

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

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Case No. 04:10-cr-00162-FJG
)	
THEODORE WIGGINS,)	
)	
Defendant.)	

**SUGGESTIONS IN OPPOSITION TO
GOVERNMENT'S NOTICE OF INTENT TO OFFER RULE 404(b) EVIDENCE**

COMES NOW Defendant, Theodore Wiggins, by and through his undersigned attorney of record and for his Suggestions in Opposition to the government's Notice of Intent to Offer Rule 404(b) Evidence, states to the court as follows;

1. This case was originally filed on May 10, 2010.
2. Presently before the court is a Second Superceding Indictment, filed June 07/2011.
3. Of the twenty five defendants in this case, Mr. Wiggins is the only defendant remaining for trial.
4. Theodore Wiggins is currently charged in a second superceding indictment with one count of conspiracy to distribute cocaine and cocaine base in violation of 21 U.S.C. §841(a)(1) and (b)(1)(A) (count 1); and knowingly and intentionally distribute cocaine base in violation of 21 U.S.C. §841(a)(1) and (b)(1)(C) (count 8).
5. Additionally, the government has filed two separate notices of intent to use prior convictions to enhance punishment, pursuant to 21

U.S.C. §851. Therefore, Mr. Wiggins faces potential sentences up to life without parole.

6. On December 30, 2011 (DOC 573) the government filed its “Notice of Intent to Offer Rule 404(b) Evidence.
7. The government intends to use two prior convictions of Defendant, Wiggins, as follows:
 - a. Jackson County, Missouri
Case No. 16CR980003880-01
Distribute/Deliver/Manufacture a Controlled Substance
Date of Offense: 02-12-1998
Date of Sentence: 08-01-2000
 - b. Clay County, Missouri
Case No. Unknown
Possession of a controlled substance
Date of Offense: 12-29-1998
Date of Sentence: 06-22-2000

SUGGESTIONS

Rule 404(b) provides:

(b) Crimes, Wrongs, or Other Acts.

(1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.

(2) Permitted Uses; Notice in a Criminal Case. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:

(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

(B) do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.

The test for introduction of evidence under Rule 404(b) is stated in ***U.S. v. Mejia-Uribe***, 75 F.3d. 395, 397-398 (8th Cir. 1996) as follows:

[Other] crimes evidence is admissible if it is: “(1) relevant to a material issue; (2) of crimes similar in kind and reasonably close in time to the crime charged; (3) sufficient to support a jury finding that the defendant committed the other crimes; and (4) more probative than prejudicial.” . . . Other crimes evidence, however, is not admissible if it tends to prove only the defendant’s criminal disposition.

In ***Urube***, supra, the court stated, “Under this test , admissibility of other crimes evidence depends on the nature and purpose of the evidence. . . . There is no absolute rule regarding the number of years that can separate offenses. Rather, the court applies a reasonableness standard and examines the facts and circumstances of each case.”

In ***Urube***, the trial court admitted evidence of a 1978 conviction in a 1994 trial. The 8th Circuit held that the district court abused its discretion in allowing introduction of the 1978 conviction. In so holding, the court held, “Here, although both crimes involved the distribution of cocaine, the 1978 conviction involved a single sale of cocaine to undercover agents.. In contrast, this case involved a large scale, ongoing operation. . . . Thus the 1978 conviction was not similar in kind or reasonably close in time to the instant charge.”

Similarly, Wiggin’s Jackson County case was for a single sale of cocaine and is just under 12 years from the date of sentencing.

The Clay County case was for possession of a controlled substance and is from the same general time period. In ***U.S. v. Cook***, 454 F.3d. 938 (8th Cir. 2006), the trial court refused to admit evidence of Cook’s four prior drug convictions and the government appealed. In upholding the trial court’s ruling, the 8th Circuit held that the district court’s ruling was to be reviewed under Rule 404(b) and Rule 403 for abuse of discretion. The court went on to state, “But here, this prior mere possession offense was six years emote and it was functionally dissimilar to the charged distribution offense.”

Similarly here, the Clay County conviction was for possession not distribution and was almost 12 years old. Under the Rule 403 analysis, the probative value of introduction of the intended convictions is far outweighed by the danger of unfair prejudice.

WHEREFORE, for the above and foregoing reasons, Defendant, Wiggin’s, prays this court deny the government’s intended offer of both the Jackson County conviction and the Clay County conviction for the reason that they

are too remote in time and factually dissimilar.

Respectfully submitted,

/s/ Michael W. Walker
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was served electronically via the CM/ECF filing system, this 23rd day of May, 2012, upon the following:

Brent Venneman, Assistant United States Attorney

/s/ Michael W. Walker

Michael W. Walker