

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	No. 09-00296-01/06-CR-W-FJG
)	
JOHN B. ANGELL ET AL.,)	
)	
Defendants.)	

**GOVERNMENT’S NOTICE OF INTENT TO OFFER RULE 404(b) EVIDENCE
AND TRIAL BRIEF ON RES GESTAE**

Comes now the United States of America, by Matt J. Whitworth, United States Attorney, and Jeffrey Valenti, Assistant United States Attorney, both for the Western District of Missouri, and files its Notice of Intent to Offer Rule 404(b) Evidence. The government states the following in support:

I. PROCEDURAL HISTORY

On September 23, 2009, a grand jury sitting in the Western District of Missouri returned a two-count indictment, in which the listed defendants were charged with conspiracy to distribute methamphetamine, cocaine, and marijuana, all Scheduled Controlled Substances, between January 1, 2002 and July 31, 2007, contrary to the provisions of Title 21 U.S.C. § 841(a)(1) and (b)(1)(A), all in violation of Title 21 U.S.C. § 846.

This matter is currently set for jury trial commencing on Monday, December 14, 2009, before the Honorable Fernando J. Gaitan.

II. FACTUAL BACKGROUND

The government's evidence concerning the charged offenses will be that between January 1, 2002, to and including July 31, 2007, the indicted co-defendants conspired with each other and others to include, but not limited to: (1) John R. Sheaffer; (2) Robert L. Cartwright; (3) Michael A. Clary; (4) William Eneff; (5) Gary Mickiewicz; (6) Billie J. Thomlinson; (7) Robert L. Peters; (8) Timothy R. Davis; (9) Michael Fitzwater; (10) Robert L. Mays; (11) Donald Street; (12) Steven M. Street; (13) Michael Hensley; (14) Donald Culey; (15) Douglas Schutz; (16) George W. Shook; (17) Dennis Anthony; (18) John B. Angell; (19) Eric G. Burkitt; (20) Robert E. Stewart; (21) James M. Cox; (22) Steve W. Larson; and (23) Nicholas E. Donkersloot, to distribute controlled substances. Testimony will be adduced that the co-conspirators in this case bought or sold methamphetamine from/to a confidential informant on at least nine separate occasions during the charged time frame. The evidence will further demonstrate that these drugs were purchased for future distribution and that each charged defendant was either a member or associate of either the El Forastero Motorcycle Club or the Galloping Goose Motorcycle Club, with each of these clubs being a self-styled Outlaw Motorcycle Gang (hereinafter OMGs).

The government's evidence will be that as members or associates of OMGs, the conspirators were required to pay dues and attend a certain number of motorcycle runs, or trips, per year. The evidence will establish that on each run, the various charters of the OMGs would pool their money, so that methamphetamine, cocaine, and marijuana could be purchased for future distribution. During a run, a member of the OMG was tasked with the responsibility of carrying a "run bag," which was where the drugs were located. Throughout the evidence, it will be evident that a far-reaching conspiracy aimed at using, distributing, and profiting off numerous types of drugs was in existence.¹

III. INTRINSIC CONSPIRACY EVIDENCE

A. Club Runs

For each run (approximately 5 per year), the government intends to adduce: (1) the name of the run; (2) which OMG chapter hosted the run; (3) where the run took place; (4) which OMG members attended the run, and (5) which OMG member carried the "run bag." Cooperators and law enforcement agents have reviewed photographs taken at the runs, as well as reviewed dues paid receipts, and other documentation to establish who attended the various runs. Consequently, the government intends to elicit evidence about the runs held by the OMGs starting with the New Years 2002 run, up to and including, the Memorial Day 2007 run.

¹ This statement of factual background is only a general summary of the evidence the government intends to offer at trial.

B. Search Warrant at 4628 Metropolitan, Kansas City, Kansas

On August 24, 2006, members of the Kansas City, Kansas Police Department executed a search warrant at 4628 Metropolitan, located in Kansas City, Kansas. That address was identified as belonging to conspirators Robert and Ronda Cartwright. On three previous occasions, a confidential informant, under supervision of law enforcement authorities, had purchased methamphetamine from conspirator John R. Sheaffer. On those occasions, surveillance teams had established that the residence located at 4628 Metropolitan was the source of the purchased methamphetamine. Consequently a search warrant was obtained and ultimately executed. When the warrant was executed, agents recovered approximately 56 grams of methamphetamine, 47 grams of cocaine, 279 grams of marijuana, 58 firearms, and \$22,000.

IV. RULE 404(B) EVIDENCE²

A. Cooperating Witnesses

(i) John Angell

As an OMG officer, Angell will testify about his lengthy association with the OMG, the customs, behavior, and organization of the OMGs, and his knowledge of the OMGs' drug distribution before, during, and after the charged time frame.

² The following acts have all been contained within discovery, which has been available for review since indictment, then later provided in electronic format.

_____ (ii) Dennis Anthony

Anthony will testify about his association with the OMGs and his knowledge of their drug distribution before, during, and after the charged time frame.

(iii) Michael A. Clary

Clary will testify about his lengthy association with the OMGs, a prior drug conviction, the customs, behavior, and organization of the OMGs, and his knowledge of their drug distribution before, during, and after the charged time frame.

_____ (iv) Daniel Clayton

Clayton will testify about his observations regarding drug deals he witnessed between Eric Burkitt, William Eneff and an associate.

(v) Rainanne Colclasure

Colclasure will testify about her lengthy association with the OMGs and her knowledge of the drug distribution that occurred on runs.

(vi) Nicholas Donkersloot

Donkersloot will testify about his lengthy association with the OMGs, the customs, behavior, and organization of the OMGs, his problems with the club since leaving, and his knowledge of their drug dealing before, during and after the charged time frame.

(vii) Jennifer Harrison

Harrison will testify about her lengthy association with the OMGs and her knowledge of their drug distribution that occurred on runs.

(viii) Michael Hensley

M. Hensley will testify about his lengthy association with the OMGs, a prior drug conviction, the customs, behavior, and organization of the

OMGs, and his knowledge of their drug distribution before, during, and after the charged time frame.

(ix) Josh Monk

Monk will testify about his lengthy association with the OMGs, a prior drug conviction, and his knowledge of their drug distribution before, during, and after the charged time frame.

(x) Bobby Paulson

Paulson will testify about his lengthy association with the OMGs, a prior drug conviction, the customs, behavior, and organization of the OMG and his knowledge of their drug distribution before, during, and after the charged time frame.

(xi) Richard Rohda

Rohda will testify about his lengthy association with the Hell's Angels, his association with the Minnesota El Forastero, drug and other prior convictions, and his knowledge of the OMGs drug distribution before, during, and after the charged time frame.

(xii) Thomas Shue

Shue will testify about his lengthy association with the OMGs and his knowledge of their drug distribution.

(xiii) Dennis Stone

Stone will testify about his association with the OMG and his knowledge of their drug distribution.

(xiv) Donald Street

As an OMG officer, D. Street will testify about his lengthy association with the OMG, the customs, behavior, and organization of the OMG, and his knowledge of the OMGs' drug distribution before, during, and after the charged time frame.

(xv) Steven Street

S. Street will testify about his lengthy association with OMGs, prior drug convictions, the customs, behavior, and organization of the OMG and his knowledge of their drug distribution before, during, and after the charged time frame.

(xvi) Velma “Vicki” Tolleson

Tolleson will testify about her lengthy association with the OMGs, including significant drug use, a prior conviction that she obtained for narcotics within the OMG environment, and her knowledge of the OMGs drug distribution before, during, and after the charged time frame.

(xvi) Lisa Yazel

Yazel will testify about her lengthy association with the OMGs, prior drug convictions, and her knowledge of drug distribution before and during the charged time frame.

The government intends to offer this evidence as being relevant to the issues of the defendants’ knowledge and intent. Moreover, the government offers this notice out of an abundance of caution, believing this evidence to be inextricably interwoven with the underlying charged conspiracies.

B. Richard Rohda’s dealings with Steve W. Larson

Richard Rohda was a former member, before he was himself was prosecuted, of the Minneapolis Charter of the Hells Angels. During the time that Rohda prospected with the Hells Angels (approximately 1996 to 1997), Steve Larson also prospected with the El Forastero charter in Minneapolis. Consequently, Rohda knows Steve Larson well. Rohda will testify that he had personally been to the El Forastero clubhouse located in

Minneapolis, MN, the clubhouse in Sioux City, Iowa, and the clubhouse in Des Moines, Iowa. Rohda will testify that on every such occasion, methamphetamine was readily provided by the El Forasteros. Rohda will testify that he has sold methamphetamine to members of the El Forastero at the Minneapolis clubhouse and that he and Steve Larson discussed a large amount of methamphetamine that Larson was willing to sell. Rohda will testify that before a deal to purchase the methamphetamine could be consummated, Larson's home was raided by police and during the investigation, five to six pounds of methamphetamine was discovered. Rohda will testify that a case was prosecuted against Larson's paramour, Cheryl Gigley. Rohda will also testify that Larson told him that the drugs that were seized were drugs that Larson had obtained in Kansas City. Finally, Rohda will testify that he knew Larson to wear a DFFL patch, which Rohda was told meant, "dope forever, forever loaded."

V. LEGAL ANALYSIS

A. Rule 404(b):

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

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 . . .

Evidence of other crimes or wrongful acts has been properly admitted under this provision to prove intent, *United States v. Moore*, 98 F.3d 347, 350 (8th Cir. 1996);

United States v. Deluna, 763 F.2d 897, 915 (8th Cir.), *cert. denied*, 474 U.S. 980 (1985); *United States v. Johnson*, 28 F.3d 1487, 1499 (8th Cir. 1984), *cert. denied*, 513 U.S. 1098 (1995); *United States v. Fraser*, 709 F.2d 1556, 1559 (6th Cir. 1983); absence of mistake or accident, *United States v. Drew*, 894 F.2d 965, 970 (8th Cir.), *cert. denied*, 494 U.S. 1089 (1990); *United States v. Carlson*, 547 F.2d 1346, 1354 (8th Cir. 1976); *cert. denied*, 431 U.S. 914 (1977); common scheme or plan, *United States v. Baker*, 82 F.3d 273, 276 (8th Cir. 1996); *United States v. Brown*, 770 F.2d 768, 770-771 (9th Cir.), *cert. denied*, 474 U.S. 1036, 1067 (1985), 476 U.S. 1172 (1986); planning or preparation, *United States v. Calvert*, 523 F.2d 895, 907 (8th Cir. 1975), *cert. denied* 424 U.S. 911 (1976); *United States v. Ratliff*, 893 F.2d 161, 165 (8th Cir.), *cert. denied*, 498 U.S. 840 (1990); modus operandi, *United States v. Ortega-Chavez*, 682 F.2d 1086, 1091 n.6 (5th Cir. 1982); *United States v. Davis*, 551 F.2d 233, 234 (8th Cir. 1977); opportunity, *United States v. Emmanuel*, 112 F.3d 977, 980 (8th Cir. 1997); knowledge, *United States v. Johnson*, 28 F.3d 1487, 1499 (8th Cir. 1994), *cert. denied*, 513 U.S. 1098 (1995), identity, *United States v. Drew*, 894 F.2d at 970, and motive, *United States v. Kadouk*, 768 F.2d 20, 21-22 (1st Cir. 1985).

Such evidence is admissible even though it consists of acts committed subsequent to the offense charged in the indictment. *United States v. Bryson*, 110 F.3d 575, 582 (8th Cir. 1997); *United States v. Parker*, 699 F.2d 177, 180 (4th Cir.), *cert. denied*, 464 U.S. 836 (1983); *United States v. Terebecki*, 692 F.2d 1345, 1349 (11th Cir. 1982); *United*

States v. O'Brien, 601 F.2d 1067, 1070 (9th Cir. 1979). The criminal activity admitted under this section need not have resulted in a conviction, *United States v. Nolan*, 551 F.2d 266, 271 (10th Cir.), *cert. denied*, 434 U.S. 904 (1977), nor in the lodging of a criminal charge. *United States v. Fowler*, 735 F.2d 823, 830 (5th Cir. 1984). Indeed, Rule 404(b) refers not merely to “other crimes” but to “other crimes, wrongs or acts.” Thus, the behavior need not be criminal. *United States v. Normandean*, 800 F.2d 953, 956 (9th Cir. 1986). Additionally, as discussed later, the government is permitted to present such evidence in its case-in-chief. *United States v. Thomas*, 58 F.3d 1318, 1320 (8th Cir. 1995); *United States v. Gilmore*, 730 F.2d 550, 554 (8th Cir. 1984); *United States v. Beechum*, 582 F.2d 898, 915 (5th Cir. 1978), *cert. denied*, 440 U.S. 920 (1979); *United States v. Adcock*, 558 F.2d 397, 402 (8th Cir.), *cert. denied*, 434 U.S. 921 (1977).

The trial court is vested with wide discretion in determining whether the probative value of Rule 404(b) evidence outweighs its potential prejudice. *United States v. Mihm*, 13 F.3d 1200, 1204 (8th Cir. 1994); *United States v. Brown*, 956 F.2d 782, 786 (8th Cir. 1992); *United States v. Czarnecki*, 552 F.2d 698, 702 (6th Cir.), *cert. denied*, 431 U.S. 939 (1977).³ The decision to admit 404(b) evidence will only be reversed “when it is

³ The Sixth Circuit Court of Appeals in *United States v. Czarnecki*, noted that the legislative history of Rule 404(b) suggested that “there be a greater emphasis on the admissibility of such evidence.” 552 F.2d at 702. Similarly, this Circuit in *United States v. Simon* recognized that Rule 404(b) is a “rule of inclusion rather than exclusion and admits evidence of other crimes or acts relevant to any issue in the trial unless it tends to prove only criminal disposition.” 767 F.2d at 526. This notion that Rule 404(b) is rule of inclusion was recently reaffirmed in *United States v. Loveless*, 139 F.3d 587, 592 (8th Cir. 1998), *see also*, *United States v. Brown*, 956 F.2d at 786; *United States v. Dobyne*s, 905 F.2d 1192 (8th Cir.), *cert. denied*, 498 U.S. 877 (1990);

clear that the evidence has no bearing on the case.” *United States v. Williams*, 895 F.2d 1202, 1205 (8th Cir. 1990). Evidence is admissible under Rule 404(b) when: (1) it is relevant to a material issue, (2) similar in kind and reasonably close in time, (3) sufficient to support a jury finding that defendant did the act, and (4) its probative value is not substantially outweighed by its prejudicial effect. *United States v. Baker*, 82 F.3d 273 (8th Cir. 1996). There is no “rigid checklist” of requirements which must be met before evidence will be admitted under this provision. *United States v. Czarnecki*, 552 F.2d at 702. While the similarity of the evidence has been seen as a highly important factor in determining admissibility, dissimilar conduct has been held to be properly admitted. *Id.* The standard of proof for the admission of such evidence is preponderance of the evidence. *United States v. Loveless*, 139 F.3d 587, 591 (8th Cir. 1998). A certified copy of a conviction may be used to establish the other crimes evidence. *United States v. Bryson*, 110 F.3d at 583. It is important to note that the Eighth Circuit has consistently allowed similar acts of illegal activity to be introduced into evidence in prosecutions where intent and knowledge were essential elements of the crime charged. *United States v. Tomberlin*, 130 F.3d 1318, 1320 (8th Cir. 1997); *United States v. Dobyne*s, 905 F.2d 1192 (8th Cir.), *cert. denied*, 498 U.S. 877 (1990); *United States v. Adams*, 898 F.2d 1310 (8th Cir. 1989); *United States v. Gilmore*, 730 F.2d at 554; *United States v. Williams*, 895 F.2d 1202 (8th Cir. 1990); *United States v. Drew*, 894 F.2d 965 (8th Cir.), *cert. denied*,

United States v. Yellow, 18 F.3d 1438, 1441 (8th Cir. 1994).

494 U.S. 1089 (1990); *United States v. Fischel*, 693 F.2d 800, 802 (8th Cir. 1982); *Llach v. United States*, 739 F.2d 1322, 1327 (8th Cir. 1984).⁴

A related issue is whether the government is permitted to introduce other crimes evidence during its case-in-chief. This issue was addressed in *United States v. Hamilton*, 684 F.2d 380 (6th Cir.), *cert. denied*, 459 U.S. 976 (1982). In *Hamilton*, the defendant challenged the government's introduction of evidence during its case-in-chief that the defendant had uttered an altered obligation of the United States one year prior to the incidents involved in the case. In affirming the defendants' conviction, the court held:

We find that the evidence of the prior act was properly admitted to show intent and identity. Hamilton contends that intent was not "in issue" because he had not actively contested intent. We disagree. 18 U.S.C. § 472 requires the government to prove that the defendant passed the altered bills with the intent to defraud and the defendant in this case did not concede the issue of intent in any way. "Faced with a plea of not guilty, the prosecution is under no obligation to wait and see whether the defendant argues the non-existence of an element of crime before the prosecution presents evidence establishing that element." (citations omitted) . . . Indeed, the government has an affirmative burden to prove

⁴ A charge of conspiracy increases the probative value of 404(b) evidence. *See e.g. United States v. Sampol*, 636 F.2d 621, 659 n.23 (D.C. Cir. 1980); *United States v. Gordon*, 780 F.2d 1165, 1174 (5th Cir. 1986); *United States v. Dabish*, 708 F.2d 240, 242-43 (6th Cir. 1983). Where conspiracy is charged, evidence of similar substantive offenses is admissible to show the background, creation, organization, and extent of the charged conspiracy. *United States v. Salerno*, 868 F.2d 524, 536-37 n.5 (2d Cir.), *cert. denied*, 491 U.S. 907 (1989); *United States v. Rodriguez*, 859 F.2d 1321 (8th Cir. 1988), *cert. denied*, 489 U.S. 1058 (1989). Such evidence may also be probative of the intent of a given defendant to participate in the charged conspiracy. *United States v. Moeckly*, 769 F.2d 453 (8th Cir. 1985), *cert. denied*, 475 U.S. 1015 (1989); *United States v. Burchinal*, 657 F.2d 985 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981). It would appear that such an analysis would also apply to aiding and abetting offenses.

every element of the crime beyond a reasonable doubt.
(emphasis added).

684 F.2d at 384. *See also United States v. DeLoach*, 654 F.2d 763 (D.C. Cir. 1980), *cert. denied*, 450 U.S. 1004 (1981). This Circuit, as stated earlier in this motion, has adopted the same position. *United States v. Gilmore*, 730 F.2d at 554. Likewise, in *United States v. Rentaria*, 625 F.2d 1279 (5th Cir. 1980), the Fifth Circuit upheld the government's introduction of extrinsic evidence of a cocaine offense during its case-in-chief, reasoning that "[s]uch proof would have to be offered during the case-in-chief because if the defendant offered no evidence there would be no opportunity to offer evidence in rebuttal." *Id.* at 1282.

B. Res Gestae:

The Eighth Circuit further recognizes that evidence, similar in type, but distinct from Rule 404(b) evidence, consisting of other crimes is properly admitted where the evidence is inextricably bound to or intertwined with the offense charged or explains the circumstances of the crime charged. *United States v. Forcelle*, 86 F.3d 838, 841 (8th Cir. 1996); *United States v. Moore*, 735 F.2d 289, 292 (8th Cir. 1984); *United States v. Derring*, 592 F.2d 1003 (8th Cir. 1979); *United States v. Blewitt*, 538 F.2d 1099 (5th Cir.), *cert. denied*, 429 U.S. 1026 (1976). Under those circumstances, such evidence is admissible to show the criminal relationships that existed between persons prior to the commission of the crime charged. *United States v. McGuire*, 45 F.3d 1177, 1188 (8th Cir.), *cert. denied*, 115 S. Ct. 2558 (1995). The admission of such evidence is often

called the *res gestae* or extrinsic evidence exception. *United States v. Forcelle*, 86 F.3d at 84;⁵ *United States v. Blewitt*, 538 F.2d at 1101. It is not admitted under Rule 404(b), but as its own exception. 45 F.3d at 1188, *Carter v. United States*, 549 F.2d 77, 78 (8th Cir. 1977); *United States v. Petary*, 857 F.2d 458, 462 (8th Cir. 1988). Similarly, other crimes evidence is properly allowed where it is offered to prove an ongoing or continuing plan or scheme or to show the development of a course of conduct that led to the commission of the charged offense. *United States v. Adcock*, 558 F.2d 397, 401 (8th Cir.), *cert. denied*, 434 U.S. 921 (1977).⁶ See generally, Cissell, James C., *Federal Criminal Trials*, 2d Edition, § 1526 (1987). A jury is entitled to know the circumstances and background of the crime charged and cannot be expected to make its decision in a void without such knowledge of the facts. *United States v. Moore*, 735 F.2d at 292. If, however, the evidence actually falls within the factual and/or temporal window alleged in the charged

⁵ The Court in *Forcelle* stated:

the district court also called the evidence “*res gestae*” evidence, but some commentators and courts have disapproved of that term, calling the term useless or unsatisfactory. See McCormick on Evidence § 190 (John William Strong ed., 4th ed. 1992). Some courts have substantiated phrases such as “same transaction evidence” or “‘complete story’ principle” for the term *res gestae* evidence. 86 F.3d at 841, n.1. The evidence offered in the case most certainly completes the story.

⁶ The Fourth Circuit, in approving the *res gestae* exception, noted that evidence of other crimes is admissible when the evidence of other crimes “furnishes part of the context of the crime or is necessary to a full presentation of the case or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its environment that its proof is appropriate in order to complete the story of the crime on trial by proving its immediate context.” The Court further recognized that the “jury is entitled to know the setting of the case.” *United States v. Master*, 622 F.2d 83, 85 (4th Cir. 1980).

offense of conspiracy, then it is not uncharged misconduct evidence, but rather is substantive evidence of the charged offense and Rule 404(b) is inapplicable. *United States v. Jones*, 880 F.2d 55, 58-59 (8th Cir. 1989).

As the preceding authority makes clear, the government is permitted to provide the jury with a complete picture of the crime charged. This necessarily involves development of the relationships between the persons who jointly committed a crime or aided in its commission. It would be impossible to present the evidence regarding the defendants' distribution activities without evidence of their prior relationships with the persons with whom they formerly conspired, for it would appear improbable to a fact finder that such a series of events would simply materialize without some previous association. As was cited earlier, a jury is entitled to know the circumstances and the background of the crime charged and cannot be expected to make its decision in a void without such knowledge. *United States v. Moore*, 735 F.2d at 292; *United States v. Masters*, 622 F.2d at 85.

VI. CONCLUSION

Wherefore, the government respectfully requests the court's authority to elicit the noticed evidence.

Respectfully submitted,

Matt J. Whitworth
United States Attorney

By *s/Jeffrey Valenti*

Jeffrey Valenti #43254
Assistant United States Attorney

Charles Evans Whittaker Courthouse
400 East 9th Street, Suite 5510
Kansas City, Missouri 64106
Telephone: (816) 426-3122

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was delivered on December 4, 2009, to the CM-ECF system of the United States District Court for the Western District of Missouri for electronic delivery to all counsel of record.

s/Jeffrey Valenti

Jeffrey Valenti

Assistant United States Attorney

JV/bw