M ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA		§	
		§	
v.		§	Criminal No. 3:07-CR-289-M
		§	
DONALD E. HILL	(01)	§	
a/ka/ "Don Hill"		§	
D'ANGELO LEE	(02)	§	
SHEILA D. FARRINGTON	(03)	§	
a/k/a "Sheila Hill"		§	
BRIAN L. POTASHNIK	(04)	§	
CHERYL L. POTASHNIK	(05)	§	
a/k/a Cheryl L. Geiser"		§	
GLADYS E. HODGE	(06)	§	
a/k/a "Terrie Hodge"		§	
DARREN L. REAGAN	(07)	§	
a/k/a "Dr. Darren L. Reagan"		§	
JIBREEL RASHAD	(09)	§	
a/k/a "Vernon Cooks, Jr."		§	
RICKEY E. ROBERTSON	(10)	§	
a/k/a "Rick Robertson"		§	
RONALD W. SLOVACEK	(12)	§	
a/k/a "Ron Slovacek"		§	
KEVIN J. DEAN	(13)	§	
JOHN J. LEWIS	(14)	§	

NOTICE OF INTENT TO OFFER FED.R.EVID. 404(b) EVIDENCE

The United States of America, by and through the United States Attorney for the Northern District of Texas, hereby gives notice of its intent to offer evidence under FED.R.EVID. 404(b), the general nature of which is set-out below as to each defendant[1]:

[1]Much of the evidence referenced below is inextricably intertwined with the charged offenses and is admissible under Federal Rule of Evidence 402. However, this notice is given in an abundance of

Donald E. Hill: The government is aware of at least nine matters that could be classified as 404(b) evidence. First, financial difficulties providing a motive to commit the various offenses. Second, from at least November of 2004 through January of 2005, Hill threatened to withdraw political support, votes, and assistance for a known company if that entity did not give a concession contract to a known individual. Third, in 2005 after requesting help on a zoning matter, Hill and Lee requested the owner of a known restaurant to collect campaign contributions and hold a fund-raising event for the benefit of Hill. Fourth/Fifth, in 2004, Hill and Lee, after two known home builders sought help on matters before the Council, sent co-conspirator Andrea Spencer to them seeking consulting contracts in return for political support. Sixth, Hill told a known individual that he would withhold his vote in relation to a matter pending before the council regarding a contract in the Dallas Arts District unless supporters of the vote paid some money. Seventh, problems with the State Bar of Texas involving the handling the client funds. Eighth, structuring monetary transactions to avoid reporting requirements. (Obviously the facts surrounding the structuring are intrinsic to the charged offenses but the facts also establish a violation of federal criminal law under Title 31, a crime for which Hill has not been charged). Ninth, Hill did not report bribe and extortion monies received by him on his 2004 or 2005 Federal Income Tax returns.

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caution, in case the evidence is later determined to be 404(b) evidence. Additionally, the United States reserves the right to make further disclosures at a later date, in the event that additional misconduct on the part of any defendant is discovered.

D'Angelo Lee: The government is aware of at least six matters that could be classified as 404(b) evidence. First, in 2005 after requesting help on a zoning matter, Hill and Lee requested the owner of a known restaurant to collect campaign contributions and hold a fund-raising event for the benefit of Hill. Second/Third, in 2004, Hill and Lee, after two known home builders sought help on matters before the Council, sent co-conspirator Andrea Spencer to them seeking consulting contracts in return for political support. Fourth, in May of 2005, Lee and Rickey Robertson, after Lee purchased a vehicle from Robertson, misrepresented to Robertson's commercial lender that the vehicle in question was simply being test driven by Lee. Fifth, Lee did not report bribe or extortion monies received by him on his 2004 or 2005 Federal Income Tax returns. Sixth, in February or March 2005, Lee offered to help a known individual with a zoning issue in return for the payment of money.

Sheila D. Farrington: The government is aware of at least three matters that could be classified as 404(b) evidence. First, financial difficulties providing a motive to commit the various offenses. Second, structuring financial transactions to avoid reporting requirements. (Obviously the facts surrounding the structuring are intrinsic to the charged offenses but the facts also establish a violation of federal criminal law under Title 31, a crime for which Farrington has not been charged). Third, Farrington did not report bribe or extortion monies received by her on her 2004 or 2005 Federal Income Tax returns.

Brian L. Potashnik: The government is aware of at least four matters that could be classified as 404(b) evidence. First, Potashnik hired James L. Fantroy's company, JL Security, in return for political support and votes on tax credit projects in Dallas. Second, Potashnik made repeated false statements on certifications to the TDHCA representing that he had not been suspended, debarred, or been subject to enforcement action under state or federal securities law, when in truth and in fact Potashnik, in 1991, was censured, fined, and suspended from association with any member of the NASD in any capacity for six months, relating to fund-raising activity associated with the sale of limited partnerships. Third, Brian Potashnik on his 2001 and 2002 personal tax returns, falsely deducted charitable contributions of over $1.8 million dollars relating to the land given back to the HOA in exchange for the HOA supporting the land sale. Fourth, in 2005 when SWH sought support from FRI on a bond application pending with TDHCA, it was not disclosed that Potashnik agreed to give monies to FRI in return for FRI participation in several SWH projects.

Cheryl L. Potashnik:. All of crimes, wrongs or other bad acts committed by the defendant which the government intends to offer during the trial of this matter are acts committed by her in furtherance of, and therefore intrinsic to, the charged offenses. Should the government become aware of any extrinsic evidence that it may wish to offer against Potashnik, the government will immediately provide notice thereof. It should be noted that there is some indication that Cheryl L. Potashnik, using her maiden name of Cheryl Geiser, made misstatements to the Federal Home Loan Bank (FHLB) claiming that HST/HSI was an independent non-profit. FHLB issued grants to seven SWH projects. Six of the projects were sponsored by HST/HSI, represented to be a non-profit. There is an additional concern that HST/HSI inappropriately loaned the grant monies to the limited partnerships (LPs) developing the properties. Loans were apparently executed between HST/HSI and the LPs calling for repayment 20 years in the future. The money was not HST/HSI's to loan, and if it is paid back, it belongs to the FHLB.

Gladys E. Hodge: The government is aware of at least three matters that could be classified as 404(b) evidence. First, Hodge received payments from families of Texas Prison inmates in return for her political support and assistance on proceedings affecting the inmate before the Texas Board of Pardons and Parole. Second, Hodge solicited money from a known development company in return for her assistance on affordable housing projects in Dallas, Texas. Third, Hodge demanded from a known developer that an assistant in Hodge's office be provided free rent in the developer's property.

Darren L. Reagan: The government is aware of at least four categories of matters that could be classified as 404(b) evidence. First, Reagan's efforts through the use of BSEAT to extort monies and other things of value from several entities, including Wells Fargo and Bank One/Chase. Second, though clearly intrinsic to the charged offenses to a point, the sheer volume of money "donated " to BSEAT for scholarships and other charitable purposes as compared to Reagan's actual disbursement of funds - the overwhelming majority of which went to him and co-conspirators for their own personal use while the amount actually disbursed for scholarships or charitable purposes was quite small. Third, the facts and circumstances surrounding his recent conviction for HUD fraud. Fourth, Reagan and others engaged in fraudulent conduct related to the sale of the West Cliff Shopping Center in March 2005.

Jibreel Rashad: The facts and circumstances surrounding his recent mortgage fraud conviction.

Rickey E. Robertson: The government is aware of at least four matters that could be classified as 404(b) evidence. While the movement of the proceeds of bribery and extortion schemes between co-conspirators is certainly intrinsic to the charged offenses, Robertson's conduct violated other provisions of federal law on at least two occasions. First, Robertson received $10,000.00 in cash from Lee in March of 2005 and then structured the money into his bank account to avoid the filing of a currency transaction report by the financial institution. (These facts establish one or more violations of federal criminal law under Title 31, crimes for which Robertson has not been charged). Second, in May of 2005, Robertson and Lee, after Lee had purchased a vehicle from Robertson, misrepresented to Robertson's commercial lender that the vehicle in question was simply being test driven by Lee. Third, Robertson did not claim any extortion monies received by him on his 2004 or 2005 Federal Income Tax return. Fourth, Robertson was involved as a middle-man in a mortgage fraud scheme. Robertson would locate buyers and recruit straw borrowers. Robertson would purchase the property from the buyer and "flip" it to the straw at or near the same time at an inflated price.

Ronald W. Slovacek: All of crimes, wrongs or other bad acts committed by the defendant which the government intends to offer during the trial of this matter are acts committed by him in furtherance of, and therefore intrinsic to, the charged offenses. Should the government become aware of any extrinsic evidence that it may wish to offer against Slovacek, the government will immediately provide notice thereof.

Kevin J. Dean: Dean did not report extortion monies received by him on his 2004 or 2005 Federal Income Tax returns.

John J. Lewis: The government is aware of at least two matters that could be classified as 404(b) evidence. First, in April or May 2005, Lewis made material misstatements on a home loan application. Second, Lewis did not report extortion monies received by him on his 2004 or 2005 Federal Income Tax returns.

Argument and Authorities

As this evidence is relevant on issues other than character, the United States will seek to introduce it, either in its case in chief pursuant to Rule 404(b) of the Federal Rules of Evidence, or as impeachment/rebuttal evidence.

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 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.

"In order to avoid the strictures of Rule 404(b) [regarding the admission of character evidence], all the government need do is suggest a logical hypothesis of the relevance of the evidence for purposes other than to demonstrate [the defendant's] propensity to act in a particular manner. Moreover, evidence of acts committed pursuant to a conspiracy and offered to prove the defendant's membership or participation in the conspiracy are not extrinsic evidence, *i.e.*, evidence of other acts, for purposes of Rule 404(b). Acts committed in furtherance of the charged conspiracy are themselves part of the act charged. Thus, evidence of such acts constitutes intrinsic evidence-that is, direct evidence of the charged conspiracy itself." *United States v. Garcia Abrego*, 141 F.3d 142, 175 (5th Cir. 1998)(internal citations and quotations omitted).

Before evidence of other crimes is admissible, (1) it must be relevant to an issue other than the character of the defendant, such as identity, knowledge, plan, or scheme, and (2) the probative value must not be substantially outweighed by the dangers of unfair prejudice, confusion of the issues, or misleading material. *United States v. Beechum*, 582 F.2d 898 (5th Cir.), *cert. denied*, 440 U.S. 920 (1978).

There is no requirement that the court make a preliminary finding, under Rule 104(a) of the Federal Rules of Evidence, that the defendant in fact committed the similar act, but need only decide whether the jury could reasonably find by a preponderance of the evidence that the similar act was committed. *Huddleston v. United States*, 485 U.S.

681 (1988).

The Fifth Circuit has held that the mere entry of a not guilty plea in a conspiracy case raises the material issue of intent sufficiently to justify the admissibility of extrinsic offense evidence. See *e.g., United States v. Parziale,* 947 F.2d 123, 129 (5^{th} Cir.1991). Further, the Fifth Circuit "has consistently ... held that evidence of a ... conviction for a similar crime is more probative than prejudicial and that any prejudicial effect may be minimized by a proper jury instruction." *United States v. Saucedo-Munoz*, 307 F.3d. 344, 350 (5^{th} Cir. 2002), citing *United States v. Taylor*, 210 F.3d 311, 318 (5^{th} Cir. 2000).

While the Advisory Committee Note for Rule 404(b) states that, in determining whether evidence of other crimes, wrongs, or acts is admissible, "no mechanical solution is offered," the Fifth Circuit has defined it as a rule of inclusion. *United States v. Shaw*, 701 F.2d 367, 386 (5^{th} Cir. 1983), citing *United States v. Halper*, 590 F.2d 422, 432 (2d Cir. 1978). Although there is no "rigid checklist" to follow, *United States v. Czarnecki*, 552 F.2d 698, 702 (6^{th} Cir.), *cert. denied*, 431 U.S. 939 (1977), the courts have identified various appropriate considerations including the following:

> similarity between the offense charged and the other crime, wrong, or act may be the key factor when it is offered to prove identity, but not necessarily a key factor when it is offered to prove motive, intent, plan, or design. *Beechum, supra* at 912 n.15;
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> remoteness or closeness in time of a prior crime, wrong, or act is also a factor. *United States v. Chavez*, 119 F.3d 342, 347 (5^{th} Cir. 1997); and
>
> whether the other crime, wrong, or act is before or after the offense charged is generally not a factor. *Beechum, supra* at 903 n.1.

The evidence is also to be weighed against the requirements of Rule 403, Federal Rules of Evidence, which requires relevant evidence to be excluded if its probative value is substantially outweighed by unfair prejudice, confusion of the issues, misleading the jury, undue delay, or needless cumulative evidence. The trial judge should give the jury a cautionary instruction under Rule 105 at the time such evidence is offered, limiting its purpose, and also include a limiting instruction in the final jury charge.

As evidence of other crimes, wrongs, or acts is admissible to show motive, intent, identity, knowledge, plan, design, preparation, or absence of mistake or accident - issues which may be material to proving the government's case-in-chief - the government is not required to wait for the defendant to put those matters in issue. *United States v. Buchanan*, 633 F.2d 423, 426 (5th Cir. 1980).

Although motive is never an element itself, evidence of it is often relevant to show the defendant's state of mind and purpose for committing the crime charged. If the motive can be proved by prior or subsequent crimes, wrongs, or acts, Rule 404(b) permits their admission in evidence. The other crimes, wrongs, or acts offered to prove motive may be totally dissimilar to the acts giving rise to the offense charged. Thus, when the issue is motive, similarity of the physical elements of the crime charged with the extrinsic act need not be established. *Beechum, supra* at 912 n.15.

Intent and knowledge, or the lack thereof, are often contested issues in criminal cases. A defendant may agree that he did the physical acts which form the basis for the charge, but assert that he lacked the intent or criminal knowledge necessary to find him guilty. In such a case, evidence of other crimes, wrongs, or acts is admissible under Rule 404(b) to prove that the defendant did, in fact, have the requisite intent and knowledge.

Evidence of other crimes, wrongs, or acts is also admissible to prove an ongoing or continuing plan or scheme, or the development of a course of conduct leading up to and including the offense charged. See *e.g., United States v. West*, 22 F.3d 586, 595 (5th Cir. 1994).

Conclusion

The Fifth Circuit recognizing that, as stated above, FED.R.EVID. 404(b) is a rule of inclusion, reviews a trial court's decision to admit this type of evidence under a heightened abuse of discretion standard. *United States v. Buchanan*, 70 F.3d 818, 831 (5th Cir. 1995). Extrinsic offense evidence is properly admitted under Rule 404(b) only if: (1) it is relevant to an issue other than the defendant's character, and (2) its probative value is not substantially outweighed by its undue prejudice. *Id.* (Internal citations omitted). An abuse of discretion occurs when a judicial determination is arbitrary, capricious, or whimsical. It is not merely an error of law, but an overriding of the law by the exercise of manifestly unreasonable judgment or the result of impartiality, prejudice, bias, or ill-will as shown by the record. *United States v. Wright*, 826 F.2d 938, 943 (10th Cir. 1987).

While the issue of admissibility of any of the foregoing categories of evidence will not be decided until the trial of one or more of the defendants, the government has brought forth these initial arguments in support of admissibility and may very well supplement them as specific issues arise at or near trial.

Respectfully submitted,

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Certificate of Service

I hereby certify that on July 28, 2008, I filed the foregoing document under seal with the Clerk of Court for the United States District Court, Northern District of Texas. The electronic case filing system will send a "Notice of Electronic Filing" to the following attorney of record who has consented in writing to accept this Notice as service of this document by electronic means after the document is scanned by court personnel. A courtesy copy has also been electronically mailed to each attorney of record.

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