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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 10-00162-03/06/07/16-CR-W-FJG
	)	
SHAWN HAMPTON, a/k/a "Smoke",	)	
	)	
NARICCO T. SCOTT, a/k/a "Rico"	)	
	)	
CALAH D. JOHNSON, a/k/a "Green Eyes"	)	
	)	
THEODORE S. WIGGINS, a/k/a "Theo"	)	
	)	
Defendants.	)	

GOVERNMENT'S NOTICE OF INTENT TO OFFER RULE 404(b) EVIDENCE

Comes now the United States of America, by Beth Phillips, United States Attorney, and Assistant United States Attorney, Brent Venneman, both for the Western District of Missouri, and files its Notice of Intent to Offer Rule 404(b) Evidence. The government offers the following in suggestions in support of admission of the evidence.

I. PROCEDURAL HISTORY

On June 7, 2011, a grand jury sitting in the Western District of Missouri returned a seventeen count Second Superseding Indictment which charged all defendants with conspiracy to distribute: 1) five (5) kilograms or more of cocaine; and , 2) fifty (50) grams or more of cocaine base (Count One). The sixteen additional counts charge various defendants with individual sales

of cocaine and cocaine base as well as the weapons offenses felon in possession of a firearm and possessing a firearm in furtherance of a drug trafficking crime.

II. FACTUAL BACKGROUND

The government's evidence concerning the charged offenses will be that, between July 1, 2009, to and including May 26, 2010, the remaining defendants conspired with each other and others to distribute cocaine and cocaine base in the Kansas City metropolitan area. The evidence, will include intercepted telephone conversations from a court-authorized wiretap, the testimony of law enforcement officers from numerous federal and state law enforcement agencies, and the testimony of cooperating defendants. The evidence will establish that all defendants were engaged in the trafficking of cocaine and crack cocaine during the stated conspiracy time frame with evidence of specific acts of distribution of cocaine and/or crack cocaine by Hampton, Scott, and Wiggins. All defendants except Scott were arrested and detained on June 9, 2010, pursuant to arrest warrants issued in this case. Scott was arrested and detained on May 9, 2010, in possession of narcotics and a firearm. Defendant Calah Johnson was also arrested by Kansas City police in possession of a firearm during the course of the investigation, on March 7, 2010, but he was released without immediate charges.

III. RULE 404(b) EVIDENCE [1]

A. Defendants' Prior Convictions

The government is seeking to admit prior convictions of drug crimes for the remaining defendants in the form of certified copies of the convictions and/or the testimony of witnesses who may have participated in the arrest or investigation for these prior convictions.

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[1] The following acts have all been contained within discovery, which has been available for review by the defendants.

1) Hampton has two prior convictions that the government would offer in its case-in-chief. The first conviction arises from trafficking in drugs (cocaine base) in the second degree in Jackson County, Missouri, on July 2, 1998. Hampton pled guilty to this crime on May 26, 2000. Hampton's second conviction was for trafficking in drugs (cocaine base) in the second degree in Jackson County, Missouri, on January 9, 2004. He pled guilty to that matter on October 4, 2004.

2) Scott has multiple prior convictions relating to drug distribution and possession. The first conviction arises from the sale of a controlled substance (cocaine base) and trafficking in drugs (cocaine base) in the second degree in Jackson County, Missouri, on September 15, 1999. Scott pled guilty to these crimes on March 15, 2000. Scott's second conviction was for trafficking in drugs (cocaine base) in the second degree in Jackson County, Missouri, on July 21, 2001. Scott pled guilty to this crime on June 11, 2002. Scott's third conviction was for possession of a controlled substance (cocaine) in Clay County, Missouri on January 9, 2002. Scott pled guilty to this crime on July 12, 2002 and was sentenced on September 5, 2002.

3) Calah Johnson also has multiple prior convictions relating to drug distribution and possession. The first conviction is possession of a controlled substance (cocaine) in Clay County, Missouri on March 26, 1998. Johnson pled guilty to this crime on November 4, 1998 and was sentenced on December 18, 1998. Johnson's second conviction was for sale of a controlled substance (cocaine base) in Jackson County, Missouri on March 26, 1998. Johnson pled guilty to this crime on January 27, 1999. Johnson's third conviction was for trafficking drugs (cocaine base) in Jackson County, Missouri, on May 13, 1998. Johnson pled guilty to this crime on January 27, 1999.

Johnson's fourth conviction is for trafficking drugs (cocaine base) in Jackson County, Missouri, on July 28, 1998. Johnson pled guilty on January 27, 1999. Johnson's fifth conviction was for sale of a controlled substance in Jackson County, Missouri, on August 11, 1998. Johnson pled guilty to this crime on January 27, 1999. Johnson's sixth conviction was for trafficking drugs (cocaine base) in Jackson County, Missouri on December 8, 1999. Johnson pled guilty to this crime on April 19, 2000.

4) Wiggins has two prior convictions for sale of a controlled substance and possession of a controlled substance. The first conviction arises from the sale of a controlled substance (cocaine base) in Jackson County, Missouri on February 12, 1998. Wiggins pled guilty to this crime on July 31, 2000 and was sentenced on August 1, 2000. Wiggins' second conviction was for possession of a controlled substance (cocaine) in Clay County, Missouri on December 29, 1998. Wiggins pled guilty on May 4, 2000 and was sentenced on June 22, 2000.

IV. LEGAL ANALYSIS

A. Evidence That Qualifies as 404(b) - Generally

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); absence of mistake or accident, *United States v. Drew*, 894 F.2d 965, 970 (8th Cir.), *cert. denied*, 494 U.S. 1089 (1990); common scheme or plan, *United States v. Baker*, 82 F.3d 273, 276 (8th Cir. 1996);

planning or preparation, *United States v. Ratliff*, 893 F.2d 161, 165 (8th Cir.), *cert. denied*, 498 U.S. 840 (1990); modus operandi, *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); and motive, *United States v. Kadouk*, 768 F.2d 20, 21-22 (1st Cir. 1985). The list included in the rule is provided by way of example; it is not exhaustive, and issues not listed may be litigated using 404(b) evidence purely in rebuttal. *United States v. Beck*, 122 F.3d 676, 681 (8th Cir. 1997).

Because the government is requesting 404(b) evidence be admitted to show knowledge and intent, 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. Dobynes*, 905 F.2d 1192 (8th Cir.), *cert. denied*, 498 U.S. 877 (1990). Such prior 'intent' incidents "need not be duplicates of the one for which the defendant is now being tried…(t)he degree of similarity is relevant only insofar as the acts are sufficiently alike to support an inference of criminal intent." *United States v. Tuchow*, 768 F.2d 855, 863 (7th Cir. 1985).

B. Presumption for Inclusion of 404(b)

Great deference is given to the district court who admits evidence under Rule 404(b). *United States v. Vieth*, 397 F.3d 615, 618 (8th Cir. 2005). The trial court does not abuse its discretion by admitting such evidence, unless the evidence clearly had no bearing on any material issue in the case. *United States v. DeAngelo*, 13 F.3d 1228, 1232 (8th Cir.), *cert. denied*, 512 U.S. 1224 (1994).

While admission is discretionary, Rule 404(b) is a rule of inclusion, not a rule which carries a presumption of exclusion. See *United States v. Arcoren*, 929 F.2d 1235, 1243 (8th

Cir.), *cert. denied*, 502 U.S. 913 (1991)("Rule 404(b) is one of inclusion rather than exclusion"). If, therefore, the prosecution can offer a proper purpose for the admission of the evidence, the evidence is to be admitted unless considerations of *unfair* prejudice (Rule 403) dictate otherwise. *United States v. Loveless*, 139 F.3d 587 (8th Cir.1998). Such unfair prejudice is to be found only where the evidence shows merely the criminal propensities of the defendant. *United States v. Escobar*, 50 F.3d 1414, 1421 (8th Cir. 1995).

C. Evidence of Past Crimes and Convictions is Admissible Under 404(b)

The Eighth Circuit Court of Appeals has engaged in a four-part inquiry as an appropriate test for admission of evidence under Rule 404(b): (1) 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. Strong*, 415 F.3d 902, 905 (8th Cir. 2005) (*citing United States v. Green*, 151 F.3d 1111, 1113 (8th Cir. 1998)). A preponderance of the evidence is the standard of proof for the admission of such evidence. *United States v. Loveless*, 139 F.3d 587, 591 (8th Cir. 1998).

1. Relevance

Knowledge and intent are particularly relevant in drug cases, and prior drug offenses are admissible to prove intent to distribute drugs. *United States v. Ruiz-Estrada*, 312 F.3d 398, 403 (8th Cir. 2002); *United States v. Thomas,* 398 F.3d 1058, 1062-63 (8th Cir. 2005). Evidence of participation in other drug transactions is relevant to show intent, therefore the admission of the defendant's past crime meets the Rule 404(b) relevancy test. *United States v. Adams,* 401 F.3d 886, 899 (8th Cir. 2005), *citing United States v. Hill*, 249 F.3d 707, 713 (8th Cir. 2001). Knowledge, another specified basis for admission, often arises as an issue where a defendant claims to have been "merely present" during a conspiracy. *United States v. Mendoza*, 341 F.3d

687, 692 (8th Cir. 2003) (defendant's prior drug-trafficking conviction was properly admitted to rebut defense that defendant was merely present).

Where a conspiracy is charged, evidence of similar substantive offenses is admissible to show the background, creation, organization, and extent of the charged conspiracy, and the nature of the relationships between the conspirators. *United States v. Hill*, 410 F.3d 468 (8th Cir. 2005). This evidence is admissible, even though the uncharged offenses may have been committed during time periods outside the scope of the charged conspiracy, or before a bar resulting from the applicable statute of limitations. *United States v. Johnson*, 28 F.3d 1487, 1499 (8th Cir. 1994), *cert. denied*, 513 U.S. 1195 (1995). Such evidence is probative of the intent of a given defendant to participate in the charged conspiracy. *United States v. Johnson*, 439 F.3d 947, 952 (8th Cir. 2006). It may also show the defendant's motive, knowledge, and/or opportunity to engage in the charged conspiracy and/or its substantive offenses. *United States v. Smith*, 383 F.3d 700, 706 (8th Cir. 2004).

Since all defendants have asserted a defense of general denial, and it is anticipated that they will claim that they were merely present during the conspiracy, they have essentially denied both knowledge and intent and put both at issue. See *United States v. Tomberlin*, 130 F.3d 1318, 1320 (8th Cir. 1997) ("A defendant denies both knowledge and intent when he asserts the 'mere presence' defense – that he was present, but did not know of the presence of illegal [activity]"). The Eighth Circuit approved "the use of Rule 404(b) evidence of prior drug possession 'to show knowledge and intent when intent is an element of the offense charge.'" *Strong*, 415 F.3d at 904 (*quoting United States v. Hawthorne*, 235 F.3d 400, 404 (8th Cir. 2000)). Moreover, evidence of defendants' past possession of firearms goes towards proving the absence of mistake or accident. See *United States v. Jernigan*, 341 F.3d 1273, 1281 (11th Cir. 2003) ("The case law in this and

other circuits establishes clearly the logical connection between a convicted felon's knowing possession of a firearm at one time and his knowledge that a firearm is present at a subsequent time (or, put differently, that his possession at the subsequent time is not mistaken or accidental).") Defendants' prior drug convictions address the material issue of their knowledge of the presence of the drugs and their intent to possess the same.

2. Similar Nature of the Crime and Nearness in Time

All of the defendants' prior drug convictions involve either the distribution of or the possession of crack cocaine or cocaine, the same drugs at issue in this instant case. The amount of elapsed time between the 404(b) evidence and the charged conduct is a somewhat flexible standard, affected by an assessment of the similarity of the acts. There is no fixed period within which the prior acts must have occurred to qualify them as similar in kind and time to the issue in question. *United States v. Jackson*, 278 F.3d 769, 772 (8th Cir. 2002) *citing United States v. Baker*, 82 F.3d at 276. The Eighth Circuit has held that thirteen years is not too remote for introduction under Rule 404(b), *United States v. Rush,* 240 F.3d 729, 731 (8th Cir. 2001), and that convictions sixteen years earlier were appropriate given defendant's history of firearms possession. *Strong*, 415 F.3d at 904; See*, e.g., United States v. Green*, 151 F.3d 1111, 1114 (8th Cir. 1998) (noting Eighth Circuit approvals of admission of uncharged acts 17 years, 12 years, and 13 years before charged offenses (citations omitted)); *United States v. Prevatte*, 16 F.3d 767, 771-777 (7th Cir. 1994) (prior offense eighteen-months old not too remote to show scheme, background, and motive), *citing, United States v. Obiuwevbi*, 962 F.2d 1236, 1241 (7th Cir. 1992) (five years). *Accord*, *United States v. Lopez-Martinez*, 725 F.2d 471, 475 (9th Cir.) (eight years), *cert. denied,* 469 U.S. 837 (1984).

In this case, the government seeks to introduce previous convictions that involve the distribution or the possession of cocaine and crack cocaine which occurred up to twelve years or less of the time-frame for the charged conspiracy.

3. Sufficient Evidence to Support a Jury Finding and Potential Prejudicial Effect is Limited

The government intends to prove the defendants' prior convictions through the testimony of an agent who will identify the certified copies of the convictions, which has been held to be sufficient evidence to support a jury finding. *United States v. Strong*, 415 F.3d 902, 906

In order to limit the potential prejudicial effect of this evidence and to guarantee that jurors correctly limit their consideration of evidence admitted under the Rule, the Eighth Circuit has long held that issuing a standard limiting instruction is appropriate. *United States v. Kent*, 531 F.3d 642, 651 (8th 2008) ("(t)his Court has 'been reluctant to find that the evidence was unfairly prejudicial when the district court gave an appropriate limiting instruction, instructing the jury not to use the evidence as proof of the acts charged in the indictment'" (*quoting United States v. Loveless*, 139 F.3d 587, 593 (8th Cir. 1998)). The Court of Appeals has refused to hold, however, that the giving of such instructions is a *sua sponte* requirement. *United States v. Bamberg*, 478 F.3d 934, 939 (8th Cir. 2007). The government intends to offer a limiting instruction in this case in conjunction with its presentation of 404(b) evidence, as the United States is entitled to present the 'other crimes' evidence during its case-in-chief.

D. Limiting Instruction Proper and Appropriate Regarding Other Crimes Evidence

The Eighth Circuit has continued to hold that where intent is an element of the charged offense, uncharged misconduct evidence is admissible to prove this element in the government's case-in-chief, even if the defendant plans to present only a general denial defense. *United States*

v. Crouch, 46 F.3d 871 (8th Cir.), *cert. denied*, 516 U.S. 871; *United States v. Miller*, 974 F.2d 953, 960 (8th Cir. 1992); *United States v. Ballew*, *supra*, 40 F.3d at 941-942. To guarantee that jurors correctly limit their consideration of evidence admitted under the rule, the Eighth Circuit has held that a standard limiting instruction is appropriate. *United States v. Felix*, *United States v. Felix*, 867 F.2d 1068, 1075 (8th Cir. 1989), reversed on other grounds, 503 U.S. 378 (1992); Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit (2009), Instruction No. 2.08.

E. Procedure and Admission During Government's Case-in-Chief

Since defendants appear to be asserting general denial defenses, the government is entitled to present evidence relating defendants' intent during its case-in-chief. See *United States v. Hill,* 249 F.3d 707, 712 (8th Cir.2001) ("*Old Chief* eliminates the possibility that a defendant can escape the introduction of past crimes under Rule 404(b) by stipulating to the element of the crime at issue."); See *Old Chief,* 519 U.S. at 186-87, 117 S.Ct. 644 ("[A] criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it.")

Such evidence is admissible in the government's case-in-chief, because the offense charged is a specific intent crime, and the "government need not await the defendant's denial of intent before offering evidence of similar acts relevant to that issue." *United States v. Adcock*, 558 F.2d 397, 402 (8th Cir.), *cert. denied*, 434 U.S. 921 (1977). *Accord*, *United States v. Schweihs*, 971 F.2d 1302 (7th Cir. 1992) (prior extortionate acts as old as six years prior to charged offenses properly admitted where intent was automatically at issue as material element of charged offense); *United States v. Zeuli*, 725 F.2d 813 (1st Cir. 1984); *United States v. Wilkes*, 685 F.2d 135, 138 (5th Cir. 1982) (intent was at issue and difficult to prove without uncharged

evidence, an "important factor in admission" was the "government's need for the evidence" and absence of other evidence to show motive, intent, or knowledge); *United States v. Hamilton*, 684 F.2d 380, 384 (6th Cir.), *cert. denied,* 459 U.S. 976 (1982); *United States v. Price*, 617 F.2d 455, 459 (7th Cir. 1980).

F. Potential Rebuttal Evidence

Other matters would become admissible, subject to the discretion of the Court, if the defense places in issue any matter which would make such evidence proper rebuttal. Such issues could, for example, include evidence of the defendant's good character, or entrapment. *United States v. Bruguier*, 161 F.3d 1145, 1148-9 (8th Cir. 1999); *United States v. Roper*, 135 F.3d 430 (6th Cir.), *cert. denied,* 524 U.S. 920 (1998); FED. R. EVID. 404(a).

V. CONCLUSION

Wherefore, the government respectfully files its Notice of Intent to Offer Rule 404(b) Evidence.

Respectfully submitted,

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By /s/ ***Brent Venneman***

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was delivered on this ___ day of December, 2011, to the Electronic Filing System (CM/ECF) of the United States District Court for the Western District of Missouri for electronic delivery to all counsel of record.

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