the Defendants' motions are DENIED as moot.

2. Motion for Order Requiring the Government to Give Notice of its Intention to Use Evidence of Other Crimes, Wrongs or Acts Evidence

Defendants request that this Court order the Government to give notice of its intention to use "other crimes, wrongs or acts" evidence as that phrase is used in Federal Rule of Evidence 404(b). The Government acknowledges its obligation under Rule 404(b) and has no objection to compliance therewith. The Government states that at present, it does not have any Rule 404(b) evidence concerning Defendants. However, the Government recognizes its obligation to give notice of its intention to use Rule 404(b) evidence and has agreed to give opposing counsel such notice one month before trial if possible. Accordingly, Defendants' motion is DENIED as moot.

Included in Defendants' motion for an order **requiring** the Government to give **notice** of its intention to use "other crimes, wrongs or acts" evidence is a request for an order **requiring** the Government to give **notice** of its intention to use evidence of "specific instances of conduct" of the Defendants as that phrase is used in Federal Rule of Evidence **608(b).** Rule **608(b)** allows inquiry on cross-examination into specific instances of conduct bearing on the credibility of the witness. Unlike Rule 404(b), which explicitly provides for pre-trial discovery of relevant evidence, Rule **608(b)** contains no such provision. The Defendants have not directed this Court to any authority for ordering such disclosure. In the absence of such authority, Defendants' motion insofar as it requests pretrial disclosure of Rule **608(b)** evidence is DENIED.

3. Motion for Early Disclosure of Witness Statements

The Jencks Act requires the government to provide defendants with prior statements of government witnesses after the witnesses have testified at trial. 18 U.S.C. § 3500. The Jencks Act generally requires production of Jencks material after the government witnesses have testified.

However, according to the Government, virtually all previous statements of likely government witnesses have already been disclosed to the defense. Furthermore, the Government has agreed to turn over any new material on an on-going basis. Consequently, Defendants' Motion for Early Disclosure of Witness Statements is DENIED as moot.

4. Motion for Pre-trial Disclosure of Co-conspirators' Statements/Motion for Disclosure of Names of Co-conspirators

***2** The Government notes that its Santiago proffer will be filed thirty days before the trial in this case. See United States v. Santiago, 582 F.2d 1128 (7th Cir.1978). Accordingly, Defendants' Motions for Pre-trial Disclosure of Co-conspirators' statements

and for Disclosure of the Names of Co-conspirators are DENIED as moot.

To the extent names of co-conspirators are not revealed in the Government's Santiago proffer, the Court notes that the Government has acknowledged its obligation under Brady and Giglio to disclose information favorable to the Defendants and material to either guilt or punishment.

5. Motion for an In Camera Production of Probation Officers' Presentence Investigation Reports

Defendants have moved for production of the presentence investigation reports of Tadeusz Morawa and Andrew Schechula, both of whom are likely government witnesses in this case.

The Government has agreed to an in camera inspection of the presentence investigation reports of Morawa and Schechula so that the Court can determine whether the reports contain exculpatory information and/or impeachment material useful in cross-examining the Government's witnesses. See U.S. v. Canino, 949 F.2d 928, 942-43 (7th Cir.1991), cert. denied, 112 S.Ct. 3058 (1992).

Defendants' Motion for Production of the Presentence Investigation Reports of Morawa and Schechula is DENIED. However, the Court will review the reports in camera to determine if they contain exculpatory information or material useful for impeachment purposes.

6. Motion for List of Government Witnesses Together with Addresses and Phone Numbers

A defendant has no right to a list of government witnesses prior to trial although the court has authority to require the government to provide such a list. See Weatherford v. Bursey, 429 U.S. 545, 559 (1977); U.S. v. Sims, 808 F.Supp. 607, 613 (N.D.Ill.1992) (citing United States v. Braxton, 877 F.2d 556, 560 (7th Cir.1989); United States v. Naupe, 834 F.2d 1311, 1317 (7th Cir.1987); United States v. Bouye, 688 F.2d 471, 473-74 (7th Cir.1982); United States v. Jackson, 508 F.2d 1001, 1006-1008 (7th Cir.1975), rev'd on other grounds, 474 U.S. 302 (1986)).

However, the parties have agreed that the Government will provide Defendants with a list of government witnesses. The parties have further agreed that, instead of providing Defendants with the home addresses and telephone numbers, the Government will arrange for defense counsel to meet with listed government witnesses, who have not already been located by independent defense investigation, so that defense counsel can request interviews.

Consequently, Defendants' Motion for a List of Government Witnesses is DENIED as moot.

7. Motion for Production of Personnel Files of Law Enforcement Officers for In Camera Inspection

***3** Defendants request that this Court order the Government to turn over the personnel files of any testifying agent for in camera inspection so that the Court can determine whether the files contain exculpatory information and/or impeachment material useful in cross-examining the agents. However, Defendants give no support for their contention that the personnel files might contain evidence which is favorable to the Defendants and material to the issue of guilt or punishment.

In United States v. Andrus, 775 F.2d 825, 843 (7th Cir.1985), the Seventh Circuit held that the defendant was not entitled to the personnel files of the law enforcement witnesses where there was not even a hint that impeaching material was contained in the files. The Seventh Circuit relied on a prior opinion in United States v. Navarro, 737 F.2d 625, 631 7th Cir.), cert. denied, Mugercia v. U.S., 469 U.S. 1020 (1984) where it stated,

> Mere speculation that a government file may contain Brady material is not sufficient to require a remand for in camera inspection, much less reversal for a new trial. A due process standard which is satisfied by mere speculation would convert Brady into a discovery device and impose an undue burden on the district court.

A defendant's request for Brady material does not entitle him to "embark upon an unwarranted fishing expedition through government files, nor does it mandate a trial judge conduct an in camera inspection of the government's files in every case." U.S. v. Phillips, 854 F.2d 273, 278 (7th Cir.1988). See also, U.S. v. Quintanilla, 760 F.Supp. 687, 696-97 (N.D.Ill.1991), aff'd 2 F.3d 1469 (7th Cir.1993).

As a request by Defendants does not automatically trigger an in camera review of the personnel files of any testifying agent, Defendants' motion is DENIED. To the extent these personnel files contain information favorable to the Defendants and material to the issues of guilt and punishment, the Court notes that the Government has recognized its continuing obligation under Brady and Giglio to disclose such information.

8. Motion to Continue Trial or for Alternate Relief

Defendants request that this Court grant judicial immunity for four defense witnesses who can allegedly exonerate Defendants, but who refuse to testify because of the fear of self-incrimination. Alternatively, Defendants ask the Court to stay the trial date until December 10, 1995 allowing the statute of limitations to run so that the witnesses testimony could not be used to prosecute them. The language of 18 U.S.C. §§ 6002, 6003, which governs a federal prosecutor's right to grant immunity to a witness, provides the government with considerable discretion and does not obligate the government to grant defense witnesses immunity. U.S. v. Hooks, 848 F.2d 785, 798-99 (7th Cir.1988). The trial court does not have the power to direct the government to seek immunity for a defense witness who exercises his fifth amendment privilege against self-incrimination. Id. at 799. However, the prosecutor's unfettered discretion to grant immunity is limited by due process considerations. Id. See also, U.S. v. Schweihs, 971 F.2d 1302, 1315 (7th Cir.1992). The prosecutor cannot use his power to grant immunity "to distort the judicial fact-finding process." Hooks, 848 F.2d at 799.

***4** The Defendants have not made the requisite substantial evidentiary showing that the Government, by refusing to grant immunity to the four defense witnesses, intended "to distort the judicial fact-finding process." Id. at 802. In fact, the Government has not refused to apply for statutory immunity "in any final sense." Rather, the Government has decided that it simply does not have enough information at this point to determine whether granting these witnesses immunity would be appropriate and in the public interest.

The Defendants' vague and cursory description of the testimony of the four witnesses makes it difficult to determine whether their anticipated testimony is cumulative of that of other witnesses, whether the exclusion of the supposed incriminating statements would prejudice the Defendants and whether the testimony is in fact protected by the fifth amendment privilege against self-incrimination. Defendants have not presented substantial evidence to show a clear abuse of prosecutorial discretion, and thus a violation of due process rights.

For the foregoing reasons, Defendants' motion is DENIED.

END OF DOCUMENT

UNITED STATES of America, Plaintiff,
v.
Emery L. GOAD and William R. Wood, Defendants.

CRIM. A. Nos. 89-10062-01, 89-10062-02.

United States District Court, D. Kansas.

June 15, 1990.

MEMORANDUM AND ORDER

THEIS, District Judge.

*1 This matter is before the court on several pretrial motions filed by one or both defendants. The court held a hearing on March 12, 1990, at the conclusion of which the court announced it would take the motions under advisement. At the request of the defendants, the court held an evidentiary hearing on June 4, 1990. The court has previously granted defendant Goad's motion to sever. Defendants Goad and Wood are charged with possessing, concealing, and storing a stolen pickup truck which had crossed a state boundary after being stolen and for conspiracy to commit the same offense, in violation of 18 U.S.C. §§ 2313, 2, and 371.

The indictment charges the existence of a conspiracy from on or about November 22, 1985, and continuing through on or about February 8, 1989. Eight separate overt acts are listed in the indictment and are summarized as follows. On or about November 1, 1985, defendant Goad located a stolen Ford pickup truck in a parking lot at 550 West Central, Wichita, Kansas. On or about November 22, 1985, Goad refused to disclose to the Hanover Insurance Company, Birmingham, Alabama, the location of the stolen pickup truck. On or about December 1, 1985, Goad and Leonard Young towed the stolen pickup truck to the residence of defendant Wood. On or about January 29, 1986, defendant Wood hired Douglas Maib to key the ignition and door locks on the pickup truck. At some point after January 1986, the pickup truck was driven to Wood's lake property in Greenwood County, Kansas. During the spring or summer of 1988, Wood, an attorney, contacted a client of his, George E. Creekmore, requesting that Creekmore obtain a vehicle identification plate from an automobile salvage yard so that the plate in the stolen pickup truck could be switched, thereby allowing Wood to obtain a new title for the stolen pickup truck. At some time during the summer of 1988, Wood arranged for Creekmore to drive the stolen pickup truck from Greenwood County, Kansas, to Creekmore's residence in Sedgwick County, Kansas, to assist Creekmore in switching the vehicle identification plates. On or about October 1, 1988, Creekmore returned the stolen pickup truck to Wood's residence in Sedgwick County, Kansas.

The facts, as summarized by defendant Wood in his motion to dismiss (Doc. 29), are as follows. On September 30, 1984, a pickup truck was discovered missing from Larry Salvage Chevrolet in Huntsville, Alabama. The truck was reported missing and an insurance claim was made. Later that fall, Sedgwick County District Court Judge Nicholas Klein observed an apparently abandoned truck in the parking lot of the apartment complex where he lived. After the truck had remained there for about a year, Judge Klein told Goad, a private investigator, of the vehicle's location. Goad obtained the vehicle identification number, determined the truck was stolen, and contacted the Huntsville Police. Goad thereafter contacted the insurance company which had paid the claim on the vehicle. When the insurance company refused to pay Goad a finder's fee, Goad refused to tell the insurance company of the location of the vehicle. The vehicle was towed to Wood's home. The locks were changed by Douglas Key and Lock Company in January 1986. The truck was taken to Wood's lake house in the summer of 1986. In the summer of 1988, the truck was driven back to Wood's residence. On October 31, 1988, the truck was taken to a barn in Rose Hill, Kansas, where it was stored until it was turned over to the police on or about February 18, 1989.

1. Motion for bill of particulars (Doc. 20-21, filed by Goad)

*2 Goad's motion for a bill of particulars seeks very specific details about the alleged offenses: the place(s), including street address(es), where the conspiracy was initially formed, and where each defendant and each coconspirator joined the conspiracy; the date(s) and time(s) when each defendant and each coconspirator joined the

conspiracy; the period(s) of time during which each defendant and each coconspirator remained in the conspiracy; the circumstances under which, and the words or conduct by means of which each defendant and each coconspirator joined the conspiracy; the objects of the conspiracy; what the defendant Goad agreed to do in further of the conspiracy; the specific words or conduct of defendant Goad constituting overt acts in furtherance of the conspiracy; specific information regarding any overt acts not included in the indictment; the names of coconspirators; whether any defendant or coconspirators were acting on behalf of any governmental entity at the time of the conspiracy; and whether any defendant has furnished information to law enforcement authorities with respect to the conspiracy. Doc. 20.

Goad alleges that he needs this information to prepare for trial and to avoid surprise at trial, given the delay in prosecution. Goad merely asserts that the delay has resulted in prejudice to him. The affidavit of Goad's attorney states that: the indictment alleges that the conspiracy to violate 18 U.S.C. § 2313 existed from November 22, 1985 through February 8, 1989; that the indictment fails to state with particularity the locations, dates, and times when the defendants joined the conspiracy and committed the overt acts, and which defendants or coconspirators committed which overt acts; that the indictment fails to allege all the matters requested in the motion for a bill of particulars; and that Goad does not know the theory upon which the government intends to proceed. Doc. 21.

Wood has adopted this motion. Doc. 30.

The government has responded, asking the court to deny the motion for a bill or particulars. Doc. 38. The government argues that the indictment adequately informs the defendants of the charges against them. The government states that it has provided a complete copy of its investigative file to each defendant. All reports or records have been provided to the defendants. Further, the facts are so well known to the defendants that they have entered into a stipulation of facts, filed with defendant Wood's motion to dismiss (Doc. 29).

"The purpose of a bill of particulars is to inform the defendant of the charge against him with sufficient precision to allow him to prepare his defense, to minimize surprise at trial, and to enable him to plead double jeopardy in the event of a later prosecution for the same offense." United States v. Dunn, 841 F.2d 1026, 1029 (10th Cir.1988) (quoting United States v. Cole, 755 F.2d 748, 760 (11th CIr.1985)). "It is not the function of a bill or particulars 'to disclose in detail the evidence upon which the Government will rely at the trial.' " United States v. Barbieri, 614 F.2d 715, 719 (10th Cir.1980) (quoting Cefalu v. United States, 234 F.2d 522, 524 (10th Cir.1956)). An indictment is generally sufficient if it sets forth the offense in the words of the statute, as long as the statute adequately states the elements of the offense. United States v. Salazar, 720 F.2d 1482, 1486 (10th Cir.1983), cert. denied, 469 U.S. 1110 (1985). The determination of the sufficiency of the indictment, however, is governed by practical rather than technical considerations. Dunn, 841 F.2d at 1029. Moreover, this determination is left to the sound discretion of the trial court. United States v. Wright, 826 F.2d 938, 942 (10th Cir.1987).

***3** Applying these standards, the court finds that the defendants are not entitled to a bill of particulars setting forth the requested matters. The indictment tracks the language of the statute, and is thus specific in terms of the statute. The overt acts listed in the conspiracy count inform the defendants of the charges against them with sufficient precision to allow them to prepare their defense. The defendant's motion is a request for evidentiary detail and impermissible discovery material. Accordingly, the motion for a bill of particulars shall be denied.

2. Motion for disclosure of impeaching information/Motion for discovery (Doc. 24-25, filed by Goad)

Goad requests information regarding: (1) prior felony convictions and juvenile adjudications of all witnesses; (2) all prior misconduct or bad acts of witnesses; (3) all consideration or promises made to witnesses; (4) any threats made to or directed against witnesses; (5) all occasions when the witness has testified before any tribunal about this case; (6) all occasions when any witness who is an informer, accomplice, or coconspirator has ever testified before any tribunal; (7) all personnel files on law enforcement witnesses; (8) any and all records or information which may be impeaching; and (9) the same information with respect to any

non-witness whose statements may be offered in evidence.

Wood has adopted this motion. Doc. 27-28.

The government has responded, asking that the motion be denied except as otherwise agreed to. Addressing each category of Goad's request, the government states: (1) it is not aware of any juvenile convictions, but such convictions are confidential and should not be disclosed; (2) it will provide arrest and conviction data of which it is aware; no other information will be provided; (3) all promises or consideration will be disclosed; (4) no threats have been made; (5) prior testimony is Jencks material and will be disclosed at the time required by law; (6) identity of persons who have previously testified is not required to be disclosed pretrial; (7) personnel files are not discoverable; (8) it is unaware of any further information. The government does not address category (9) specifically.

The court will address each category of defendant's motion in turn. (1) The court will grant defendant's motion for discovery of arrest and conviction data for adult offenses. The court agrees with the government that juvenile adjudications, if any witnesses have had such adjudications, should remain confidential. (2) Under Fed.R.Evid. **608(b),** cited by the defendant, prior bad acts may not be proven by extrinsic evidence. In the discretion of the court, they may be inquired into on cross examination, if probative of truthfulness or untruthfulness. The requested discovery is not provided for in the criminal rules. The court will deny the requested discovery. (3) and (4) All promises, consideration, and threats shall be disclosed. (5) Prior testimony and statements come within the provisions of the Jencks Act, 18 U.S.C. § 3500(e), and are not subject to disclosure until after the witness testifies. Id. § 3500(a)-(b). (6) The identity of witnesses is not discoverable under Fed.R.Crim.P. 16. (7) The defendant has not provided the court with any Tenth Circuit authority **requiring** the **disclosure** of the personnel files of law enforcement witnesses; consequently, the court will deny the motion. (8) Since the government states that it is unaware of any information fitting within this catch-all category, the requested discovery will be denied. (9) If the government is intending to introduce the statements of non-witnesses, the government shall respond to this requested category of discovery.

3. Motion to dismiss (Doc. 29, filed by Wood)

***4** Defendant Wood argues that the indictment charges defendant with possessing a vehicle which had been stolen and then crossed a state line. The indictment does not charge that the vehicle was involved in interstate commerce at the time the vehicle was in the defendants' possession. Wood makes three arguments in his motion to dismiss: (1) Congress has unconstitutionally extended its authority under the commerce clause to matters purely local in nature; (2) the statute is overbroad; and (3) the vehicle had ceased to be a part of interstate commerce.

Prior to its amendment in October 1984, 18 U.S.C. § 2313 provided:

Whoever receives, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U.S.C. § 2313 (emphasis added). This statute was in effect at the time the vehicle was reported missing in September 1984. The statute was amended effective October 25, 1984 to read:

Whoever receives, possesses, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft, which has crossed a State or United States boundary after being stolen, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U.S.C. § 2313 (emphasis added).

Wood argues that prior to the amendment, for a violation of the statute to occur, the vehicle must have been involved in interstate commerce at the time of the defendant's involvement with it. The amended statute, which took effect after the theft of the vehicle, requires only that the vehicle crossed a state line at some point in time. There is no requirement that the vehicle still be involved in

interstate commerce. This, Wood argues, is an ex post facto law. Additionally, this involves the federal government in matters of a purely local nature involving stolen property. Defendant argues the statute is overbroad since it makes no exception for police officers and repossessors who knowingly deal with stolen vehicles.

Goad has adopted this motion for the most part, Doc. 26, except for the portion of Wood's brief which states that Goad towed the vehicle to Wood's home. Goad states that one Leonard Young towed the vehicle to Wood's home, where it remained until it was turned over to the police. Doc. 32.

The government has responded to this motion, asking that it be denied. Doc. 39, 52.

The amendment of the statute in 1984 cannot form the basis for an ex post facto challenge, since the defendants' conduct occurred after the effective date of that amendment. The defendants argue that since the theft of the truck occurred before the amendment to the statute, all further charges arising out of that theft must be based on the pre-amendment version of the statute. The date of the theft of the truck is not relevant to the ex post facto inquiry, since the defendants are not charged with stealing the truck. The relevant dates are the dates of the defendants' conduct in possessing, concealing, and storing the truck. "The key ex post facto inquiry is the actual state of the law at the time the defendant perpetrated the offense." Watson v. Estelle, 886 F.2d 1093, 1096 (9th Cir.1989). Since the defendants' conduct occurred well after the 1984 amendment to the statute, no ex post facto problem is presented. Cf. United States v. Gillies, 851 F.2d 492, 495-96 (1st Cir.), cert. denied, 109 S.Ct. 147 (1988) (that transportation of firearm in interstate commerce may have occurred prior to enactment of firearm statute, 18 U.S.C. § 922(g)(1), does not violate ex post facto clause; defendant engaged in possession of firearm seven months after the law's enactment).

***5** It is undisputed that Congress may legislate in this area only because interstate commerce is involved. Prior to the 1984 amendment, 18 U.S.C. § 2313 specified "interstate commerce" as an element of the offense. Congress changed the elements of the offense in the 1984 amendment to the statute; however, Congress did not remove the link to interstate commerce. The crossing of state boundaries constitutes interstate commerce.

Wood also argues that the pickup truck was no longer involved in interstate commerce at the time of their involvement with it. Under the old statute, whether the vehicle was still in the stream of commerce when the defendant dealt with it was ordinarily a question of fact for the jury. See United States v. Radtke, 799 F.2d 298, 306 (7th Cir.1986); United States v. Hiscott, 586 F.2d 1271, 1274 (8th Cir.1978). The 1984 amendment to the statute has removed this requirement. The crime of possessing, concealing, and storing a stolen motor vehicle has four essential elements: (1) that the vehicle was stolen; (2) after it was stolen, the vehicle was moved across a state line; (3) after the vehicle had been stolen and moved across a state line, the defendant possessed, concealed, and stored it; and (4) at the time the defendant concealed and stored the vehicle, he knew it had been stolen. See Model Criminal Jury Instructions for the District Courts of the Eighth Circuit § 6.18.2313 (West rev. ed. 1989). The amended statute provides that federal criminal jurisdiction continues over a stolen vehicle once it crosses a state line even after it ceases to be part of interstate commerce. Id. Committee Comments. This is a constitutional exercise of Congress' commerce clause powers. Cf. Scarborough v. United States, 431 U.S. 563 (1977) (the interstate commerce nexus requirement in firearm statute, 18 U.S.C. App. § 1202(a), is satisfied by proof that the firearm had previously travelled in interstate commerce); United States v. Gillies, 851 F.2d 492, 493 (1st Cir.), cert. denied, 109 S.Ct. 147 (1988) (words "affecting commerce" in firearm statute, 18 U.S.C. § 922(g), signal Congress' intent to exercise its commerce clause powers broadly, "perhaps as far as the Constitution permits;" statutory language applies to possession of firearm that previously moved in interstate commerce).

Finally, the defendant argues that the statute is overbroad since it makes no exception for those who legitimately deal with stolen vehicles. This argument warrants little discussion. The court is unaware of any criminal statutes which contain specific exceptions for law enforcement personnel. However, a person whose employment requires him or her to deal with contraband would necessarily lack the criminal intent required for a violation of the law to occur.

4. Motion to dismiss for preaccusatory delay (Doc. 18-19, filed by Goad)

Defendant Goad moves to dismiss the indictment on the grounds that there was a delay of 45 months between November 1985, the time of his alleged involvement in the offense, and August 1989, when the indictment was returned. Goad alleges that the delay was attributable solely to the government and that he has suffered substantial actual prejudice thereby. Goad alleges that the Wichita Police and the Kansas Highway Patrol were aware of his involvement with the truck and of the location of the truck in the fall of 1985. Goad alleges prejudice from the inability to locate certain witnesses and the loss or destruction of evidence.

***6** Wood has joined in this motion. Doc. 31. The government has filed a response. Doc. 51.

Based on the testimony given and the June 4 hearing, the court makes the following findings of fact. Jerry Dunbar, a private investigator, worked for defendant Goad from approximately late 1985 through the summer of 1987. Dunbar testified that in approximately the fall of 1987, Leonard Young, who contracted with Goad to tow repossessed cars, told Dunbar that Goad had taken a stolen vehicle and given it to defendant Wood following a dispute with an insurance company. Young told Dunbar that he wanted to talk with the authorities.

Dunbar met with Sheriff Mike Hill in October or November 1987. Dunbar told Hill that a local private investigator and a local attorney were allegedly involved with a stolen vehicle which was taken by one and then taken to the other's house. Dunbar related that a witness wanted to talk, but did not know whom to contact. Hill telephoned Dunbar the next day to set up a meeting with United States Attorney Benjamin L. Burgess, Jr. At the meeting with Burgess, Dunbar related the story Young had told him.

Around January 1989, Dunbar was contacted by an agent of the Kansas Bureau of Investigation regarding the truck.

On cross-examination, Dunbar admitted that he did not recall the dates exactly. The meeting with Hill and Burgess may have occurred in October 1986, although Dunbar thought it occurred in October 1987. Dunbar admitted that he had no personal knowledge of the matter, where the truck was located, whether Young was telling the truth, or whether Young had further contact with law enforcement.

Former United States Attorney Benjamin L. Burgess, Jr., submitted an affidavit (Doc. 50). Burgess' affidavit states that he has been informed that Jerry Dunbar claims to have met with him and Sheriff Mike Hill in October 1986 regarding the events giving rise to this criminal prosecution. Burgess states that he cannot remember whether such a meeting occurred. Burgess stated that he did vaguely remember a meeting with representatives of law enforcement agencies in late 1986 or early 1987, at which time there was some discussion about defendant Goad.

According to Kansas Bureau of Investigation reports, shortly after Goad contacted the insurance company regarding the stolen pickup truck, two Wichita Police Department Detectives contacted Goad. Goad advised the police that he did not know the current location of the truck. In October 1986, Dunbar met with Hill and Burgess regarding the truck. Hill and Burgess allegedly asked Dunbar to help them develop information which might lead to the filing of charges against Goad. Dunbar declined to become involved in the investigation. Doc. 53, Exh. 3.

The due process clause of the fifth amendment to the Constitution requires dismissal of an indictment when the defendant is able to demonstrate that delay in charging him with a particular crime "was the product of deliberate action by law enforcement personnel designed to gain a tactical advantage resulting in actual prejudice to the accused, thereby depriving him of his right to a fair trial." United States v. Comosona, 614 F.2d 695, 696 (10th Cir.1980). Several elements must be considered. First, there must be a demonstration of actual prejudice to the defendant resulting from the delay. This prejudice generally takes the form of a loss of witnesses and/or physical evidence. Second, the length of the delay must be considered. Third, the government's reasons for the delay must be carefully considered. Id. Something more than ordinary negligence on the part of the government is required; the government's delay must be intentional and purposeful. Id. at 696 n. 1 (citing

United States v. Glist, 594 F.2d 1374 (10th Cir.1979)).

*7 The defendant must make a prima facie showing of fact that the delay in charging him has actually prejudiced his ability to defend, and that the delay was intentionally or purposely designed by the government to gain some tactical advantage over or to harass him. Once the defendant makes a prima facie showing, the burden of going forward with the evidence shifts to the government. Once the government presents evidence showing that the delay was not improperly motivated, the defendant bears the ultimate burden of establishing the government's due process violation by a preponderance of the evidence. Id. at 696-97.

The defendant has failed to make a prima facie showing. The defendant may have shown some prejudice. The evidence presented shows that witnesses' memories have begun to fail, leading to a loss of evidence.

The delay, however, is not so lengthy as to be fatal to the case. The indictment charges a conspiracy, which continues from its inception in November 1985 until February 1989. A conspiracy is by nature a continuing enterprise. The conspiracy charged here begins with the finding of the truck in 1985, continues through the hiding of the truck, and ends with the discovery of the truck in 1989. Charges were brought later that year.

Finally, the defendant has failed to show any improper motive on the part of the government. The evidence presented by the defendant supports at most an inference of negligence--that the United States Attorney was informed about this crime yet failed to investigate promptly. The defendant has presented nothing which would demonstrate an intentional and purposeful delay on the part of the government.

The court shall deny the defendant's motion to dismiss for preaccusatory delay. The issue presented by defendant Goad is a matter of proof for trial. The court would consider the issue again at the close of the government's case or at the close of all the evidence.

IT IS BY THE COURT THEREFORE ORDERED that defendant Goad's motion for a bill of particulars (Doc. 20-21), joined in by defendant Wood (Doc. 30), is hereby denied.

IT IS FURTHER ORDERED that defendant Goad's motion for disclosure of impeaching information (Doc. 24-25), joined in by defendant Wood (Doc. 27-28), is hereby granted in part and denied in part as specified in this opinion and order.

IT IS FURTHER ORDERED that defendant Wood's motion to dismiss (Doc. 29), joined in by defendant Goad (Doc. 26, 32), is hereby denied.

IT IS FURTHER ORDERED that defendant Goad's motion to dismiss for preaccusatory delay (Doc. 18-19), joined in by defendant Wood (Doc. 31), is hereby denied.

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R404(b) - immed. disclosure

UNITED STATES of America, Plaintiff,
v.
James Richard BERRY, Jr., Lisa Ann Berry, Daniel Wayne Connell and Deana Marie Sandoval, Defendants.
Nos. 92-40043-01-SAC to 92-40043-04-SAC.
United States District Court, D. Kansas.
Nov. 23, 1992.

Lee Thompson, U.S. Atty. for the District of Kansas, Thomas G. Luedke, Asst. U.S. Atty., for U.S.

John J. Ambrosio, John J. Ambrosio, Chartered, Topeka, Kan., for James Richard Berry, Jr.

Marilyn M. Trubey, Federal Public Defender's Office, Topeka, Kan., for Lisa Ann Berry.

Michael M. Jackson, Topeka, Kan., for Daniel Wayne Connell.

MEMORANDUM AND ORDER

CROW, District Judge.

***1** On October 21, 1992, the grand jury returned a four count superseding indictment charging all of the defendants in Count I with one count of





Cf.Fla.Stat.Ann s 90.404(2)(b) (written disclosure must describe uncharged misconduct with particularity required of an indictment or information). Instead, the Committee opted for a generalized notice provision which requires the prosecution to apprise the defense of the general nature of the evidence of extrinsic acts. The Committee does not intend that the amendment will supersede other rules of admissibility or disclosure, such as the Jencks Act, 18 U.S.C. s 3500, et seq. nor require the prosecution to disclose directly or indirectly the names and addresses of its witnesses, something it is currently not required to do under Federal Rule of Criminal Procedure 16.

***3** The amendment requires the prosecution to provide notice, regardless of how it intends to use the extrinsic act evidence at trial, i.e., during its case-in-chief, for impeachment, or for possible rebuttal. The court in its discretion may, under the facts, decide that the particular request or notice was not reasonable, either because of the lack of timeliness or completeness. Because the notice requirement serves as condition precedent to admissibility of 404(b) evidence, the offered evidence is inadmissible if the court decides that the notice requirement has not been met.

Nothing in the amendment precludes the court from requiring the government to provide it with an opportunity to rule in limine on 404(b) evidence before it is offered or even mentioned during trial. When rules in limine, the court may require the government to disclose to it the specifics of such evidence which

the court must consider in determining admissibility.
The amendment does not extend to evidence of acts which are "intrinsic" to the charged offense, see United States v. Williams, 900 F.2d 823 (5th Cir.1990) (noting distinction between 404(b) evidence and intrinsic offense evidence). Nor is the amendment intended to redefine what evidence would otherwise be admissible under Rule 404(b).
Id.
During oral argument, the government basically indicated that it did not intend to introduce any evidence that was extrinsic to the crimes charged. Therefore, the notice requirements of Rule 404(b) appear to be satisfied. Upon inquiry, the government gave examples of the type of evidence it believed to be "intrinsic" to the crime charged. As a specific example, the government indicated that an act intrinsic to the alleged conspiracy of growing and distributing of marijuana would include the acquisition of supplies to raise marijuana. The defendants did not directly respond to government's characterization of those acts as intrinsic or extrinsic.
In light of the government's response, the court will briefly discuss the distinction between "extrinsic" and "intrinsic" acts. This discussion is not intended to express any opinion as to whether the evidence offered by the government in this case is "intrinsic" or "extrinsic," but is simply intended to provide a brief overview of this issue.



The distinction between evidence of "intrinsic" acts and evidence of "extrinsic" acts is crucial and sometimes subtle. Rule 404(b) only applies to evidence of acts extrinsic to the charged crime. United States v. Record, 873 F.2d 1163, 1372 n. 5 (10th Cir.1989). Conversely, acts intrinsic to the crimes charged are not excludable under 404(b). An uncharged act may not be extrinsic if:
(1) The act was part of the scheme for which a defendant is being prosecuted; Record, 873 F.2d at 1372 n. 5, or
(2) The act was "inextricably intertwined with the charged crime such that a witness' testimony 'would have been confusing and incomplete without mention of the prior act.' " Record, 873 F.2d at 1372 n. 5 (quoting United States v. Richardson, 764 F.2d 1514, 1521-22 (11th Cir.), cert. denied, 474 U.S. 952 (1985).
See United States v. Williams, 900 F.2d 823, 825 (5th Cir.1990) (" 'Other act' evidence is 'intrinsic' when the evidence of the other act and the evidence of the crime charged are 'inextricably intertwined' or both acts are part of a 'single criminal episode' or the other acts were 'necessary preliminaries' to the crime charged.") (citations omitted).
***4** In the event the government does obtain 404(b) evidence it shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on **good cause** shown, of the general nature of any **404(b)** it

plans to introduce at trial. See United States v. Williams, 792 F.Supp. 1120, 1134 (S.D.Ind.1992) (Government only need supply the defense with **information** sufficient to indicate the general nature of the evidence of extrinsic acts); United States v. Alex, 791 F.Supp. 723, 728 (N.D.Ill.1992) (defendant's demand for specific evidentiary detail including dates, times, places and persons involved is wholly overbroad; Rule 404(b) only requires the government to disclose the general nature of such evidence it intends to introduce at trial); United States v. Sims, No. 92-CR-166, 1992 WL 295672, 1992 U.S.Dist. Lexis 14619, at *2-4 (N.D.Ill. September 28, 1992) (same); United States v. Swano, No. 91-CR-477-02-03, 1992 WL 137588, 1992 U.S.Dist. Lexis 7554, at *16-17 (N.D.Ill. May 29, 1992) (Rule 404(b) not a tool for discovery; defendants' requests for specific dates, times, places, persons, etc. ..., well beyond scope of Rule 404(b)); but see United States v. Melendez, No. 92 Crim. 047 (LMM), 1992 WL 96327, 1992 U.S.Dist. LEXIS 5616, at *1 (S.D. New York April 24, 1992) ("Rule 404(b) will be satisfied if the notice to be given by the government identifies each crime, wrong or act by its specific nature (e.g., sale of cocaine), place (e.g., New York City), and approximate date (e.g., July 1986) to the extent known by the government."). The defendants' motions for 404(b) disclosure is granted. The government is reminded of its continuing obligation to provide notice of the general nature of the 404(b) evidence it intends to use at trial.

**INSTA-CITE**

CITATION: 1992 WL 372181

**Direct History**

=> 1 **U. S. v. Berry,** 1992 WL 372181 (D.Kan., Nov 23, 1992)
(NO. 92-40043-01-SAC, 92-40043-02-SAC, 92-40043-03-SAC, 92-40043-04-SAC)

**Related References**

2 U.S. v. Sandoval, 812 F.Supp. 1156 (D.Kan., Feb 09, 1993)
(NO. 92-40043-04-SAC)

UNITED STATES of America, Appellee,
v.
Eugene Lamar SUTTON, Appellant.

No. 94-2597.

United States Court of Appeals,
Eighth Circuit.

Submitted Oct. 11, 1994.

Decided Dec. 7, 1994.

Defendant was convicted in the United States District Court for the District of Minnesota, Paul A. Magnuson, Chief Judge, of bank robbery, use of firearm in course of violent crime, and being felon in possession of firearm. Defendant appealed. The Court of Appeals, McKay, Senior Circuit Judge, sitting by designation, held that: (1) district court did not abuse its discretion in excusing the government's failure to timely notify defendant that it intended to introduce evidence of defendant's prior narcotics use; (2) evidence of defendant's prior drug use was not material; (3) prejudicial impact of evidence substantially outweighed its probative effect; (4) admission of evidence of defendant's prior drug use was harmless error; (5) district court did not abuse its discretion in precluding defendant from calling witness who would have testified to inconsistent statements made by prosecution witness; and (6) conviction was supported by sufficient evidence.

Affirmed.

[1] CRIMINAL LAW ⇐ 374
110k374
District court did not abuse its discretion in excusing the government's failure to notify defendant at least four days prior to trial, pursuant to district court orders, that it intended to introduce evidence of defendant's prior narcotics use in trial for bank robbery; the government discovered the evidence only five days before trial on a Friday and notified defendant on the following Monday, and defendant was on notice that his involvement with drugs would be an issue at trial. 18 U.S.C.A. § 2113(a, d); Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[2] CRIMINAL LAW ⇐ 371(12)
110k371(12)
In bank robbery prosecution, evidence of defendant's prior drug use was not material, where government simply asked the jury to draw a raw inference about defendant's motive from the fact that he used drugs. 18 U.S.C.A. § 2113(a, d); Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[3] CRIMINAL LAW ⇐ 371(12)
110k371(12)
In bank robbery prosecution, even if motive was material issue and evidence of defendant's prior drug use was probative of motive, prejudicial impact of evidence substantially outweighed its probative effect; slight probative value of knowing one possible motive for defendant to commit robbery did not outweigh likely prejudicial effect on jury of being told that defendant was crack- cocaine user. 18 U.S.C.A. § 2113(a, d); Fed.Rules Evid.Rules 403, 404(b), 28 U.S.C.A.

[4] CRIMINAL LAW ⇐ 1169.2(3)
110k1169.2(3)
In bank robbery prosecution, admission of evidence of defendant's prior drug use was harmless error, where defendant's bad character was established by admissible evidence; defendant claimed that large amounts of cash in his possession after bank robbery were result of defendant's act of breaking into cocaine dealer's home and stealing cash, and evidence that defendant purchased large amounts of cocaine was introduced into evidence to establish a recent acquisition of wealth. 18 U.S.C.A. § 2113(a, d); Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[5] WITNESSES ⇐ 389
410k389
District court did not abuse its discretion in precluding defendant from calling witness who would have testified to inconsistent statements made by one of key prosecution witnesses, where defendant failed to give prosecution witness the opportunity to explain or deny having made a prior inconsistent statement while he was on the stand; Barrett rule allowing such evidence so long as witness is available to be recalled to explain inconsistent statements had not been adopted in circuit, and thus was optional procedure, not mandatory. Fed.Rules Evid.Rule 613(b), 28 U.S.C.A.

[6] ROBBERY ⚿ 2
342k2
Conviction of bank robbery was supported by evidence of bank surveillance photographs of robber, testimony from defendant's aunt and police officer who knew defendant well identifying defendant as man in photographs, testimony that defendant possessed large amounts of cash later on same day as robbery, and testimony of two admitted accomplices implicating defendant in crime, despite fact that accomplices had made plea bargains, and existence of minor inconsistencies in accomplices' and eyewitnesses' testimony, which were easily explained by rapidity and stress of events. 18 U.S.C.A. § 2113(a, d).

[7] CRIMINAL LAW ⚿ 1144.13(3)
110k1144.13(3)
In examining challenge to sufficiency of evidence, Court of Appeals views evidence in light most favorable to government and resolves all evidentiary conflicts in favor of the government.

***1258** Glenn P. Bruder, Minneapolis, MN, argued, for appellant.

David L. Lillehaug, U.S. Atty., Minneapolis, MN, argued (Jon M. Hopeman, on the brief), for appellee.

Before McMILLIAN, Circuit Judge, McKAY, [FN*] Senior Circuit Judge, and BOWMAN, Circuit Judge.

FN* The HONORABLE MONROE G. McKAY, Senior Circuit Judge, United States Court of Appeals for the Tenth Circuit, sitting by designation.

McKAY, Circuit Judge.

Eugene Lamar Sutton appeals from a final judgment entered in the United States District Court for the District of Minnesota finding him guilty upon a jury verdict of bank robbery, use of a firearm in the course of a violent crime, and being a felon in possession of a firearm, in violation of 18 U.S.C. § 2113(a)(d), 18 U.S.C. § 924(c)(1) and (2), and 18 U.S.C. § 922(g)(1), respectively. Mr. Sutton presents three issues on appeal: (1) he challenges the admission of certain evidence; (2) he challenges the exclusion of certain evidence; and (3) he challenges the sufficiency of the evidence as a whole. We affirm the judgment of the district court.

[1] Mr. Sutton contends that the district court improperly admitted evidence of his prior narcotic use under Fed.R.Evid. 404(b). In support of this claim, he has demonstrated that he was provided notice of this evidence only two days before trial, despite the fact that the district court explicitly ordered the government to notify the defendant at least four **days prior** to **trial** of any **404(b)** evidence it planned to use. The district court excused this breach for two reasons. First, the government discovered the evidence only five **days prior** to **trial,** on a Friday, and they notified the defendant on the following Monday. Second, the government had provided the defendant with a copy of the statement of another one of its witnesses over a month before the trial. This statement related to a drug buy the day of the robbery. Thus, the defendant was on notice that his involvement with drugs would be an issue at the trial and had adequate time to prepare for this type of evidence. The district court did not abuse its discretion in excusing the government's late ***1259** notification of Mr. Sutton under these circumstances.

[2] Mr. Sutton also argues, persuasively, that the evidence of his drug use does not meet our test for admissibility under Rule 404(b).

In order for the trial court to admit evidence under Rule 404(b), the evidence must satisfy the following conditions:

1. The evidence of the bad act or other crime is relevant to a material issue raised at trial;
2. The bad act or crime is similar in kind and reasonably close in time to the crime charged;
3. There is sufficient evidence to support a finding by the jury that the defendant committed the other act or crime; and
4. The potential prejudice of the evidence does not substantially outweigh its probative value.

United States v. DeAngelo, 13 F.3d 1228, 1231 (8th Cir.) (citing United States v. Johnson, 934 F.2d 936, 939 (8th Cir.1991)), cert. denied, --- U.S. ----, 114 S.Ct. 2717, 129 L.Ed.2d 842 (1994).

Mr. Sutton contends that his prior drug use does not meet either the first or last part of this test. We agree, but find the error to be harmless.

The first part of our test under Rule 404(b) allows

evidence of prior bad acts where it is used for purposes "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." The government argues that the evidence of Mr. Sutton's drug use showed a motive for the bank robbery. In other words, the government was attempting to show that he stole the money to support his drug habit. Although other circuits have allowed evidence of drug use to demonstrate motive to commit a bank robbery (see, e.g., United States v. Miranda, 986 F.2d 1283, 1285 (9th Cir.) (citing cases), cert. denied, --- U.S. ----, 113 S.Ct. 2393, 124 L.Ed.2d 295 (1993)), we have never decided this precise issue.

This court has allowed evidence of other prior bad acts to show motive in a robbery case. United States v. Mays, 822 F.2d 793, 797 (8th Cir.1987). However, that case is readily distinguishable from the present case. First, in Mays we held that motive was a material issue in that case, although we did not explain why. Furthermore, the facts that were admitted as evidence of motive were also clearly relevant to the issue of identity, which is indisputably a material issue in a robbery case. [FN1] Id. at 797. Another distinction between this case and Mays is that in Mays the evidence of motive ("to secure enough funds to start a new life together") was offered as direct testimony by a co-conspirator. In this case, motive was not a material issue; the defendant did not put his motive in issue; there was no testimony by his co-conspirators about his motive; and the facts which the government used to show motive were not also relevant to identity. The government simply asked the jury to draw a raw inference about the defendant's motive from the fact that he used drugs. We decline to approve such a tenuous link.

FN1. The evidence related to a previous bank robbery committed by defendant that was "similar enough to establish some identity between the robberies. Both banks were located in an isolated rural area; before both robberies a four-wheel drive vehicle was stolen and later abandoned; and in both robberies a .45 caliber automatic pistol was used." Id.

[3] Even if motive were a material issue in this robbery case and drug use were probative of it, the evidence would still fail the fourth part of our test, which is derived from the general requirement of Rule 403 that the prejudicial impact of the evidence should not substantially outweigh its probative value. The admission of evidence of prior wrongful acts creates a danger that the jury will convict the accused on the basis of bad character; thus, it is normally excluded under Rule 404. We cannot say that the slight probative value of knowing one possible motive for Mr. Sutton to commit a robbery outweighs the likely prejudicial effect on the jury of being told that the defendant was a crack-cocaine user. [FN2] In any event, it could hardly come as *1260 a surprise to the jury that Mr. Sutton was robbing a bank because he needed money for some reason. [FN3]

FN2. There is a substantial split among the cases about whether this type of evidence should be admissible. See generally, Debra T. Landes, Annotation, Admissibility of Evidence of Accused's Drug Addiction or Use to Show Motive for Theft of Property Other Than Drugs, 2 A.L.R. 4th 1298 (1980). We think the better-reasoned cases exclude such evidence. See State v. LeFever, 102 Wash.2d 777, 690 P.2d 574 (1984) (Evidence of defendant's addiction to heroin, offered by prosecution to show motive for robbery, is inadmissible in that resulting prejudice overwhelmed any possible relevance or probativeness.); People v. Holt, 37 Cal.3d 436, 208 Cal.Rptr. 547, 554, 690 P.2d 1207, 1214 (1984) (Whatever probative value defendant's drug use might have had to show motive for robbery was outweighed by prejudicial value.).

FN3. This brings to mind the story of a more famous bank robber with the same surname. When asked why he robbed banks, Willie Sutton replied, "That's where the money is."

[4] Although we believe that the admission of Mr. Sutton's prior drug use was erroneous, we nevertheless find the error to be harmless, because when viewed in the context of all the evidence presented at Mr. Sutton's trial, any possible prejudice that Mr. Sutton suffered was de minimis. For example, in Mr. Sutton's opening statement, his counsel referred to his association with drug dealers and how he broke into a cocaine dealer's home and stole $10,000. (Tr. [FN4] 35-36) This information was a crucial part of Mr. Sutton's defense, as it provided an alternative explanation for how Mr. Sutton came to have large amounts of cash just after

the time of the bank robbery. However, these statements also gave the government the prerogative to explore on cross-examination the basis for his knowledge that there would be large amounts of cash in the drug dealer's house and the nature of his relationship with the drug dealer. Furthermore, testimony was presented that Mr. Sutton purchased large amounts of cocaine the day of the robbery. This evidence was properly admitted because it tended to establish a recent acquisition of wealth. We think Mr. Sutton's bad character was so thoroughly established by admissible evidence (including his own) that there is no likelihood that this additional bad character evidence would have influenced the outcome in this case.

FN4. Trial Transcript.

[5] Mr. Sutton also contends that the district court improperly precluded him from presenting a witness who would have testified to inconsistent statements made by one of the key prosecution witnesses, Mr. Smith. This testimony was not allowed because Mr. Smith was not given the opportunity to explain or deny having made a prior inconsistent statement while he was on the stand, which is normally the proper foundation for impeachment under Fed.R.Evid. 613(b). Mr. Sutton points out that the First Circuit has relaxed this requirement, requiring only that a witness be available to be recalled to explain inconsistent statements. United States v. Barrett, 539 F.2d 244, 254-56 (1st Cir.1976); United States v. Hudson, 970 F.2d 948, 955 (1st Cir.1992). However, this procedure is not mandatory, but is optional at the trial judge's discretion. Id. at 956 & n. 2. More to the point, since this circuit has never adopted the rule in Barrett, we cannot say that the district court abused its discretion in not applying it.

[6][7] Mr. Sutton has also challenged the sufficiency of the evidence. Accordingly, we must examine whether a rational trier of fact could have found the defendant guilty beyond a reasonable doubt. United States v. Fetlow, 21 F.3d 243, 247 (8th Cir.), cert. denied sub nom., Ferguson v. United States, --- U.S. ----, 115 S.Ct. 456, 130 L.Ed.2d 365 (1994). In examining such a claim, we view the evidence in the light most favorable to the government and resolve all evidentiary conflicts in favor of the government. United States v. Nelson, 984 F.2d 894, 899 (8th Cir.), cert. denied, --- U.S. ----, 113 S.Ct. 2945, 124 L.Ed.2d 693 (1993).

The evidence, viewed in the light most favorable to the prosecution, indicates that a man matching the description of Mr. Sutton robbed the Chisago City Bank. (Tr. 46). There were photographs taken by bank surveillance cameras which the jury viewed and compared to Mr. Sutton. There was also testimony that his Aunt and a police officer who knew him well identified him as the man in the photos. (Tr. 145, 158).

Further testimony demonstrated that Mr. Sutton had in his possession large quantities *1261 of cash later on the same day of the robbery. He used this money to purchase a car for $2500 in cash (Tr. 42) and $2400 worth of cocaine. (Tr. 261, 263, 265). Mr. Sutton provided conflicting and unsubstantiated claims for the origins of the money (Tr. 351, 378-79), but it is undisputed that he did not earn the money through legal gainful employment.

Furthermore, two admitted accomplices of Mr. Sutton implicated him in the crime and provided sufficient detail that the jury might rationally have found them credible. Although the accomplices had made plea bargains, the jury was properly instructed by the trial judge on this point. The inconsistencies in the accomplices' and eyewitnesses' testimony are minor and are easily explained by the rapidity and stress of the events. The bank tellers' inability to pick Mr. Sutton's photo out of a lineup may also be explained by the speed and stress of the event, plus the fact that the robber was wearing a hat and sunglasses. This weakness in the evidence was overcome by the independent identification by Mr. Sutton's aunt and the police officer.

After carefully reviewing the evidence presented in the light most favorable to the government, we conclude that there was sufficient evidence to support the jury's verdict.

Accordingly, the judgment of the district court is affirmed.

END OF DOCUMENT

**INSTA-CITE**

CITATION: 41 F.3d 1257

**Direct History**

=> 1 **U.S. v. Sutton,** 41 F.3d 1257, 41 Fed. R. Evid. Serv. 708 (8th Cir.(Minn.), Dec 07, 1994) (NO. 94-2597)
Certiorari Denied by
2 Sutton v. U.S., 115 S.Ct. 1712, 131 L.Ed.2d 572, 63 USLW 3754 (U.S., Apr 17, 1995) (NO. 94-8309)

UNITED STATES of America
v.
Rafael CRUZ, a/k/a "Esa," Defendant.

No. S1 94 CR. 313 (CSH).

United States District Court, S.D. New York.

Oct. 20, 1995.

MEMORANDUM OPINION AND ORDER

HAIGHT, District Judge:

*1 In Counts Fifty-Three and Seventy-Seven of the 78-count superseding indictment in this case, defendant Rafael Cruz is charged with conspiracy to distribute and to possess with the intent to distribute heroin in violation of 21 U.S.C. §§ 812, 841(a)(1), 841(b)(1)(A), and 846 and 18 U.S.C. § 2, and using a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. §§ 924(c) and 2. By Notice of Motion dated September 29, 1995 Cruz requests the following relief: (1) provision of a bill of particulars; (2) an order striking any prejudicial surplusage from the indictment; (3) an order allowing defendant to inspect the minutes of the Grand Jury proceeding with regard to evidence supporting County Fifty-Three of the indictment; (4) an order granting defendant discovery under Federal Rule of Criminal Procedure 16; (5) a Federal Rule of Evidence 404(b) order directing the government to provide advance notice of any evidence of prior bad acts or criminal convictions of the defendant the government intends to introduce at trial; (6) an order requiring the government to disclose before trial all prior conduct by which the government would seek to impeach defendant; (7) an order compelling the government to comply with its obligations under Brady v. Maryland, 373 U.S. 83 (1963). For the reasons stated below, defendant's applications are denied with the exception of his motion concerning superfluous counts in the indictment, his motion for discovery of surveillance photographs, and his motion for Rule 404(b) evidence and impeachment evidence.

DISCUSSION

1. Bill of Particulars

Cruz seeks an order directing the government to provide a bill of particulars pursuant to Fed. R. Crim. P. 7(f). He asks for provision of the date, time, and location of the occurrence of any overt acts the government intends to prove at trial as well as the names and addresses of any unindicted co-conspirators and the dates on which they joined the alleged conspiracy.

The decision whether to require the government to provide a bill of particulars rests within the sound discretion of the district court. See United States v. Cephas, 937 F.2d 816, 823 (2d Cir. 1991), cert. denied, 502 U.S. 1037 (1992); United States v. Bortnovsky, 820 F.2d 572, 574 (2d Cir. 1987) (per curiam). Its function is to "'provide defendant with information about the details of the charge against him if this is necessary to the preparation of his defense, and to avoid prejudicial surprise at the trial."' United States v. Torres, 901 F.2d 205, 234 (2d Cir. 1990), quoting 1 C. Wright, Federal Practice and Procedure § 129, at 434-35 (2d ed. 1982), cert. denied, 498 U.S. 906 (1990). A bill of particulars is required "'only where the charges of the indictment are so general that they do not advise the defendant of the specific acts of which he is accused."' Id. at 234, quoting United States v. Feola, 651 F. Supp. 1068, 1132 (S.D.N.Y. 1987), aff'd, 875 F.2d 857 (2d Cir. 1989), cert. denied, 493 U.S. 834 (1989); see also Bortnovsky, 820 F.2d at 574 (per curiam) (bill of particulars only appropriate when necessary to "prevent surprise").

*2 "The test is not whether the particulars sought would be useful to the defense. Rather, a more appropriate inquiry is whether the information in question is necessary to the defense." United States v. Guerrerio, 670 F. Supp. 1215, 1224 (S.D.N.Y. 1987) (emphasis in original) (citation omitted). "Generally if the information sought by defendant is provided in the indictment or in some acceptable alternate form, no bill of particulars is required." Bortnovsky, 820 F.2d at 574; see also Feola, 651 F. Supp. at 1133 ("In deciding whether the bill of particulars is needed, the court must determine whether the information sought has been provided elsewhere, such as in other items provided by discovery.... and the indictment itself.").

Applying these precepts, Cruz has not demonstrated the necessity of a bill of particulars. The superseding indictment specifies the approximate beginning and end dates of the

narcotics conspiracy and the corresponding time frame of the defendant's possession and use of a firearm. It also supplies the general vicinity and mechanics of the operation of the narcotics conspiracy of which he is alleged to have been a member. The government has also provided the defendant with abundant discovery materials, and the defendant has available to him the transcript of the earlier trial of a member of the conspiracy to which he is allegedly party. In the aggregate, this information satisfies the need a bill of particulars is designed to fulfill: it enables Cruz to adequately prepare his defense and prevents the possibility of unfair surprise at trial.

Although this information does not expose every detail of the crimes alleged to have been committed, the government is not obligated to particularize all of its evidence before trial. Details concerning the date on which the conspiracy was formed and the date and means by which Cruz entered into it need not be revealed before trial. [FN1] See United States v. Persico, 621 F. Supp. 842, 868 (S.D.N.Y. 1985). Nor is the government required to set forth the location of each predicate act or details concerning meetings at which the defendant was present. United States v. Wilson, 565 F.Supp. 1416, 1438-39 (S.D.N.Y. 1983) (Weinfeld, J.). Cruz's request for the names of unindicted co-conspirators also fails. The indictment names thirteen of defendant's alleged co-conspirators in the conspiracy with which he is charged. A more "exhaustive list" of the participants is not necessary. United States v. Benevento, 649 F. Supp. 1379, 1388 (S.D.N.Y. 1986) (Weinfeld, J.), partially vacated on other grounds, 836 F.2d 60 (2d Cir. 1987), cert. denied, 486 U.S. 1043 (1988); see also United States v. Santobello, 1994 WL 525053, * 6 (S.D.N.Y. September 23, 1994) (where indictment named twelve individuals involved in conspiracies, government was not required to provide names and addresses of all unindicted accomplices through bill of particulars).

*3 Since the indictment and the other information provided to the defendant adequately apprise him of the nature of the crimes with which he is charged so as to prevent the risk of double jeopardy and undue surprise at trial, Cruz's request for a bill of particulars is unwarranted.

2. Striking Surplusage In The Indictment

Defendant moves to strike certain of the superseding indictment's allegations he deems "surplusage," in particular, what he deems to be superfluous counts and superfluous references to aliases. Defendant argues first that he is named in a seventy-eight count indictment which alleges acts of murder, kidnapping, extortion and assault by the C&C enterprise, but that he himself is not alleged to have been a member of that enterprise. Defendant is accused of aiding, abetting, and conspiring with that organization, not of having been a member of it nor a co-conspirator in the RICO charge of the indictment.

The government, in its memorandum, concedes that the information deemed surplusage by the defendant "is not necessarily relevant to prove the elements of Counts Fifty-Three and Seventy-Seven." Govt's Mem. at 4. The government then states that it is willing to confer with defense counsel and the Court in an effort to reach agreement about removal of "surplusage" from the indictment. Id. Given that the parties share common ground on this issue, the Court orders them to confer on this issue and inform the Court of their decisions concerning any surplusage in the indictment and the appropriate changes that will be made. The parties may request Court participation in this process if they are unable to reach an agreement.

Defendant also objects to the use of an alias in the indictment, arguing that the alias will raise prejudicial suspicion in jurors' minds, and has no probative value on the question of his identity in this case. The government responds that defendant was known to his alleged co-conspirators as "Esa," not as "Rafael Cruz," and that the alias is therefore necessary to establish defendant's identity.

The Court is convinced that preservation of the alias "Esa" in the indictment will not unfairly prejudice jurors against the defendant. The Second Circuit explicitly allows the use of aliases at trial if the alias is necessary to prove defendant's identity. United States v. Miller, 381 F.2d 529, 536 (2d Cir. 1967), cert. denied, 392 U.S. 929 (1968), reh'g denied, 393 U.S. 902 (1968). This case presents just such a situation: since the government's witnesses know defendant only by the name of "Esa" and not as "Rafael Cruz," their accurate identification of defendant depends upon allowing the government to elicit testimony from them using the name "Esa."

Furthermore, this case is easily differentiated from United States v. Williams, 739 F.2d 297 (7th Cir. 1984), in which the alias "Fast Eddie" was stricken from the indictment on the grounds of undue prejudice to the defendant. Defendant proffers no evidence that the alias "Esa" carries the same negative connotations as the alias in Williams, and the Court sees no reason to so assume. Defendant's request to strike his alias from the indictment is denied.

3. Disclosure of Grand Jury Minutes

*4 Defendant requests that the Court order the disclosure of the portion of the Grand Jury minutes relating to the narcotics charge against him, or, in the alternative, allow him to inspect the minutes in camera.

Federal Rule of Criminal Procedure 6(3)(C)(ii) allows such disclosure "upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury." "Grand Jury proceedings carry a 'presumption of regularity."' Torres, 901 F.2d at 232, quoting Hamling v. United States, 418 U.S. 87, 139 n.23 (1974). The Supreme Court has "consistently construed the Rule ... to require a strong showing of particularized need for grand jury materials before any disclosure will be permitted." United States v. Sells Engineering, Inc., 463 U.S. 418, 443 (1983). See also Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 400 (1959). In this context, "a review of grand jury minutes is rarely permitted without specific factual allegations of government misconduct." Torres, 901 F.2d at 233.

Defendant argues that the evidence upon which the government relies is insufficient to sustain an indictment unless the government misrepresented the evidence. This assertion does not provide the kind of specific allegation needed to justify opening Grand Jury minutes, and is insufficient to convince the Court to take the unusual step of opening the Grand Jury minutes to scrutiny by defendant. Defendant's motion on this point is denied.

4. Discovery Under Federal Rule of Civil Procedure 16

a. Reports, Logs, Photographs, Videotapes

Defendant requests that the government produce all reports, logs, photographs, and videotapes to him before trial. The government states that it has no such evidence that include the defendant, but that the government is in possession of surveillance photographs of members of the C&C gang and associates of the gang and of defendant, and that it has no objection to making these surveillance photographs available to defendant. The Court orders the government to do so at a time convenient for both the government and defendant.

b. Grand Jury Dates, Adjournments, Instructions, Voting Records, and Court Transcripts of Returned Indictment

The Court rejects defendant's further requests to gain information about the grand jury proceedings. Federal Rule of Criminal Procedure 16 does not require the government to disclose such information, except as permitted under Fed. R. Crim. Pro. 6. As discussed above, Rule 6(3)(C)(ii) allows such disclosure "upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury." Because defendant has not made any such showing, his motion is denied.

c. Government's Witness List

With respect to defendant's request for a government witness list, Rule 16 "does not require the Government to furnish the names and addresses of its witnesses in general." United States v. Bejasa, 904 F.2d 137, 139 (2d Cir. 1990), cert. denied, 498 U.S. 921 (1990); see also United States v. Victor Teicher & Co., L.P., 726 F. Supp. 1424, 1443 (S.D.N.Y. 1989) (Haight, J.). Although this Court has the authority to require the government to disclose the identity of its witnesses, such an order will only be granted if the defendants make "a specific showing that disclosure was both material to the preparation of [the] defense and reasonable in light of the circumstances surrounding [the] case." Bejasa, 904 F.2d at 140 (quoting United States v. Cannone, 528 F.2d 296, 300 (2d Cir. 1975)) (emphasis and alterations in Bejasa). "Especially in narcotics cases, where the dangers of witness intimidation, subornation of perjury or actual injury to witnesses are great, the defendant's request for a witness list should not be granted absent a particularized showing of need." United States v.

Taylor, 707 F. Supp. 696, 703 (S.D.N.Y. 1989) (citation omitted). "[A]n abstract, conclusory claim that such disclosure [is] necessary," is not adequate to make the requisite showing. Cannone, 528 F.2d at 301-02.

*5 Defendant represents that the identities of the government's witnesses are generally unknown to the defendants and that without this knowledge and the opportunity to interview the witnesses, the defense will be unprepared to meet the government's evidence at trial. While there is some force to this contention, the generalized need Cruz professes is not sufficient under Second Circuit authority. In addition, the availability in this case of the transcript from the prior trial of a conspirator further diminishes defendant's professed need. Having failed to make a particularized showing of need for the government's witness list the request must be denied.

5. Federal Rule of Evidence 404(b) Evidence

Cruz requests an order directing the government to provide advance notice, 14 days prior to trial, of any evidence of other crimes, wrongs or acts committed by him it intends to introduce at trial pursuant to Rule 404(b) of the Federal Rules of Evidence ("Fed. R. Evid."). The Rule itself requires the government to provide "reasonable notice" of such evidence in advance of trial, but does not define "reasonable." It is therefore left to the Court to give meaning to that term in each particular case. This Court has generally required such notification ten days before trial. [FN2]

The government represents that it has not yet finalized its decisions concerning what evidence it will seek to introduce at trial. The government is nevertheless ordered to furnish notification ten calendar days in advance of trial, failing which the evidence will be precluded. To the extent the government determines after that point that it intends to introduce such evidence, the government must seek a ruling as to its admissibility and show good cause for its failure to provide notice within the appointed time frame.

6. Impeachment Material

Cruz also requests an order from the Court pursuant to Rule 404(b) requiring the government to advise him prior to trial of any evidence of his prior criminal conduct or immoral acts it plans to use for the purpose of impeaching him on cross-examination with such evidence. The government agrees to provide reasonable notice of impeachment material. The Court orders the government to produce this material ten days before trial.

7. Brady Material

Cruz seeks an order directing the government to produce material favorable to the defense pursuant to Brady v. Maryland, 373 U.S. 83 (1963).

The government represents that it is cognizant of its obligations under Brady and is currently unaware of any material falling under its mandate. In light of this representation, an order directing the production of such material is unnecessary at the present time. Of course, I expect the government to honor its commitment to disclose forthwith any Brady material of which it subsequently becomes aware.

CONCLUSION

Defendant's applications are denied with the exception of his motion concerning superfluous counts in the indictment, his motion for discovery of surveillance photographs, and his motion for Rule 404(b) evidence and impeachment evidence.

*6 It is SO ORDERED.

FN1. Defendant's request for particulars concerning every overt act the government intends to prove at trial is misguided. The government is not required to prove the commission of an overt act to establish the existence of the narcotics conspiracy charged. See United States v. Shabani, 115 S.Ct. 382, 385 (1994). Thus, defendant cannot show a need for this information sufficient to justify a bill of particulars.

FN2. Consistent with Rule 404(b), the Court also allows the government to provide such notice during trial if pre-trial notice can be excused for good cause.

END OF DOCUMENT

**INSTA-CITE**

CITATION: 1995 WL 617220

**Direct History**

=> 1 **U.S. v. Cruz,** 1995 WL 617220 (S.D.N.Y., Oct 20, 1995)
(NO. S1 94 CR. 313 (CSH))

**Related References**

2 U.S. v. Padilla, 1994 WL 681812 (S.D.N.Y., Dec 05, 1994)
(NO. S1 94 CR. 313 (CSH))

3 U.S. v. Padilla, 1995 WL 5920 (S.D.N.Y., Jan 05, 1995)
(NO. S1 94 CR. 313 (CSH))

4 U.S. v. Cherry, 1995 WL 66595 (S.D.N.Y., Feb 15, 1995)
(NO. S1 94 CR. 313 (CSH))

5 U.S. v. Cherry, 876 F.Supp. 547, 63 USLW 2566 (D.N.Y., Feb 17, 1995)
(NO. S1 94 CR.313 (CSH))

6 U.S. v. Cherry, 1995 WL 77719 (S.D.N.Y., Feb 23, 1995)
(NO. S1 94 CR. 313 (CSH))

7 U.S. v. Boggio, 1995 WL 77722 (S.D.N.Y., Feb 23, 1995)
(NO. S7 94 CR. 313 (CSH))

8 U.S. v. Padilla, 1995 WL 105280 (S.D.N.Y., Mar 13, 1995)
(NO. S1 94 CR. 313 (CSH))

9 U.S. v. Padilla, 1995 WL 261513 (S.D.N.Y., May 03, 1995)
(NO. S1 94 CR. 313 (CSH))
On Reconsideration

10 U.S. v. Padilla, 1995 WL 301348 (S.D.N.Y., May 16, 1995)
(NO. S1 94 CR. 313 (CSH))

11 U.S. v. Jones, 57 F.3d 1071 (6th Cir.(Ohio), Jun 09, 1995)
(TABLE, TEXT IN WESTLAW, NO. 94-3092)

12 U.S. v. Cruz, 1995 WL 463107 (S.D.N.Y., Aug 04, 1995)
(NO. S1 94 CR. 313 (CSH))

13 U.S. v. Cruz, 1995 WL 640546 (S.D.N.Y., Oct 31, 1995)
(NO. S1 94 CR.313CSH)

14 U.S. v. Cruz, 907 F.Supp. 87 (D.N.Y., Dec 04, 1995)
(NO. S11 94 CR. 313 (CSH))

UNITED STATES of America, Appellee,
v.
Garry D. KERN, Appellant.
UNITED STATES of America, Appellee,
v.
Troy P. REEVES, Appellant.

Nos. 93-1524, 93-1566.

United States Court of Appeals,
Eighth Circuit.

Submitted Oct. 13, 1993.

Decided Dec. 17, 1993.

Defendants were convicted in the United States District Court for the District of Nebraska, Lyle E. Strom, Chief Judge, of bank robbery, conspiracy to commit bank robbery, and carrying of firearm during and in relation to crime of violence. Defendants appealed. The Court of Appeals, Magill, Circuit Judge, held that: (1) other acts evidence was admissible on issue of intent to conspire; (2) motion for new trial on basis of newly discovered evidence was properly denied; and (3) state's knowledge of its police report potentially exonerating defendants could not be imputed to federal prosecutor on issue whether prosecutor withheld evidence and thereby violated Brady.

Affirmed.

[1] CRIMINAL LAW ⇐ 374
110k374
Government gave "reasonable notice" of general nature of bad act evidence to be used, when government informed defendants in hearing before magistrate judge that it might use evidence from some local robberies and when it provided the reports one week later, a week before trial. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

See publication Words and Phrases for other judicial constructions and definitions.

[2] CRIMINAL LAW ⇐ 369.2(8)
110k369.2(8)
Victim's testimony identifying defendants as participants in hotel robbery was relevant to issue of defendants' intent to conspire to rob bank 17 days earlier and was admissible; both robberies were committed by three stocking-masked males, in both robberies larger male carried black short-barreled shotgun, and smaller robber in both robberies vaulted over relatively high obstacle. 18 U.S.C.A. §§ 371, 2113(a, d); Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[2] CRIMINAL LAW ⇐ 371(8)
110k371(8)
Victim's testimony identifying defendants as participants in hotel robbery was relevant to issue of defendants' intent to conspire to rob bank 17 days earlier and was admissible; both robberies were committed by three stocking-masked males, in both robberies larger male carried black short-barreled shotgun, and smaller robber in both robberies vaulted over relatively high obstacle. 18 U.S.C.A. §§ 371, 2113(a, d); Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[3] CRIMINAL LAW ⇐ 945(2)
110k945(2)
Police report indicating confession to hotel robbery and refusal to name accomplices would not exonerate defendants in bank robbery prosecution using evidence of defendants' involvement in the hotel robbery, and, thus, report did not entitle defendants to new trial; if the evidence had been presented to jury, it could reasonably have believed that hotel robber was merely protecting defendants, and although jury could also have inferred that hotel robbery victim improperly identified defendants, evidence of guilt warranted denial of new trial motion. Fed.Rules Cr.Proc.Rule 33, 18 U.S.C.A.

[4] CRIMINAL LAW ⇐ 700(6)
110k700(6)
State's knowledge of its police report potentially exonerating defendants could not be imputed to federal prosecutor on issue whether prosecutor withheld evidence and thereby violated Brady. U.S.C.A. Const.Amends. 5, 14.

***123** Mark W. Bubak, Omaha, NE, argued, for appellants.

Michael P. Norris, Asst. U.S. Atty., Omaha, NE, argued, for appellee.

Before McMILLIAN, BOWMAN, and MAGILL,

Circuit Judges.

MAGILL, Circuit Judge.

Troy B. Reeves (Reeves) and Garry D. Kern (Kern) appeal the judgment entered by the district court [FN1] following a jury's finding of guilt on three bank-robbery-related counts. Specifically, Reeves and Kern (the defendants) contend the trial court erred when it admitted evidence of another subsequent robbery, when it refused to grant a new trial after the discovery of new evidence, and when it found as a matter of law that conspiracy to commit bank robbery is a crime of violence. For the reasons addressed below, we affirm the judgment of the district court.

FN1. The Honorable Lyle E. Strom, Chief Judge, United States District Court for the District of Nebraska.

## I. BACKGROUND

On June 12, 1992, an Omaha branch office of the First Federal Savings and Loan Association of Lincoln (First Federal) was robbed of approximately $12,700 by two stocking-masked males who differed significantly in height and weight. The smaller robber entered the bank first and the larger robber followed carrying a black short-barreled shotgun. The robbers left the bank and entered a recently-stolen white Buick driven by a third male. Immediately after the robbery, a stocking mask with a few human hairs was found outside the bank.

Kern's girlfriend at the time, Andrea Fraire (Fraire), testified at trial that Kern had related a plan to her to rob a jewelry store and bank in Omaha. According to Fraire, the planned robberies were to take place on June 12, 1992, and involved the use of stolen getaway cars. Fraire further testified that on the evening of June 12, 1992, Kern arrived home with $4000 to $4500 in cash.

Jack Parrott, a security guard for the shopping center in which the bank was located, testified at trial that he observed a rusted gold Oldsmobile Cutlass (Cutlass) occupied by four males in the shopping center parking lot on June 11, 1992. The next day, June 12, the same car was observed again by Parrott, again occupied by four males. Later that same morning, Parrott observed the Cutlass in a church parking lot parked beside a white Buick. The white Buick was now occupied by three of the males and the Cutlass held the fourth individual. After observing the Buick for a short time, Parrott noticed a shotgun being passed to a backseat passenger. Parrott subsequently identified Reeves from a photograph array as the frontseat passenger. Although Parrott was unable to identify Kern from a police lineup, he did identify Kern at trial as the backseat passenger.

The bank employees were unable to identify Reeves or Kern from lineups or at trial. Reeves and Kern both had alibi witnesses testify that they were elsewhere at the time of the robbery. The human hairs in the mask, however, were identified by an FBI hair and fiber expert as matching samples taken from Kern.

At trial, testimony was introduced by the government regarding the defendants' alleged participation in a hotel robbery that occurred seventeen days after the bank robbery. Kern was charged in state court with commission of this robbery. The testimony was prefaced by a limiting instruction prohibiting the jury from using this testimony to establish "bad" character and, accordingly, conformity with that character. The testimony was then introduced pursuant to Federal ***124** Rule of Evidence 404(b). The hotel robbery victim, Ashford, testified he was robbed by three armed masked males, and he identified both Reeves and Kern as two of the individuals who robbed him.

Following a jury trial, the defendants were convicted of all three counts against them. Count I charged the defendants with conspiracy to commit bank robbery in violation of 18 U.S.C. § 371. Count II charged them with the June 12, 1992 bank robbery of First Federal in violation of 18 U.S.C. § 2113(a), (d). Count III charged Reeves with carrying a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1), and Kern was charged as Reeves' co-conspirator on that count.

After the jury convicted Reeves and Kern for the First Federal robbery, the government received from the Omaha police a supplementary report related to the hotel robbery. An individual named Stacey Lue (Lue) confessed to participating with two accomplices in the hotel robbery. Lue was

specifically asked if Reeves and Kern were his accomplices, but he denied any participation on their part. Lue, however, refused to name his two accomplices. Upon receipt, the government immediately disclosed this information to the defendants' attorneys. Following the disclosure of the Lue confession, Reeves and Kern moved for a new trial. In state court, Kern pleaded nolo contendere to the hotel robbery charge and was convicted.

## II. DISCUSSION

The defendants contend that three errors of the trial court mandate reversal and a new trial: admission of Ashford's testimony, Brady [FN2] evidence and/or newly discovered evidence, and the district court's finding as a matter of law that conspiracy to commit bank robbery is a crime of violence as defined by 18 U.S.C. § 16. We find that the district court committed no reversible error, and we affirm the court's judgment.

FN2. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

### A. The Hotel Robbery Evidence

The defendants object to the admission into evidence of Ashford's testimony regarding the hotel robbery because they claim the government gave insufficient notice that it planned on using this evidence and it was not properly admissible under Federal Rule of Evidence 404(b) (Rule 404(b)). The district court, however, has broad discretion to admit such evidence and its decision will not be overturned unless it is clear that the evidence has no bearing on the case. United States v. Sykes, 977 F.2d 1242, 1246 (8th Cir.1992).

[1] The government gave the defendants adequate notice that it planned on using Rule **404(b)** evidence. The rule states the prosecution must "provide reasonable notice in advance of trial, or during trial ... on **good cause** shown, of the general nature of any such evidence." Fed.R.Evid. **404(b)**. The magistrate judge specifically ordered that any "bad act" evidence be disclosed at least fourteen days prior to trial. The government complied by informing the defendants in a hearing before the magistrate judge that the government might use evidence from some local robberies. See Tr. at 335. At that time, the government did not yet have the state reports concerning these robberies. Approximately one week before trial, when the government obtained the reports, the defendants were likewise provided with these reports. Id. We find that the government's notice satisfies the requirements of Rule 404(b); the district court did not abuse its discretion in finding that this notice was reasonable.

Rule 404(b) prohibits the admission of "other crimes, wrongs, or acts" to prove the character of a person, and hence, conformity with that character; that is, it prohibits propensity evidence. See id. The rule, nonetheless, specifically recognizes that evidence of "other crimes, wrongs, or acts" could be admissible for other purposes, such as to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake. Id.

To properly admit Rule 404(b) evidence for purposes other than to prove propensity, it must (1) be relevant to a material issue raised at trial, (2) be similar in kind and close ***125** in time to the crime charged, (3) be supported by sufficient evidence to support a finding by a jury that the defendant committed the other act; and (4) not have a prejudicial value that substantially outweighs its probative value. Sykes, 977 F.2d at 1246; United States v. Johnson, 934 F.2d 936, 939 (8th Cir.1991). The district court warned the jury in an instruction prior to Ashford's testimony that "the mere fact that these defendants may have committed a similar act in the past is not evidence that they committed the acts charged in this case." Tr. at 365. The district court repeated essentially the same warning in Jury Instruction No. 10. The permissible purposes enumerated by the district court for which this testimony could be considered included proof of identity, knowledge, plan, motive, and intent to conspire.

[2] We find that the hotel robbery evidence was properly admitted to prove that Reeves and Kern intended to enter into an agreement or understanding to commit robbery and that they understood the purpose of this agreement. [FN3] The court instructed the jury that in order to find the defendants guilty of conspiracy to commit bank robbery, it had to find four elements: (1) two or more persons reached an agreement to commit the crime, (2) the defendant voluntarily and

intentionally joined in the agreement, (3) at the time the defendant joined in the agreement, he knew the purpose of the agreement, and (4) that while the agreement was in effect, one or more of the persons who had joined in the agreement did an overt act in order to carry out the agreement. Thus, the hotel robbery evidence was relevant to a material fact: intent to conspire. See Cheek v. United States, 858 F.2d 1330, 1336-37 (8th Cir.1988); United States v. Scholle, 553 F.2d 1109, 1121 (8th Cir.), cert. denied, 434 U.S. 940, 98 S.Ct. 432, 54 L.Ed.2d 300 (1977); United States v. Carlson, 547 F.2d 1346, 1354 & n. 5 (8th Cir.1976), cert. denied, 431 U.S. 914, 97 S.Ct. 2174, 53 L.Ed.2d 224 (1977).

FN3. We do not decide whether the hotel robbery evidence could otherwise have been admissible as evidence of identity, plan, or motive, because we find the district court did not abuse its discretion in allowing its admission into evidence and the limiting instruction properly warned the jury not to impermissibly use this evidence as proof of propensity. However, we do not countenance the district court's use of this virtual laundry list of permissible Rule 404(b) purposes. See United States v. Mothershed, 859 F.2d 585, 589 (8th Cir.1988). Such an action, nevertheless, in itself is not a basis for reversal. See id.

As required by Sykes and Johnson, the hotel robbery evidence was similar in kind and close in time to the crime charged. The hotel robbery occurred only seventeen days after the bank robbery. Both robberies were committed by three stocking-masked males. In both robberies, the larger male carried a black short-barreled shotgun. Moreover, the smaller masked robber in both robberies vaulted over a relatively high obstacle: the teller's counter in the bank robbery and the desk in the hotel robbery.

Ashford's testimony regarding the hotel robbery was sufficient for a jury to have found that Reeves and Kern committed the hotel robbery. Ashford not only made a positive identification of the defendants at trial, but he also identified Reeves from an array of photographs soon after the hotel robbery.

Moreover, the court's limiting instruction to the jury was sufficient to prevent undue prejudice from the admission of this evidence. Therefore, because the hotel robbery evidence was admissible to prove that the defendants intended to enter into a conspiracy to rob, we find that the district court did not abuse its discretion when it allowed Ashford to testify.

### B. The Supplementary Omaha Police Division Report

[3] After the defendants received the Omaha police division supplementary report (the report) indicating that Lue had confessed to the hotel robbery and refused to name his accomplices, the defendants moved for a new trial. Reeves and Kern claim that the report "exonerated" them and hence a new trial should have been granted pursuant to Federal Rule of Criminal Procedure 33 (Rule 33). Furthermore, they claim that Brady mandates a new trial because the knowledge ***126** of the Omaha police regarding this report should be imputed to the federal prosecutor. We do not agree that the new evidence exonerated the defendants or that the prosecutor withheld evidence from the defendants.

Rule 33 allows a court to grant a motion for a new trial on the basis of newly discovered evidence if the evidence is, in fact, discovered since trial; the court may infer the movant has been diligent; the evidence is not merely cumulative or impeaching; the evidence is material; and the newly discovered evidence would probably produce an acquittal. United States v. Gustafson, 728 F.2d 1078, 1084 (8th Cir.), cert. denied, 469 U.S. 979, 105 S.Ct. 380, 83 L.Ed.2d 315 (1984); see also United States v. Wang, 964 F.2d 811, 813 (8th Cir.1992) (new trial may be granted if the defendant's substantial rights are affected). The defendants' argument fails because the report did not exonerate them; that is, it would not have been likely to have produced an acquittal. As stated by the district court, the report [FN4] would merely have "given the jury some additional information to evaluate in determining whether or not Mr. Ashford had indeed properly identified the two defendants as being participants." Tr. at 766. Had this evidence been presented to the jury, the jury could reasonably have believed that Reeves and Kern were Lue's accomplices and that Lue was merely protecting them by denying their participation in the hotel robbery. The jury could also have inferred that Ashford improperly identified Reeves and Kern as participants in the hotel robbery. The district court, however, found that this latter possibility did not warrant a new

trial. Particularly in light of the amount of evidence presented to the jury on the issue of the defendants' guilt, the district court did not abuse its discretion by denying the defendants' motion for a new trial. See Gustafson, 728 F.2d at 1084.

> FN4. The report states, in relevant part: [Lue] had committed that robbery with two other individuals. Previously arrested in connection with this robbery was a Garry KERN, and a Troy REEVES had also been identified as a suspect in this robbery also. I, Officer MAHONEY, asked Stacy LUE if these other two suspects were with him when this robbery occurred, and LUE stated that they were not; however, he would not name the other two suspects out of fear.

[4] Nor does Brady mandate a new trial in this case. See Brady, 373 U.S. at 87-88, 83 S.Ct. at 1196-97. A defendant's due process rights are violated under Brady if a prosecutor "withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty." Id. In order to establish such a claim, the prosecutor must have suppressed or withheld evidence that was both favorable and material to the defense. Moore v. Illinois, 408 U.S. 786, 794, 92 S.Ct. 2562, 2568, 33 L.Ed.2d 706 (1972). Nothing in this record indicates that this prosecutor withheld evidence from the defendants. Here, the prosecutor simply did not have the report until the trial was over. Such a case is fundamentally different than when information is in the prosecutor's files. See State v. Agurs, 427 U.S. 97, 110, 96 S.Ct. 2392, 2400, 49 L.Ed.2d 342 (1976). We do not accept the defendants' proposal that we impute the knowledge of the State of Nebraska to a federal prosecutor. See United States v. Walker, 720 F.2d 1527, 1535 (11th Cir.1983) (refusing to impute the knowledge of state officials to a federal prosecutor), cert. denied, 465 U.S. 1108, 104 S.Ct. 1614, 80 L.Ed.2d 143 (1984). Consequently, we hold that the district court did not abuse its discretion when it refused to grant a new trial.

Finally, we find wholly without merit Kern's contention that conspiracy to commit bank robbery is not a crime of violence as defined by 18 U.S.C. § 16, and we reaffirm our previous holding to that effect. See United States v. Johnson, 962 F.2d 1308, 1311 (8th Cir.), cert. denied, --- U.S. ----, 113 S.Ct. 358, 121 L.Ed.2d 271 (1992), and cert. denied, --- U.S. ----, 113 S.Ct. 1418, 122 L.Ed.2d 788 (1993).

## III. CONCLUSION

Accordingly, we find that the district court did not abuse its discretion when it admitted the hotel robbery evidence and denied the defendants' motion for a new trial. Moreover, the district court properly found that conspiracy to commit bank robbery is a *127 crime of violence. Therefore, we affirm the judgment of the district court.

END OF DOCUMENT

**INSTA-CITE**

CITATION: 12 F.3d 122
=> 1 **U.S. v. Kern,** 12 F.3d 122, 39 Fed. R. Evid. Serv. 1428
(8th Cir.(Neb.), Dec 17, 1993) (NO. 93-1524, 93-1566)

Citation Rank(R) Page(P) Database Mode
763 F.2d 897 R 16 OF 19 P 1 OF 182 CTA8 P LOCATE
18 Fed. R. Evid. Serv. 465
**(Cite as: 763 F.2d 897)**

UNITED STATES of America, Appellee,
v.
Carl Angelo DeLUNA, Appellant.
UNITED STATES of America, Appellee,
v.
Carl James CIVELLA, Appellant.
UNITED STATES of America, Appellee,
v.
Charles David MORETINA, Appellant.
UNITED STATES of America, Appellee,
v.
Carl Wesley THOMAS, Appellant.
UNITED STATES of America, Appellee,
v.
Anthony CHIAVOLA, Sr., Appellant.
UNITED STATES of America, Appellee,
v.
Carl James CIVELLA, Appellant.
Nos. 83-2408 to 83-2411, 83-2462 and 84-1047.





Tropicana in 1978. Agosto testified that he met with Nick Civella in a light projection room of the Tropicana to discuss this interest. Following instructions from Chicago and the Civellas, Agosto paid the Bakers $375,000 of his own money in order to buy out this interest. Agosto testified that this was in keeping with the agreements with the Civellas that the Civellas would eliminate the Bakers as rivals to Agosto's control of the Tropicana and would protect Agosto from other people who might attempt to assert interests at the Tropicana.

***915** The government argues that the evidence does not indicate criminal activity by any appellant. The government further argues that the evidence is highly probative of the conspiracy charged, that is, that appellants had a hidden interest in the Tropicana and exercised management and control over the Tropicana. We agree with the government's position and hold that the district court did not abuse its discretion in admitting the evidence.

Misconduct of Carl Thomas

[26] The government was permitted to present recorded conversations of Carl Thomas (Marlo tape, Ex. 199), wherein he stated that he had been involved in skimming at many casinos in Las Vegas for many years. This conversation occurred during a meeting wherein appellants discussed various methods of skimming and Thomas related his experience with skimming and recommended ways of skimming.

Appellants argue that the evidence was highly prejudicial and should have been excluded under Fed.R.Evid. 404(b). The government argues that the evidence was not other crimes evidence because the references were **inextricably** intertwined in the offense charged and because the evidence established Thomas' role in the **conspiracy.** Alternately, the government argues that the evidence is admissible under Fed.R.Evid. 404 as proof of intent.

[27] We hold that the evidence was admissible. "The rule limiting admissibility of uncharged misconduct does not shield an accused from the reception of evidence that he boasted of his past experience in crime in order to reassure a prospective vender or co-worker of his skill and reliability." United States v. Stokes, 12 M.J. 229, 10 Mil.L.Rep. (Pub.L.Educ.Inst.) 2185, 2190 (C.M.A.1982). Moreover, Thomas' statements, to the extent they prove bad character and Rule 404(b) is implicated, are admissible to prove Thomas' intent to engage in the charged conspiracy because Thomas had consistently taken the position that he had no intent to join a conspiracy.

List of Excluded Persons (Black Book)

[28] The government was permitted to introduce evidence that Carl and Nick Civella appeared in the List of Excluded Persons (commonly referred to as the Black Book). The Black Book is a list of people who must be excluded from Nevada casinos by a gaming licensee. The Black Book is issued by the State Gaming Control Board and adopted and promulgated by the Nevada Gaming

Citation | Rank(R) | Database | Mode
763 F.2d 897 | R 16 OF 19 | CTA8 | P LOCATE
**(Cite as: 763 F.2d 897)**

United States Court of Appeals,
Eighth Circuit.
Submitted Sept. 10, 1984.
Decided May 10, 1985.
Rehearing Denied July 9, 1985 in Nos. 83-2408 to 83-2410, 83-2462 and 84-1047.
Rehearing and Rehearing En Banc Denied July 12, 1985 in No. 83-2411.

Defendants were convicted in the United States District Court for the Western District of Missouri, Joseph E. Stevens, Jr., J., on charges arising out of a casino skimming conspiracy, and they appealed. The Court of Appeals, McMillian, Circuit Judge, held that: (1) Travel Act convictions were properly predicated upon violations of Nevada state law resulting from the conduct of gambling operations without the necessary licenses and the indirect receipt of gambling monies without the necessary licenses; (2) coconspirator's statements contained sufficient "indicia of reliability," and therefore admission of such statements did not violate confrontation clause rights of codefendants; (3) there was no variance between indictment and the evidence, which established a single conspiracy to skim money from casino and transport it to persons in other states who had a hidden interest in the casino, rather than establishing multiple conspiracies; and (4) trial court did not abuse its discretion in denying defendants' motions for severance on grounds of any "spillover effect."

Affirmed.

**INSTA-CITE**

CITATION: 763 F.2d 897

**Direct History**

=> 1 **U.S. v. DeLuna,** 763 F.2d 897, 18 Fed. R. Evid. Serv. 465
(8th Cir.(Mo.), May 10, 1985) (NO. 83-2408, 83-2409, 83-2410, 83-2411, 83-2462, 84-1047)
Certiorari Denied by
2 Thomas v. United States, 474 U.S. 980, 106 S.Ct. 382, 88 L.Ed.2d 336
(U.S.Mo., Nov 12, 1985) (NO. 85-423)

**Negative Indirect History**

Declined to Follow by
3 Government of Virgin Islands v. Joseph, 964 F.2d 1380, 35 Fed. R. Evid. Serv. 877
(3rd Cir.(Virgin Islands), Jun 01, 1992) (NO. 91-3424)

**Secondary Sources**

**Corpus Juris Secundum (C.J.S.) References**
15 C.J.S. Commerce Sec.132 Note 19.10 (Pocket Part)
22A C.J.S. Criminal Law Sec.611 Note 23
22A C.J.S. Criminal Law Sec.621 Note 66
23 C.J.S. Criminal Law Sec.825 Note 60
23 C.J.S. Criminal Law Sec.1059 Note 88
23 C.J.S. Criminal Law Sec.1063 Note 39
23 C.J.S. Criminal Law Sec.1128 Note 23
79 C.J.S. Searches and Seizures Sec.183 Note 66