UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

UNITED STATES OF AMERICA, Plaintiff, v. NARICCO T. SCOTT, Defendant.	)))))))))	Case No.: 10-00162-06-CR-W-FJG

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

COMES NOW Naricco Scott, by and through counsel Robin D. Fowler, and hereby files this response to the Government's Notice of Intent to Offer Rule 404(b) Evidence (Doc. 573). In support of said response, Mr. Scott states:

A. BACKGROUND

Naricco Scott is currently charged in a second superseding indictment with one count of conspiracy to distribute cocaine and cocaine base in violation of 21 U.S.C. §846 (count 1), 2 counts of distribution of cocaine base in violation of 21 U.S.C. §841 (counts 4 and 5), possession with intent to distribute fifty grams or more of cocaine base in violation of 18 U.S.C. §841 (count 11), and use of a firearm in furtherance of a drug trafficking offense in violation of 18 U.S.C. §924(c) (count 12). Mr. Scott therefore is facing severe potential penalties, including the possibility of life without parole.

The Government's notice states that Mr. Scott has three prior convictions which it intends to offer in its case-in-chief. These convictions involve Jackson County

convictions in 1999 for drug sale (count 1) and trafficking (count 2); and in 2001 for trafficking. There is also a Clay County conviction in January, 2002, for felony possession of cocaine. The two Jackson County convictions both involved cocaine base.

As the journal entries for these convictions make clear, only the 1999 conviction involves either the sale or distribution of the controlled substance as an element of the offense. "Trafficking" under the relevant Missouri statutes requires only simple possession of certain quantities of the charged controlled substance. In other words, neither the 2001 nor 2002 convictions involve, as elements of the offense, any distribution, or "intent" to do so.

The Government indicates that it is "requesting 404(b) evidence be admitted to show knowledge and intent" (brief of Government at pg. 5). It is Mr. Scott's position that the introduction of these convictions is unfairly prejudicial under Rule 403 of the Federal Rules of Evidence (FRE), and should not be admitted in the Government's case-in-chief. These convictions may, of course, even if not admitted during the Government's case-in-chief, be admissible in cross-examination of Mr. Scott's witnesses, or in rebuttal, if Mr. Scott somehow opens the door to the admission of these convictions through evidence he might offer. That issue we submit is not likely to arise, but whether likely or not it seems premature to speculate about or address at this juncture.

However, given that rule FRE 404(b) is a rule of inclusion, Mr. Scott would urge the Court, in the event the Court is inclined to allow the admission of such evidence, to limit the Government to the introduction of only one conviction. Introducing three convictions would certainly risk the convictions being used improperly by the jury to

conclude that that Mr. Scott is guilty of the instant charges based solely on his priors, and risks a verdict based on unfair prejudice and confusion. This is especially true when two of the priors involve "trafficking" under Missouri law, which implies sale or distribution, but does not allege such as an element of the offense. This risk, we would assert, is real and a clear danger even if the jury were to be given appropriate limiting instructions. Further argument will be set forth below.

B. ARGUMENT AND AUTHORITIES

FRE 404(b) states in part that "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action and 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 …". This rule is, as the Government notes, a rule of inclusion. *Arcoren v. United States*, 929 F.2d 1235 (8th Cir. 1991). However, it "is one of inclusion rather than exclusion, permitting the admission of other act evidence, *unless the evidence tends to prove only the defendant's criminal disposition*." *Id*. at 1243 (citing *United States v. Gustafson*, 728 F.2d 1078, 1083 (8th Cir. 1984)(emphasis added).

As also noted in the Government's brief, many cases have authorized the use of such priors under this rule. However, the fact that appellate courts have refused to reverse convictions when such evidence has been admitted is not the same as saying that such convictions should always be received in evidence. For example, although *United States v. Rush*, 240 F.3d 729 (8th Cir. 2001) upheld a conviction where an old (12 years old at the time of the indictment) prior conviction had been offered under FRE

404(b) at trial, the appellate court did so noting that a "district court has broad discretion to admit evidence of other crimes, and we reverse only when it is clear the evidence has no bearing on the case." 240 F.3d at 731. Similarly, in *United States v. Green*, 151 F.3d 1111, 1114 (8th Cir. 1998), the opinion did not say that the District Court should have allowed the prior arrest of the defendant to be admitted, but merely said that it "did not abuse its discretion by admitting pursuant to Rule 404(b) the police officer's testimony regarding Green's arrest."

FRE 403 states in part "although relevant, evidence may be excluded if it's probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury …". Mr. Scott believes that the introduction of any of his priors is unfairly prejudicial, given the fact that all of these convictions are several years old, and especially because the Government seeks to offer all three of them. 404(b) evidence is not to be used to prove "predisposition" of a defendant, nor "solely to prove the defendant's propensity to commit criminal acts." *United States v. Strong*, 415 F.3d 902, 904 (8th Cir. 2005)(citing *United States v. Frazier*, 280 F.3d 835, 847 (8th Cir. 2002)0. Admission of multiple convictions creates this very risk.

The Government states that it is offering Mr. Scott's priors to prove his knowledge and intent. Although it is not explicitly stated in the Government's motion, we presume this means "knowledge" of what cocaine base is, and "intent" to either distribute, or possess with intent to distribute. It does not require 3 convictions to establish this knowledge, it would seem that the 1999 conviction alone would suffice. To the extent the Government is trying to prove "intent" to distribute, or to possess with intent to distribute, only one of these convictions involves the element of sale or

distribution, the 1999 Jackson County conviction. To offer other convictions which bear the name "trafficking," but which do not have any distribution or sale element, or "intent" to sell or distribute as an element of that crime, makes them not only prejudicial, but misleading as well. This obviously risks confusing the jury, complicates any limiting instructions, and heightens the danger of unfair prejudice and confusion.

As the Eighth Circuit has noted, "admitting evidence of prior criminal conduct has some prejudicial effect on the defendant, whether this effect substantially outweighs the evidence's probative value is left to the discretion of the trial court…Because the trial court must balance the amount of prejudice against the probative value of the evidence, this Circuit will normally defer to that court's judgment." *United States v Franklin*, 250 F.3d 653, 659 (8th Cir. 2001). We believe that a proper balancing of the prejudicial impact and probative value will justify admission, at most, of the 1999 Jackson County conviction.

Mr. Scott is facing a potential penalty of life in prison for the charges in this indictment. Admission of his prior convictions risks his being convicted for what he has done in the past, and not for the acts he is alleged to have committed in this case. He respectfully asks the Court to deny the Government's request to present any of his three felony drug priors to the jury in this case in the Government's case-in-chief. In the alternative, he asks this Court to limit this evidence solely to his 1999 Jackson County conviction, for the reasons set forth herein.

Respectfully submitted,

/s/ Robin D. Fowler

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Robin D. Fowler #000348
BATH & EDMONDS, P.A.

Historic Voigts Building
7944 Santa Fe Drive
Overland Park, Kansas 66204
(913) 652-9800; Fax (913) 649-8494
E-mail: robin@bathedmonds.com
ATTORNEY FOR NARICCO SCOTT

CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2012 I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send notice of electronic filing to all parties of record herein.

/s/ Robin D. Fowler

Robin D. Fowler