

the evidence is admissible. See United States v. Utter, 97 F. 3d 509-513 (11th Cir. 1996). (Evidence of other alleged bad acts must be extrinsic to be subject to analysis under Rule 404(b).

3. Under federal law and Rule 403 of the Federal Rules of Evidence, such evidence, even if relevant, may be excluded if its probative value is substantially outweighed by its prejudicial effect or if other considerations require exclusion. See United States v. Utter, 97 F. 3d 509, 513 (11th Cir. 1996). This determination should be made in advance of the time the evidence is offered in order to prevent prejudicial surprise and a possible mistrial.

4. The Government has failed to identify what Rule 404(b) evidence it intends to use. The Court's Standing Order would be of no consequence if it did not mean what the Rule actually says. The Government has taken the position in its Response to Defendant McGregor's Motion for Order Precluding the Government from Introducing Evidence Under Federal Rule of Evidence 404(b) that it was only required under the Standing Order to give notice of its "intent to introduce evidence" at trial under 404(b) by the date of arraignment. While that it is what the Order says, if the Court's Standing Order really only means that the Government must advise the Defendant only of its "intention" to produce such evidence, it would be of no value. Rule 404(b) provides that uncharged crimes, wrongs, or acts may be admissible:

...provided that upon request by the accused, the prosecution...shall provide reasonable notice in advance of trial, or during trial if the Court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

The Rule itself uses the words "such evidence it [the Government] intends to introduce". However,

the Rule provides that if the Defendant requests it, the burden is on the Government to provide notice of the “general nature” of the evidence it intends to introduce. The standing Order would have little meaning if it were limited to a statement by the Government that it intends to use evidence of that type. One of the purposes of a standing Order is to reduce the number of motions which must be filed. Under the Government’s interpretation, a defendant would have to file a request under Rule 404(b) to cause the Government to actually identify what 404(b) evidence it intended to offer. However, it would seem that the standing Order was intended to eliminate that necessity.

5. The Defendant is entitled to reasonable notice in advance of trial not only of the Government’s intention to introduce such evidence at trial, but also the general nature of such evidence under Rule 404(b) of the Federal Rules of Evidence. The Government has failed to comply with the intent of the Standing Order and the clear statement of Rule 404(b).

Dated this 4th day of February, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the following and all counsel of record electronically on this the 4th day of February, 2011.

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