UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA

UNITED STATES OF AMERICA	)	
	)	
v.	)	**CR. NO. 2:10cr186-MHT**
	)	
QUINTON T. ROSS, JR.	)	

MOTION OF QUINTON T. ROSS, JR., FOR ORDER PRECLUDING THE GOVERNMENT FROM INTRODUCING EVIDENCE AT TRIAL UNDER FED. R. EVID. 404(b)

Quinton T. Ross, Jr., respectfully moves this Court for an order prohibiting the Government from introducing or offering any evidence at trial in reliance on Fed.R.Evid. 404(b).

Rule 404(b) provides that, upon request by the accused, the prosecution must give notice of its intent to introduce evidence under that Rule. The kind of notice that is contemplated and required by Rule 404(b) is not a mere generic notice of an intent to use Rule 404(b) somehow. Instead, the notice contemplated and required by Rule 404(b) is notice about the evidence (described at least in terms of its general nature) the prosecution intends to offer under that Rule. *See* Rule 404(b) ("the prosecution…shall provide reasonable notice in advance of trial, or during the 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**.") (emphasis added).

The requirement of Rule 404(b) notice is among the discovery obligations that are covered by Standing Order 534. Standing Order 534 requires that the Government must provide Rule 404(b) notice along with other discovery covered

in that Standing Order. *See* Standing Order 534, Section 1(H). Standing Order 534 requires the Government to provide this information by arraignment or other date set by the Court. (This is also provided in the more recent revisions to the Court's Local Rule 16.1.)[1] The obvious purpose of such notice is to reduce surprise and promote early resolution of issues relating to the admissibility of such evidence. *United States v. Carrasco,* 381 F.3d 1237 (11th Cir. 2004).

This Court set dates for the Government to fulfill its discovery obligations. [Doc. 132, pp. 2-3 (requiring Government to disclose the materials covered in Standing Order 534 by October 22, with certain supplemental information to be disclosed by October 29)]. The Government has even emphasized this fact. [Doc. 282, p.2: "On October 18, 2010, the Court filed a scheduling order requiring that the United States finish producing its discovery to the defense by October 22, 2010…"] The Court has since extended the dates for the Government to fulfill its obligations in various respects. [*See, e.g.*, Doc. 288: "the Government shall, on or before December 20, 2010, turn over all non-contested discovery."]

Those dates have come and gone. It is now four months after indictment, three and a half months after arraignment, and every deadline for the Government's discovery has passed. The Government has not provided any Rule 404(b) notice, other than its boilerplate language included with its initial

[1] In Samuel's *Eleventh Circuit Criminal Handbook,* 2010 Edition, it is noted: [s]ome Local Rules prescribe a specific time for the disclosure of Rule 404(b) evidence. **In the Middle and Southern Districts of Alabama, for example, Rule 404(b) evidence must be disclosed at the time of arraignment."** (Emphasis added) P.22-10.

discovery submission.[2] Such is insufficient. But, Senator Ross' counsel participated in a meet-and confer conference call with counsel for all parties during which the Government took the position that this notice is sufficient and satisfies the notice requirement.[3]

The Government has undisputedly never gone beyond giving (orally or in writing) anything other than the generic assertion that it intends to somehow use some Rule 404(b) evidence. The Government has never given any notice, not even in general terms, of the nature of any evidence that the Government will seek to introduce under Rule 404(b). That is important information for trial-preparation purposes, and information on which Senator Ross should be entitled to rely in making his trial preparation. This is especially crucial when the 404(b) evidence is sought to be introduced in a ten-defendant trial with a conspiracy charge. The *Advisory Committee Notes* concerning the 1991 Amendments to Rule 404(b) (which added the pretrial notice requirement) state: "[b]ecause the notice requirement serves as condition precedent to admissibility of 404(b)

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[2] When Senator Ross' counsel was provided the original 19 discs produced in this case, the Government enclosed a letter dated October 15, 2010, which stated: "As permitted by Rules 404(b) and 609, Fed.R.Evid., and as otherwise allowed by law, the United States intends to use at trial any an all prior convictions, crimes, wrongs, or acts of defendants. The United States will provide appropriate notice of any such evidence in accordance with the Local Rules."

[3] In response to a specific question from Senator Ross' counsel during the conference call whether the Government in fact had specific Rule 404(b) evidence of uncharged acts it intended to offer as to Senator Ross, counsel for the Government indicated that the Government did have such evidence as to Senator Ross, "but don't hold me to it." Although undersigned counsel understands opposing counsel's reluctance to be bound to an on-the-spot response, the fact remains that counsel for Senator Ross have not received even solid confirmation that such evidence exists as to Senator Ross, much less the notice regarding the nature of the evidence required by Rule 404(b).

evidence, the offered evidence **is inadmissible** if the court decides that the notice requirement has not been met." (emphasis added)

Accordingly, Senator Ross requests that the Court issue an order confirming that the Government will not be allowed to introduce evidence at trial under Fed.R.Evid. 404(b).

Respectfully submitted,

/s/ H. Lewis Gillis
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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of February, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Mark Englehart
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