

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.) CR. NO. 2:10cr186-MHT
)
 MILTON E. McGREGOR,)
)
 Defendant.)

**MOTION OF MILTON McGREGOR FOR ORDER
PRECLUDING THE GOVERNMENT FROM
INTRODUCING EVIDENCE AT TRIAL UNDER FED. R. EVID. 404(b)**

Defendant Milton McGregor respectfully moves for an order prohibiting the Government from introducing or offering any evidence at trial in reliance on Fed. R. Evid. 404(b).

At the very outset of the case, Mr. McGregor requested notice of any intention on the Government's part to introduce evidence under Rule 404(b), and requested that such notice be given promptly. [Doc. 70]. The Court denied that request without prejudice (along with various other discovery requests that Ms. McGregor filed at the same time). In so doing, the Court noted that some of the requests that the Court was denying without prejudice were for matters already covered in the discovery obligations set forth under Standing Order 534. [Doc. 79].

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 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 supplied).

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.)

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 nearly four months after indictment, nearly three and a half months after arraignment, and every deadline for the Government’s discovery disclosures has passed. The Government has not provided any Rule 404(b) notice.

Mr. McGregor’s counsel have discussed this issue with the Government, during meet-and-confer discussions about discovery matters. 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).

The most reasonable inference therefore is that the Government does not actually plan to introduce any evidence under Rule 404(b). That is important information for trial-preparation purposes, and information on which Mr. McGregor should be entitled to rely in making his trial preparation. The alternative inference is that the Government does want the opportunity to offer evidence under Rule 404(b). But the Government has not complied with the schedule that the Court imposed.

Accordingly, Mr. McGregor 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/ Joe Espy, III

Joe Espy, III (ASB-6591-S82J)

One of the Attorneys for Milton E. McGregor

OF COUNSEL:

Benjamin J. Espy (ASB-0699-A64E)
William M. Espy (ASB-0707-A41E)
MELTON, ESPY & WILLIAMS, P.C.
P.O. Drawer 5130
Montgomery, AL 36103
Telephone: 334-263-6621
Facsimile: 334-263-7252
jespy@mewlegal.com
bespy@mewlegal.com
wespy@mewlegal.com

Fred D. Gray (ASB-1727-R63F)
Walter E. McGowan (ASB-8611-N27W)
GRAY, LANGFORD, SAPP
McGOWAN, GRAY, GRAY
& NATHANSON, P.C.
P.O. Box 830239
Tuskegee, AL 36083-0239
Telephone: 334-727-4830
Fax: 334-727-5877
fgray@glsmgn.com
wem@glsmgn.com

Robert D. Segall (ASB-7354-E68R)
David Martin (ASB-7387-A54J)
Shannon Holliday (ASB-5440-Y77S)
COPELAND, FRANCO, SCREWS & GILL, P.A.
P.O. Box 347
Montgomery, Alabama 36101-0347
Telephone: 334-834-1180
Fax: 334-834-3172
segall@copelandfranco.com
martin@copelandfranco.com
holliday@copelandfranco.com

Sam Heldman (ASB 3794 N60S)
THE GARDNER FIRM, P.C.
2805 31st Street NW
Washington, DC 20008

Telephone: (202) 965-8884
Fax: (202) 318-2445
sam@heldman.net

CERTIFICATE OF SERVICE

I hereby certify that on January 21, 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/ Joe Espy, III
Of Counsel