

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.)	

**REPLY IN SUPPORT OF MOTION [DOC. 360]
FOR ORDER PRECLUDING THE GOVERNMENT FROM
INTRODUCING EVIDENCE UNDER FED. R. EVID. 404(B)**

Milton McGregor respectfully submits this reply in support of his motion (Doc. 360) for an order precluding the Government from introducing evidence under Federal Rule of Evidence 404(b). The Government’s position (Doc. 387) is that it has told Mr. McGregor that it intends to use Rule 404(b), though the Government admits that it has not actually given the notice required by Rule 404(b). The Government argues that this sort of place-holder, or reservation of rights, is enough to satisfy the provision about Rule 404(b) in this Court’s Standing Order 534. The Government is incorrect.

The Government interprets Standing Order 534 as being satisfied by a placeholder notice, a generic reservation of rights to use Fed. R. Evid. 404(b) to whatever extent the Rule permits. The Government thus draws a distinction between a Rule 404(b) notice (i.e., substantive notice of the nature of the evidence to be introduced, a type of notice that the Government recognizes that it has not provided), and a Standing Order 534 notice about Rule 404(b) (which in the Government’s view can be a generic placeholder,

of the “we reserve the right and we’ll get back to you” type).

Mr. McGregor respectfully submits that this is not the most reasonable understanding of the Court’s Standing Order, and that the reasonable interpretation is that the Standing Order requires an actual substantive Rule 404(b) notice.

There is, first, no good reason why this Court would create a provision of a Standing Order merely to require a placeholder notice. Such a requirement would be of no practical benefit to anyone. A placeholder notice effectively tells the defendant nothing, if it is satisfied (as the Government argues) by a generic sentence that would apply to every defendant in every case. The Government contends that giving only such generic notice is its routine practice; but the Government cites no order in any case in which any Judge of this Court has accepted this interpretation of the Standing Order.

Second, the Government fails in its attempt to draw a distinction between Standing Order 534, and Rule 404(b), based on the language of the respective texts. The Government emphasizes that Standing Order 534 speaks of “intention.” (Doc. 387, p. 1 (emphasizing this word); *id.* p. 2 (“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.”). What the Government ignores is that Rule 404(b) also speaks in just the same way, of intent. (Rule 404(b): “[T]he prosecution shall provide reasonable notice ... of the general nature of any such evidence it intends to introduce at trial.”) (emphasis supplied). Standing Order 534, and Rule 404(b), are parallel in their operation. They both speak of the same thing, and both speak in terms of intent. There is no reason based

on their language to interpret them as speaking to two entirely different types of notice, one substantive and one merely a generic placeholder.

Third, reading the Standing Order and the Evidence Rule as speaking of the same notice, rather than two different types of notice, also makes more sense in light of the overall context of the Standing Order. All of the provisions for production of information by the Government, in section (1) of the Standing Order, are provisions about producing substantive case-specific information. Under the Government's reading of the Standing Order, subsection (1)(H) of the Standing Order (the provision about Rule 404(b) notice) would be an anomaly. On the Government's reading, unlike all the other parts which require actual exchange of substantive case-specific information, subsection (1)(H) would require only a generic invocation by the Government, such that actual information would be produced at some unknown later date that is not addressed in the Standing Order. That is a very unlikely reading of the Standing Order. The whole point of the Order, and especially section (1), is to bring clarity to the timing and substance of the production of case-specific information. The Government's reading of subsection (1)(H) is contrary to this basic purpose.

The Government emphasizes that Rule 404(b) itself, and caselaw interpreting it, do not require notice as early as Standing Order 534 does. (Doc. 387, p. 3). That is true and irrelevant. This Court undoubtedly has the authority to require earlier notice, and the Government does not deny this. In Standing Order 534 (as well as the more recent Local Rule incorporating the same provision), this Court exercised that power.

Finally, an order against the Government on this point would be fair. Mr.

McGregor's counsel put the Government on notice, during meet-and-confer discussions many weeks before filing this motion, of counsel's position that that the Government had not given adequate notice regarding Rule 404(b) evidence under Standing Order 534, and that this would preclude the Government from introducing such evidence at trial. In response to that discussion, the Government has chosen for several more weeks not to provide such notice. The Government has known of the risk in the position that it was taking, and the Government has chosen to take that risk by continuing to allow more time to go by without giving the notice that Mr. McGregor has sought. Whether the Government has taken this approach because it seeks to put Mr. McGregor at a trial-preparation disadvantage, or because the Government has decided to rush towards indictment and trial in this case without taking the time to formulate plans about its use of Rule 404(b), in either event the Government has chosen to accept the risk inherent in its position. Therefore, granting the relief requested in this motion would cause no unfair harm to the Government.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 31, 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