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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 08-00026-03/05-CR-W-FJG
	)	
TROY R. SOLOMON,	)	
	)	
CHRISTOPHER L. ELDER,	)	
	)	
and	)	
	)	
DELMON L. JOHNSON,	)	
	)	
Defendants.	)	

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

The United States of America, by Beth Phillips, United States Attorney, and Assistant United States Attorneys, Rudolph R. Rhodes IV and James Curt Bohling, all for the Western District of Missouri, and files its Notice of Intent to Offer Both Rule 404(b) and Non-404(b) Evidence. While the Government is providing notice of the discussed evidence under Rule 404(b), it is the Government's position that this evidence is "inextricably intertwined" with evidence occurring during the charged conspiracy time frame and is not limited or controlled by Rule 404(b). The Government offers the following in suggestions in support of admission of the evidence.

I. PROCEDURAL HISTORY

On February 6, 2008, a federal grand jury in the Western District of Missouri returned a 24-count indictment charging Troy R. Solomon, Christopher L. Elder, Delmon L. Johnson, and

two other defendants with crimes related to the illegal distribution of controlled substances by The Medicine Shoppe pharmacy in Belton, Missouri to Solomon and Johnson in Houston, Texas. Count One charges all five named defendants with conspiring to distribute controlled substances outside the course of professional practice and without a legitimate medical purpose. Count Two charges certain defendants, including Solomon and Johnson, with conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h). Counts Three through Twelve charge certain defendants with substantive counts of illegal distribution and dispensation of schedule III, IV, and V controlled substances, in violation of 21 U.S.C. § 841(a)(1).

II. FACTUAL BACKGROUND

The Government's evidence at trial will demonstrate that the narcotic and other drugs obtained by Defendants Troy Solomon ("Solomon") and Delmon L. Johnson ("Johnson"), with the assistance of Defendant Christopher L. Elder ("Elder") and unindicted co-conspirator, Peter Okose ("Okose"), M.D., from The Medicine Shoppe (TMS) pharmacy in Belton, Missouri, were obtained solely for the purpose of diversion and sale on the street.

Over a fifteen-month period (approximately August 2004 through October 20, 2005) TMS pharmacy filled an extremely large volume of prescriptions for generic Lorcet, Xanax and Promethazine with Codeine. Solomon had forged a supply connection with co-conspirator and co-Defendant Mary Lynn Rostie ("Rostie"), the Medicine Shoppe's pharmacist and owner, through co-conspirator and co-Defendant Cynthia Martin ("Martin"), a Belton resident who knew both Solomon and Rostie.

The volume of The Medicine Shoppe's shipments to Houston were so great that during the relevant time period, The Medicine Shoppe was the number one seller of narcotics in the

State of Missouri. In comparison among the six retail pharmacies located in Belton, Missouri, during the same 21-month time period, The Medicine Shoppe purchased approximately 12,278 grams of hydrocodone and the second highest purchaser bought approximately 1,532 grams of hydrocodone.

When the shipments began in August 2004, Solomon was preparing to open the Ascensia Nutritional Pharmacy ("ANP") in Houston, but ANP had not yet opened. Elder worked at a clinic in the same building as ANP called South Texas Wellness Center ("STWC"), owned and operated by Ada Johnson and her daughter, Pleshette Johnson. Elder and Solomon knew each other.

From August 2004 until the end of 2004, the boxes of prescription drugs mailed by Federal Express from The Medicine Shoppe were addressed to Elder at STWC. STWC staff signed for the packages. However, STWC did not dispense drugs to its patients, despite the fact that the prescriptions had been written by Elder and shipped directly to him. Instead, the boxes were picked up from STWC by Solomon and Johnson.

Solomon provided money to the Johnsons to pay operating expenses for STWC during this time period, but he did so by giving them cash payments that ultimately amounted to about $25,000. No written agreement accompanied these payments. Solomon also paid for prescription pads for Elder from a supplier of Solomon's choice. Elder saw few patients at STWC and wrote few prescriptions during the day, but he sometimes kept the pads with numerous blank pages remaining and asked for a new pad from the Johnsons when he next saw patients.

The prescriptions written by Elder to be filled by The Medicine Shoppe did not correspond to actual patients at STWC, even though the prescription pad letterhead said "South Texas Wellness Center." No record of those patients exists at STWC, and the narcotics provided by The Medicine Shoppe in fulfillment of Elder's prescriptions were not provided by Elder to STWC patients.

In about January 2005, Elder left STWC. The prescriptions sent to Belton switched from Elder to Okose, and Solomon asked Rostie to mail the boxes of filled prescriptions to ANP rather than to STWC. In fact, Okose wrote thousands of prescriptions that went through Solomon's hands. Some were filled in Belton, many more were filled by the ANP. ANP had very little walk-in business, nonetheless, during this time period ANP was among the sales leaders for Hydrocodone for all pharmacies in the State of Texas.

The Government's evidence will be that Elder issued original controlled substance prescriptions that were filled at C & G Pharmacy in Houston, Texas. Duplicates of those prescriptions had been filled at Ascensia Nutritional Pharmacy and found at The Medicine Shoppe (TMS).[1]

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

III. RULE 404(b) EVIDENCE [2]

Elder and his co-conspirators are accused of conspiracy to distribute and possession with intent to distribute prescription drugs. The evidence at trial will show that the defendants were involved in a prescription drug ring. The Indictment alleges that Elder wrote unlawful and invalid prescriptions for Schedule III, IV, and V drugs. Solomon obtained the unlawful and invalid prescriptions from Elder and would send them to Rostie at TMS in Belton, Missouri. Rostie filled Elder's prescriptions and shipped numerous packages containing filled prescription drugs to South Texas Wellness Center in Houston, Texas, addressed to Elder. The evidence will further show that numerous packages containing cash were sent via United Parcel Service from Houston, Texas, to co-conspirator Cynthia Martin, who resided in Belton, Missouri.

Once ANP opened for business, the defendants were no longer limited to diverting the drugs acquired through TMS, although the defendants continued to use TMS as a source for these drugs. Once open and licensed, ANP itself began to fill prescriptions for hydrocodone and other substances in the "Houston cocktail"[3] purely for the purpose of diverting these drugs.

In addition to Okose prescriptions that were being filled at TMS, Okose prescriptions were filled at ANP. Most of the prescriptions were written for Lortab or Lorcet along with Soma and Xanax. ANP employees filled the Okose narcotic prescriptions. Each filled prescription was placed in a bag. At the end of the day, Johnson gathered the drugs from the shelf and placed them in another, larger container, such as a garbage bag. He then placed the drugs in his car.

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[2] The following acts have all been contained within discovery, which has been provided to the defendants.

[3] A "Houston cocktail" is a mixture of hydrocodone (sold under the trade names Lorcet and Lortab), Soma, and codeine-containing cough syrup.

Ostensibly, Johnson was delivering the drugs to Okose's clinic. However, Okose's clinic did not provide drugs to patients. Moreover, none of Okose's patients came into ANP to refill their prescriptions.

In February or March 2005, Bede Nduka was hired as the new pharmacist at ANP. The evidence will be that he usually spent time sitting in the back of the pharmacy or on the telephone. Nduka did not check the prescriptions filled by the pharmacy technicians and initial the prescriptions.

During the conspiracy period, between February 1, 2005, and March 31, 2005, C & G Pharmacy filled original prescriptions issued by Christopher Elder. The C & G Pharmacy prescriptions have been compared to photocopied prescriptions at ANP and to faxed prescriptions seized by DEA at TMS in Belton, Missouri. Duplicates of Elder prescriptions filled at C & G Pharmacy were located at both ANP and TMS. Many of these are on the numbered prescription pads used at Westfield Medical Clinic in 2005. In addition, ANP filled some of the photocopied prescriptions twice.

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 . . .

1. Types of 404(b)

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).

2. Conviction or Charge Is Not Required

The criminal activity admitted under this section need not have resulted in a conviction, *United States v. Newton*, 912 F.2d 212, 214 (8th Cir. 1990), nor in the lodging of a criminal charge. *United States v. Williams*, 95 F.2d 723, 731 (8th Cir.), *cert. denied*, 519 U.S. 1082 (1997). 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. Rawle*, 845 F.2d 1244,1247 (4th Cir. 1988). The most damning types of "uncharged crimes" such as a murder do not necessarily result in "unfair" prejudice when admitted under the Rule. *United States v. Chagra*, 754 F.2d 1186 (5th Cir. 1985), *cert. denied*, 474 U.S. 922 (1985). In *Chagra*, 754 F.2d 1186, the defendant was charged with murder and conspiracy to commit murder, obstruction of justice, and conspiracy to possess marijuana with intent to distribute. Defendant sought, *inter alia*, severance of the murder counts from the other charges. The appellate court upheld the district court's denial of the severance motion, noting that, in a separate trial, the evidence of the murder would have been admitted under Rule 404(b) as evidence of the defendant's motive in the other offenses. In doing so, the Court noted:

> Evidence of Chagra's involvement in the plan to murder Judge Wood -- whether offered to convict of murder and conspiracy to murder or to show motive and intent to commit the offenses charged in counts III and IV -- undoubtedly placed Chagra in a bad light before the jury. Evidence is not unfairly prejudicial, however, simply because it convincingly incriminates the accused. We have no doubt that if counts III and IV had been severed and each tried separately from the murder and conspiracy to murder counts, if would have been well within the discretion of the trial judge under Fed. R. Evid. 404(b) to admit in each of these trials the evidence of Chagra's participation in the scheme to murder Judge Wood.

Id. at 1189.

B. <u>Presumption for Inclusion of 404(b)</u>

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 this 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. 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. Test for Admission

The Supreme Court's decision in *Huddleston v. United States*, 485 U.S. 681, 108 S. Ct. 1496 (1988), announced a four-step 404(b) inquiry as the appropriate test for admission of evidence under this rule: (1) the evidence must be offered for a proper purpose; (2) the evidence must be relevant; (3) the probative value of the evidence must outweigh any potential for unfair prejudice to the defendant; and (4) the jury must be instructed as to the limited purposes for which the evidence may be considered. The Eighth Circuit has refined this rule in *United States v. Baker*, 82 F.3d 273 (8th Cir. 1996), stating that the offered evidence needs to be: (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. 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 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).

2. Similar Nature of the Crime and Nearness in Time

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. Uncharged acts which occurred five years earlier –because of their similarity– are not too remote in time to be allowed as 404(b) evidence. *United States v. Thomas*, 398 F.3d 1058, 1063 (8th Cir. 2005). 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 13 years is not too remote for introduction under Rule 404(b). *United States v. Rush,* 240 F.3d 729, 731 (8th Cir. 2001). In this case, the government seeks to introduce acts which occurred within the charged conspiracy.

3. Inextricably Intertwined Evidence Is Not Controlled by Rule 404(b)

Rule 404(b) only applies to acts or crimes deemed "extrinsic" to the one charged, acts "intrinsic" to the alleged crime do not fall under the rule's limitations. Rule 404(b) does not apply when the evidence concerning the "other" act and the evidence concerning the crime charged are "inextricably intertwined." *United States v. O'Dell*, 204 F.3d 829, 833 (8th Cir. 2000). This also applies when some offenses in a criminal episode become "other acts" simply because the defendant is indicted for less than all of his actions. *United States v. Williams*, 95 F.3d 723 (8th Cir. 1996). The inextricably intertwined evidence may be used as direct evidence to flesh out the circumstances surrounding the crime with which the defendant has been charged, thereby placing the testimony in its proper context. *United States v. Phelps*, 168 F.3d 1048, 1057-58 (8th Cir. 1999).

It is the government's position that the evidence set forth in Section III is not covered by Rule 404(b). This evidence is so "inextricably intertwined" with the charged conspiracy that it cannot be separated; it is "admissible as an integral part of the immediate context of the crime charged." *Phelps*, 168 F.3d at 1058.

However, if this court does determine that Rule 404(b) applies to this evidence, the government submits that pursuant to Eighth Circuit law, the evidence is properly admitted.

4. Applications of the *Huddleston* & *Baker* Tests

As previously outlined, the Government intends to offer evidence as part of its case in chief. Applying the tests of *Huddleston* and *Baker*, the defendants' involvement in this drug conspiracy was intentional, and that they were knowledgeable of the conspiracy. All the prescriptions presented are relevant in that they are instances where, at the very least, indicia of drug trafficking activity are present and therefore are similar in kind to the charged conspiracy. *United States v. Maza*, 93 F.3d 1390, 1397 (8th Cir. 1996) and *United States v. Johnson,* 28 F.3d 1487, 1499 (8th Cir. 1994).

The Okose prescriptions for the same type of drugs were filled at both ANP and TMS. The C & G prescriptions are close in time. No C & G prescription sought to be introduced is outside the charged time frame, which is well within the time limits allowed by the Eighth Circuit. Finally, nothing in these instances expands the prejudice against the defendants who are already charged with conspiring to distribute controlled substances.

D. Procedure & Admission During Government's Case-in-chief

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. *Johnson*, 439 F.3d at 952. *See also Hill*, 249 F.3d at 710, 713 (past crime evidence can be part of the story of defendant's criminal behavior, so long as it proves an issue, such as intent, other than the defendant's criminal predisposition to commit criminal acts. The intent with which a person commits an act on a given occasion can many times best be proven by evidence of his prior acts.)

E. Limiting Instructions

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. *Johnson*, 439 F.3d at 954-955; Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit (1996), Instruction No. 2.08. 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). Furthermore, once again, the Government believes that the evidence is not covered by Rule 404(b) and no instruction should be given concerning that testimony.

V. CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was delivered on December 31, 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.

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