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

UNITED STATES OF AMERICA,	)	
	)	
	)	
v.	)	**CR. NO. 2:10cr186-MHT**
	)	
	)	
MILTON E. MCGREGOR	)	

UNITED STATES' RESPONSE TO DEFENDANT MCGREGOR'S MOTION FOR ORDER PRECLUDING THE GOVERNMENT FROM INTRODUCING EVIDENCE UNDER FEDERAL RULE OF EVIDENCE 404(B)

The United States of America, through undersigned counsel, hereby responds to defendant McGregor's Motion for Order Precluding the Government from Introducing Evidence under Federal Rule of Evidence 404(b). In his motion, defendant McGregor complains that the United States has failed to comply with the notice requirements dictated by the Court's Standing Order on Criminal Discovery dated February 4, 1999, and Rule 404(b). His motion should be denied.

ARGUMENT

Defendant McGregor's motion fails because it pointedly misreads the notice requirements under the Court's Standing Order and Rule 404(b).

Defendant McGregor's motion turns on two different notice requirements. First, the Court's Standing Order requires the United States, by the date of arraignment or some other date set by the Court, to "advise the defendant of its intention to introduce evidence" at trial under Rule 404(b). Standing Order at § (1)(H) (emphasis added). Second, Rule 404(b) dictates that

evidence of "other acts," i.e., uncharged crimes, wrongs, or acts, is 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 . . . ." Fed. R. Evid. 404(b) (emphasis added).

Routine practice before this Court is to interpret the Standing Order as requiring the United States to provide notice only of its intention to introduce evidence at trial under Rule 404(b) by arraignment or some other specified time. By ignoring the term "intention" in the Court's Standing Order, defendant McGregor improperly conflates the divergent requirements of the Court's Standing Order and Rule 404(b) such that the former incorporates the latter's notice provision. Thus, according to defendant McGregor, "the Government must provide Rule 404(b) notice," including a description of the general nature of the evidence in question, by arraignment or at some other time set by the Court. Mot. at 2. To the contrary, the unabridged, plain language of the Court's Standing Order simply requires notice of the government's intent to use other-acts evidence under Rule 404(b). Nothing in the Standing Order requires the United States to inform the defense by a specific date of the "general nature" of that evidence, as Rule 404(b) requires.

Here, the Court ordered the United States to fulfill its discovery obligations, including section (1)(H) of the Court's Standing Order, by October 22, 2011. Dkt. No. 132. Prior to that date, on October 15, 2010, the United States informed the defense in a formal letter of the following:

> 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 and 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.

By doing so, the United States has complied in full with the Court's Standing Order, and therefore retains the ability to introduce evidence of other uncharged crimes, acts, and wrongs at trial upon compliance with the separate notice requirements of Rule 404(b). Precluding the United States from introducing such evidence now is unwarranted and premature.

As noted above, Rule 404(b) requires that the United States provide only "reasonable" pre-trial notice of its intention to introduce other-acts evidence, or, alternatively, notice during trial if good cause is shown. The Eleventh Circuit has affirmed the reasonableness of providing such notice minutes before voir dire,[1] the day before trial commenced,[2] and approximately three weeks before trial commenced.[3] In accordance with standard practice before this Court, the United States intends to summarize and move for the admission of the other-acts evidence that it desires to introduce at trial in a motion in limine. The United States intends to file the motion on or before March 14, 2011, the filing deadline for motions in limine set by the Court's Scheduling Order. Under Eleventh Circuit caselaw and the Federal Rules of Evidence, the timing and substance of that motion will provide timely notice of the general nature of the evidence that the United States wishes to introduce under Rule 404(b).

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[1] United States v. Perez-Tosta, 36 F.3d 1552, 1560-61 (11th Cir. 1994).

[2] United States v. Carswell, 178 Fed. Appx. 1009, 1012 (11th Cir. 2006) (unpublished).

[3] United States v. Barber, 147 Fed. Appx. 941, 943-44 (11th Cir. 2005) (unpublished) (holding that three weeks constituted "ample notice").

CONCLUSION

For the foregoing reasons, the Court should deny defendant McGregor's Motion for Order Precluding the Government from Introducing Evidence at Trial under Federal Rule of Evidence 404(b).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on counsel of record through the Court's electronic filing system this 28th day of January, 2011.

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