IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	:	
	:	
v.	:	
	:	**CRIMINAL NO. 09-CR-00232-AW**
JOHN HOUSTON and	:	
MICHAEL HENSON.	:	
	:	
Defendants.	:	

UNITED STATES OF AMERICA'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION *IN LIMINE* TO ADMIT CERTAIN EVIDENCE RELATIVE TO DEFENDANT JOHN HOUSTON

The United States of America, by and through its counsel Rod J. Rosenstein, United States Attorney for the District of Maryland, and Ivana Nizich and Robert McGovern, Trial Attorneys with the Domestic Security Section, Criminal Division of the U.S. Department of Justice, respectfully submits this memorandum of law in support of its motion *in limine* to admit certain evidence of defendant John Houston's intent, knowledge, motive, and absence of mistake, among other reasons, pursuant to Federal Rule of Evidence 404(b).

THE INDICTMENT

On April 29, 2009, the defendant was charged via indictment with one count of Conspiracy to Smuggle Firearms into the United States and one count of Attempted Smuggling into the United States of Non-Invoiced Merchandise in violation of Title 18, United States Code, Sections 371, 545, and 2.

FACTS GIVING RISE TO THE CHARGES

From approximately April 2007 to August 2008, the defendant worked in Iraq for two companies contracted by the United States Department of Defense. From approximately April 2007 to May 2008, the defendant was employed by SOS International [hereinafter SOSI]. He thereafter obtained employment with MPRI until August 2008. At various times during his employment in Iraq, the defendant worked as a military analyst and in a supervisory capacity. While in Iraq, the defendant worked with the U.S. military and had access to firearms.

From approximately mid-2007, the defendant approached U.S. military soldiers and asked the soldiers to unlawfully smuggle weapons from Iraq into the U.S. on his behalf. A U.S. soldier reported the matter to his superiors. Subsequently, in a series of e-mails in early 2008, the defendant arranged with the U.S. soldier and co-defendant Michael Henson to unlawfully smuggle firearms from Iraq to Fort Bragg, North Carolina, in a manner that would evade U.S. military and civilian customs regulations and inspections. The defendant then transported a bag of weapons via two SOSI employees under his supervision to the U.S. soldier, who ostensibly had agreed to secrete the weapons to Fort Bragg on behalf of the defendant. Co-defendant Michael Henson agreed to collect the weapons once they arrived at Fort Bragg. Military investigators, however, seized the weapons before they departed Iraq. The weapons seized included eight machine guns and one semi-automatic pistol.

EVIDENCE THAT THE GOVERNMENT SEEKS TO INTRODUCE AT TRIAL

At trial, the Government seeks introduction of the following other acts of the defendant:

1. Defendants' Unauthorized Possession of Firearms

a. The defendant's unauthorized possession – and seizure by investigators – of firearms, ammunition, weapons receivers, magazines, ammunition, military equipment, and other items on August 12, 2008, while serving as a contractor in Iraq; and

b. The defendant's arrest, charge, and reprimand by the U.S. military for possession of a concealed weapon and failure to obey an order or regulation at Fort Campbell, Kentucky on April 20, 1996.

2. Defendant's Illicit Narcotic Drug Procurement and the Attempted Smuggling of this Contraband:

a. defendant's procurement, attempts to procure, possession and distribution of narcotic medications in Iraq; and

b. seizure of narcotic medications from the defendant's housing unit on August 12, 2008.

LEGAL ANALYSIS

A. Federal Rule of Evidence 404(b) Establishes An Inclusive Standard For "Other Act" Evidence.

Federal Rule of Evidence 404(b) permits the government to introduce "[e]vidence of other crimes, wrongs or acts" to prove matters other than propensity, such as "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Fed. R. Evid. 404(b). This is a Rule of inclusion, not exclusion. *See United States v. Mark*, 943 F.2d 444, 447 (1991) ("We have subscribed to the view of the rule as 'an inclusionary rule'") (internal citations omitted). Only evidence that "has *no purpose* other than to show criminal disposition" is barred from trial under Rule 404(b). *United States v. Van Metre*, 159 F.3d 339, 349 (4th Cir. 1998) (emphasis added); *United States v. Grimmond*, 137 F.3d 82831 (4th Cir. 1998) (same); *United States v. Queen*, 132 F.3d 991, 994-995 (4th Cir. 1997) (same). Thus, evidence of other bad acts may generally be introduced if the proponent can show that the proffered material is (1) relevant to some issue other than character, (2) necessary, and (3) reliable. *See United States v. Rawle*, 845 F.2d 1244, 1247 (4th Cir. 1988); *United States v. Hadaway*, 681 F.2d 214, 217 (4th Cir. 1982). Additionally, "the evidence's probative value must not be substantially outweighed by confusion or unfair prejudice in the sense that it tends to subordinate reason to emotion in the fact-finding process." *Queen*, 132 F.3d at 997.

This test is not an especially rigorous one. "Relevance" is the lowest of evidentiary thresholds; it is defined for these purposes to include any evidence that is "sufficiently related to the charged offense." *Rawle*, 845 F.2d at 1244, n. 3. Furthermore, "necessity," as used here, does not mean absolute necessity. Rather, evidence is "necessary," for purposes of Rule 404(b),

where it supplies information concerning "'an essential part of the crimes on trial,' or where it 'furnishes part of the context of the crime.'" *Mark*, 943 F.2d 444, 448 (4th Cir. 1991) (internal citations omitted). *See also id.* (evidence that tends to prove the defendant's "knowledge and intent" ordinarily is "necessary" within the meaning of Rule 404(b)); *United States v. Echeverri-Jaramillo*, 777 F.2d 933, 936 (4th Cir. 1985) (same); *Hadaway*, 681 F.2d at 218 (same).[1] "Reliability" only requires proof of the identified acts by a preponderance of the evidence. *See Huddleston v. United States*, 485 U.S. 681 (1988). Finally, the fact that evidence may be prejudicial to the defendant does not require its exclusion. "The prejudice which the rule is designed to prevent is jury emotionalism or irrationality." *United States v. Greenwood,* 796 F.2d 49, 53 (4th Cir. 1986) (referencing *United States v. Masters,* 622 F.2d 83, 87 (4th Cir. 1980)).

B. Other Instances of the Defendant's Unauthorized Possession of Firearms, and False Statements Made by the Defendant in Connection Thereto, Are Admissible Under Federal Rule of Evidence 404(b) to Establish Knowledge, Intent and Lack of Mistake or Accident.

Evidence that the defendant possessed firearms contrary to established regulations and absent proper authorization on two prior occasions separate and apart from those charged in the indictment shows that the defendant had knowledge of laws and regulations limiting the handling and movement of firearms in a military setting. Such evidence also establishes that the defendant had the requisite and necessary intent to commit the crime with which he presently is charged. The fact that the defendant subsequently made false statement regarding his unauthorized

[1] As the *Mark* Court put it, only when the already existing evidence concerning intent and knowledge is "so strong" as to be "unassailable" is 404(b) evidence on such matters "unnecessary." *Id.* at 448.

possession of weapons also is admissible to prove fraudulent intent.

In a prosecution for a violation of attempted smuggling of contraband (18 U.S.C. § 545), the Government must establish, among other things, that the defendant possessed the requisite knowledge and willful intent to smuggle weapons out of Iraq and into the United States in violation of customs-related laws and regulations.[2] *See United States v. Hassanzadeh*, 271 F.3d 574, 578 (4th Cir. 2001) (knowledge is an element of 18 U.S.C. § 545 and prior conviction for unlawful importation of same merchandise is reliable, relevant and necessary to establish such knowledge). Here, in order to establish that the defendant had the knowledge and intent to act criminally rather than for some allegedly legitimate or benevolent purpose, introduction of the defendant's other extrinsic acts involving improper possession of weapons is relevant and necessary.

The defendant's plea of not guilty also "puts one's intent at issue and thereby makes relevant evidence of similar prior crimes when that evidence proves criminal intent." *United States v. Sanchez,* 118 F.3d 192, 196 (4th Cir. 1997) (evidence of defendant's other drug deals with co-conspirator and cocaine found near the defendant at the time of arrest relevant to knowledge and admissible to prove defendant's intent). If the defendant has committed similar acts, "there can be little doubt that they are both relevant and necessary to the government's effort to demonstrate that [the defendant] had the necessary specific intent" for crimes charged in the instant matter. *United States v. McLamb,*985 F.2d 1284, 1289-90 (4th Cir. 1993) (evidence of

[2] Count Two of the Indictment (Attempted Smuggling into the United States of Non-Invoiced Merchandise) charges that the defendants "knowingly and willfully, with intent to defraud the United States, attempted to smuggle and clandestinely introduce into the United States merchandise which should have been invoiced, that is eight machine guns and one semi-automatic pistol" in violation of 18 U.S.C. §§ 545 and 2.

three extrinsic purchases exceeding amounts for which requisite transaction returns were not filed admissible to establish defendant's intent for the commission of structuring and money laundering offenses).

For the reasons enumerated above, the government seeks to admit two extrinsic acts wherein the defendant unlawfully possessed and handled weapons and, in one instance, made false statements in connection thereto.

1. **Subsequent Seizure of Weapons from the Defendant's Housing Unit, and Defendant's False Statements Made in Connection Thereto, Are Relevant and Necessary to Establish Defendant's Knowledge and Intent to Secrete and Smuggle, Rather than Return, Weapons He Unlawfully Possessed and to Prove Lack of Mistake or Accident.**

In order to establish knowledge and intent, the government seeks to admit evidence related to seizure of weapons, ammunition and other items from the defendant's housing unit six months after he attempted to smuggle weapons charged in the instant indictment. Following the February 28, 2008 seizure of weapons the defendant sought to smuggle into the United States, the defendant left Iraq and only officially resigned from SOSI in early May 2008. The defendant, thereafter, returned to Iraq in or around mid-June 2008. Prior to his return to Iraq, the defendant sent e-mails to colleagues in Iraq discussing semi-automatic weapons, pistols, and machine guns he intended to retrieve upon his return to Iraq. On August 12, 2008, a military magistrate issued a search warrant allowing search of the defendant's housing unit pursuant to law enforcement's continuing investigation of weapons smuggling by the defendant and possibly others. Following execution of that warrant, automatic and semi-automatic weapons and parts, ammunition and magazines, narcotic and other medications, and needles and syringes were recovered from the defendant's housing unit. At the time of the August 12, 2008 seizure, the defendant did not

possess proper authorization to possess the weapons, ammunition and other firearm accessories seized from his housing unit.

Moreover, to the extent that the defendant attempts to argue that in possessing unauthorized machine guns in February 2008 he was simply attempting to surrender them to proper authorities (an argument that he has signaled to the government that he might make), evidence that the defendant again possessed in his contractor residence in Iraq in August 2008 another set of illegal weapons is relevant and necessary to help refute this claim. This evidence therefore is relevant to prove lack of mistake or accident regarding the defendant's unlawful possession of virtually identical weapons in February 2008.

The defendant, moreover, transferred the weapons he sought to smuggle in February 2008 to two employees under his supervision, and the weapons were recovered from one such employee. The fact that the defendant knowingly and improperly possessed virtually identical weapons soon after the commission of the crime with which he is charged is relevant and necessary to establish that the defendant had the requisite criminal intent, the means, and the knowledge to procure, transfer and smuggle weapons on a prior occasion. The "high degree of similarity between prior acts and the act with which [the defendant] was charged supports the finding that the acts were relevant to intent." *Queen, 132 F.3d at 997.* It is an elementary principle of criminal trial practice that evidence that shows that a defendant knowingly possessed contraband on one occasion is admissible to show that he knowingly possessed contraband of the same sort on another. *See United States v. Cassell*, 292 F.3d 788, 793 (D.C. Cir. 2002) (admitting evidence of prior firearms possession in felon in possession trial).

The fact that the August 12, 2008 seizure of weapons occurred after the February 28, 2008 seizure of weapons relevant to the indictment does not preclude admission pursuant to Federal Rule of Evidence 404(b). *See Hadaway,* 681 F.2d at 217 (subsequent theft-related crimes admissible as relevant and possibly "highly probative of prior intent," and further citing *United States v. DiZenzo,* 500 F.2d 263, 265 (4th Cir. (1974) noting that "it is immaterial whether the instances are found occurring before or after the act charged"); *Sanchez,* 118 F.3d at 196 ("evidence of the prior and *subsequent* drug transactions" admissible to support the government's position that the defendant intentionally engaged in the illegal drug activity charged) (emphasis added). *See also United States v. Albarran,* 829 F.2d 1121, 1122 (4th Cir. 1987, unpublished opinion) (evidence pertaining to uncharged cocaine sale admissible and stating "[s]imilar instances of criminal activity to that charged in the indictment, which occur reasonably current with and in a manner similar to that charged in the indictment, are admissible under the rubric of intent, knowledge, plan, scheme, or design.")

Finally, separate and apart from its admissibility pursuant to Federal Rule of Evidence 404(b), the seizure of weapons from the defendant's housing unit on August 12, 2008 must necessarily be presented to the jury to explain the course of the criminal investigation and the timing and circumstances of the defendant's arrest and subsequent indictment in the United States. *See United States v. Kennedy,* 32 F.3d 876 (4th Cir. 1994) ("'[t]here is no requirement that all the Government's evidence fall within the time period of the indictment, providing it is relevant to the charges.' Rather, evidence of uncharged conduct is not considered 'other crimes' evidence if it 'arose out of the same . . . series of transactions as the charged offense, . . . or if it is necessary to complete the story of the crime (on) trial.'") (internal citations omitted).

2. **Defendant's Prior Arrest, Charge, and Military Reprimand for Carrying a Concealed Weapon and Failure To Obey an Order or Regulation is Admissible to Show Defendant's Knowledge of Rules and Regulations Regarding the Possession and Handling of Weapons in the Military, Intent to Smuggle, and Absence of Mistake or Accident.**

On April 20, 1996, while on active duty with the United States Army, the defendant's car was searched by military investigators and a .32 caliber revolver was found under the driver's seat. The defendant was apprehended and charged by military authorities for carrying a concealed weapon and failure to obey an order or regulation. Although the charges were eventually dropped, the defendant was reprimanded by military commanders and was clearly aware – as early as 1996 – that he was not permitted to possess a weapon in violation of military regulations and to secrete such weapons onto a military base.

The government seeks to admit evidence of defendant's prior unlawful possession of a weapon to establish that the defendant had prior knowledge of military laws and regulations governing the handling of weapons. Additionally, the fact that the defendant attempted to smuggle a weapon onto a military base (i.e., Fort Campbell) on a previous occasion is probative of his intent to smuggle weapons onto another military base (i.e., Fort Bragg) in the instant indictment. "'[I]n cases where a defendant is charged with unlawful possession of something, evidence that he possessed the same or similar things at other times is often quite relevant to his knowledge and intent with regard to the crime charged.'" *United States v. Cassell*, 292 F.3d 788, 793 (D.C. Cir. 2002) (quoting *United States v. King*, 254 F.3d 1098, 1100 (D.C. Cir. 2001)).

Although the prior extrinsic act dates from 1996, the fact that the defendant was arrested, charged and reprimanded for improper possession of weapons is particularly necessary to establish that the defendant's knowledge of rules and regulations relative to the handling of

firearms in the military was long-standing and well-established in the defendant's mind. Additionally, the fact that the defendant was previously arrested, charged and reprimanded for improperly handling firearms is necessary to prove that the defendant's subsequent similar acts were not the result of mistake or accident. *See United States v. Gonzalez*, 183 F.3d 1315, 1328 (11th Cir. 1999) (stating "evidence [of thirteen year-old conviction for unlawful possession of firearm] tended to make it more likely that [the defendant] in fact possessed a gun."), *superceded on other grounds*, *United States v. Diaz*, 248 F.3d 1065 (11th Cir. 2001). *See also United States v. Gomez*, 927 F.2d 1530, 1534 (11th Cir. 1991) ("[i]ntroduction of a prior conviction for carrying a concealed weapon helped the government establish that [defendant] was aware of the dangers of and law relating to concealed weapons and to rebut [defendant's] claim that the gun was for an innocent purpose and its presence was mere accident or coincidence").

C. Evidence Concerning the Defendant's Prescription and Narcotic Drug Procurement, and His Attempts at Smuggling this Contraband, is Admissible Under Federal Rule of Evidence 404(b) to Establish Intent and Knowledge and to Explain the Nature of Defendants' Relationship in the Instant Conspiracy.

Evidence of the defendant's unauthorized procurement and possession of narcotic prescription medication and other drugs is probative of defendant's intent and knowledge to utilize fraud and illicit means to smuggle contraband. Additionally, evidence of the defendant's prior agreement with co-defendant Michael Henson to secrete and transport "foot powder" and narcotic medications, their affirmative steps taken in that regard, and their methods to hide the fact and nature of their conspiracy, helps establish the defendants' prior relationship, *modus operandi*, agreement, knowledge and intent to smuggle contraband.

1. Evidence Relating to Defendant's Unauthorized Procurement and Possession of Narcotic Medications is Probative of Defendant's Prior Knowledge of Means and Intent to Defraud the U.S. Government in Order to Obtain Contraband.

The government seeks to introduce evidence that the defendant possessed and made repeated efforts to illicitly procure narcotic pain killers for which the defendant did not have valid prescribing authority for personal use or authorization to procure pursuant to his duties as a Department of Defense contractor.

The evidence that the government seeks permission to introduce includes defendant's e-mails to on-line pharmacies in North America, to co-defendant Michael Henson, and to others indicating or directly discussing defendant's plans and/or attempts to unlawfully procure and smuggle narcotic medications within and into Iraq. The government also intends to introduce evidence that, in addition to firearms for which the defendant did not have proper weapons authorization, narcotic medications for which the defendant did not have valid prescriptions also were recovered from his housing unit on August 12, 2009. Finally, the government also seeks to introduce defendant's military medical records relevant to his period as a Department of Defense contractor in Iraq that document defendant's repeated attempts to procure a myriad of narcotic drugs by "clinic shopping."[3] All such evidence is admissible given the charges in this case.

[3] It should be noted that the defendant, at various times, possessed valid prescriptions for narcotic pain killers allegedly to address joint pain. However, evidence the government seeks to introduce establishes that the defendant went to great lengths to procure and smuggle narcotic medications in greater quantities than his prescription allowed and that he sought such drugs from multiple sources simultaneously. Defendant's military medical records, moreover, were obtained pursuant to a search and seizure warrant issued by a military magistrate in Iraq. Prior to the records' introduction in court, the government will redact any and all personal and medical information not relevant to defendant's illicit use and/or procurement of narcotic medications and related information.

The instant indictment charges the defendant with conspiracy and attempt to *knowingly* and *intentionally defraud* the United States in order to *smuggle* and *clandestinely introduce* non-invoiced merchandise into the United States. The fact that the merchandise at issue is firearms rather than narcotic medications does not preclude admission of the above-described extrinsic acts. *See Hadaway,* 681 F.3d at 217 (evidence of participation in theft of other types of merchandise approximately eighteen months after the crime charged held admissible.) First, the defendant's illicit procurement of narcotic medications and unlawful movement of firearms is probative of his intent to smuggle contraband. *See Van Metre,* 150 F.3d at 350 (for earlier acts to have probative value, those acts must be similar in nature to the charged acts; "this similarity may be proved 'through physical similarity of the acts *or through the defendant's indulging himself in the same state of mind* in the perpetration of both the extrinsic offense and the charged offense.") (internal citations omitted and emphasis added). Secondly, the defendant's knowledge and manipulation of military avenues through which to transport contraband into and out of Iraq is probative of defendant's knowledge of military methods to smuggle firearms. *See Sanchez,* 118 F.3d at 194 (prior dealings with co-conspirator proved intent and defendant's knowledge of drug trade, and cocaine found near the defendant relevant to his knowledge of the drug trade and the mechanics of his distribution scheme). Finally, the period during which the defendant illicitly procured narcotics is contemporaneous with the time period he sought to smuggle firearms, and it thereby is particularly relevant and probative of intent to defraud and knowledge of the means through which to do so.

As case law cited above supports, such evidence is admissible pursuant to Federal Rule of Evidence 404(b) to illustrate defendant's knowledge and intent to smuggle contraband into and

out of Iraq. The fact that the defendants conspired to smuggle contraband using U.S. military channels with which they had particular and specialized knowledge makes it all the more relevant and necessary to prove that the defendants possessed the requisite means and *mens rea.* Additionally, the above-described evidence of defendants' attempts to smuggle contraband is contemporaneous with the period relevant to the instant indictment, i.e., 2007 and 2008, when the defendants were both employed as Department of Defense contractors.

The fact that the defendants are charged with smuggling firearms – rather than narcotic medication and other materials – in the instant indictment does not preclude admission of their prior attempts to smuggle contraband and to defraud the United States. The fact that the defendants engaged in prior smuggling and fraudulent schemes – almost always by abusing their military and government affiliation – is sufficiently similar to the circumstances of the smuggling and fraud charges contained in the instant indictment to warrant admission of such extrinsic act evidence.

2. Defendant's and Co-Defendant's Attempts to Smuggle Illicit Narcotics into Iraq are Admissible to Establish the Conspiratorial Relationship of the Defendants and Support the Government's Evidence of the Existence of the Instant Conspiracy.

As set forth above, the government seeks to introduce e-mails and other evidence of defendants' plans and attempts to procure narcotic medications without proper medical or other authorization and their illicit shipment of packages containing "quite a bit of foot powder" and seeming narcotic medications from the United States and Europe to Iraq. The defendants' agreement and plans to smuggle such items involved, in part, use of return addresses "pulled out of the phone book" and military APO addresses.

Under the "inclusionary" approach to 404(b) in this Circuit, evidence of other, similar bad acts may be admitted to explain to the jury how the relationship between defendants and cooperating witnesses developed, and to demonstrate the context of certain events relevant to the charged offense. *See Sanchez,* 118 F.3d at 195 (the Fourth Circuit has "made clear that 404(b)'s specific list of acceptable grounds for admission of evidence is not exhaustive.") *See also Queen,* 132 F.3d at 994-95, 995 n. 3 (the list of admissible prior acts enumerated in Federal Rule of Evidence 404(b) is not exhaustive, and "this circuit has found prior act evidence admissible for a wide range of reasons unrelated to character").

Indeed, the Fourth Circuit has upheld admission of other acts evidence that is similar to the charged crime in order to show the basis of an alleged co-conspirator's trust in the defendant, as relevant background information to explain the relationship among alleged co-conspirators, and to aid the jury's understanding of how a transaction for which the defendant was charged came about and the defendant's role therein. *See United States v. Boyd*, 53 F.3d 631, 437 (4th Cir. 1995), *cert. denied*, 116 S.Ct. 322 (1995) (evidence of defendant's personal drug use in front of co-conspirator admissible as relevant to show the close nature of defendant's relationship with, and established level of trust in, co-conspirator, which is thereby probative of the likelihood that the defendant and other party were, in fact, co-conspirators); *United States v. McMillon*, 14 F.3d 948, 955 (4th Cir. 1994) (upholding admission of other acts evidence as helpful "to explain to the jury how the illegal relationship between participants in the crime developed").

In *McMillon*, witness testimony of persons who acted in various capacities within a drug ring operated by the defendant was admissible and "helpful in providing the jury with an understanding of how the" witnesses knew the defendant, "and how it came about that they were

trusted brokers or other participants in" the defendant's illegal dealings. *Id.* at 955. Similarly, in the instant matter, evidence of Houston's and Henson's prior attempts to illicitly procure and smuggle narcotics and other substances and their prior collusion to "establish a cover story" and "plan strategy" to defraud others is admissible to explain the close nature of the defendants' relationship and how the illegal relationship between the defendants' developed in relation to the unlawful smuggling venture charged in the indictment.

Moreover, the government seeks to introduce a series of e-mails dating from late 2007 through 2008 between defendants Houston and Henson wherein the defendants discuss the need to coordinate stories regarding investigations of their improper and illegal narcotics procurement, smuggling, and possession, as well as other investigations involving allegations of their financial and other improprieties in Iraq. These e-mails include discussions of their joint efforts to establish "a cover story" regarding Houston's concealment of unauthorized medication at SOSI's offices in Iraq; and "planning strategy" to impugn other SOSI employees that, in turn, accused either or both defendants of improper or illegal behavior, including fiscal malfeasance.

This evidence further establishes the close conspiratorial relationship between the two defendants, and their intent to use obfuscation and deceit to further the object of both the charged and uncharged conspiracies – to smuggle contraband across international borders.

D. The Probative Value of the Other Crimes Evidence Far Outweighs its Prejudicial Value and is Not Subject to Exclusion Under Federal Rule of Evidence 403.

The above-described extrinsic act evidence is not subject to exclusion under Federal Rule of Evidence 403 because its prejudicial effect does not outweigh its probative value. The

evidence the government seeks to introduce is relevant, necessary and reliable without being inflammatory.

By its terms, Federal Rule of Evidence 403 is designed to exclude otherwise admissible evidence in limited circumstances. The rule only operates where the "probative value" of the evidence "is *substantially* outweighed by the danger of unfair prejudice, confusion of the issues, or the misleading of the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403 (emphasis added). To be "unfairly prejudicial," the evidence must be of such character that it results in "an undue tendency to suggest a decision on an improper basis." *See* Advisory Committee Notes to 1972 Amendments. Put another way, there must be a genuine risk that the challenged testimony will lead the jury to act irrationally, and this risk must be disproportionate when compared against the probative value of the evidence. *See Morgan v. Foretich*, 846 F.2d 941, 945 (4th Cir. 1988). Federal courts have repeatedly explained that there is *no* unfair prejudice to the defendant where the proffered 404(b) evidence involves another crime of similar (rather than a more sensational or disturbing) nature. *See Boyd*, 53 F.3d at 637 (4th Cir. 1995) ("In this case, the balancing test undeniably weighs in favor of admitting the evidence, because the evidence of [the defendant's] personal use of marijuana and cocaine did not involve conduct any more sensational or disturbing than the crimes with which he was charged."); *United States v. Powers*, 59 F.3d 1460 (4th Cir. 1995) (evidence that defendant repeatedly raped his daughter was not unduly prejudicial and was therefore admissible in prosecution for aggravated sexual abuse of minor; evidence was highly probative and judge gave appropriate limiting instruction); *Van Metre,* 150 F.3d at 351 ("there is no unfair prejudice under Rule 403 when the extrinsic act is no more sensational or disturbing

tha[n] the crimes with which the defendant was charged;" admission of evidence concerning the defendant's prior abduction and rape of a victim was "no more disturbing than the circumstances of . . . kidnapping and murder" at issue in the instant case) (referencing *United States v. Boyd,* 53 F.3d at 637)).

This principle applies here. The extrinsic acts the government seeks to introduce are confined to events similar in time and character to those charged in the instant indictment. The government's 404(b) evidence would be offered here for the limited – and very legitimate – purpose of showing knowledge, intent, and lack of mistake or accident. This is precisely the sort of other act evidence commonly admitted by federal courts. *See supra* at 5-16 (citing cases in which evidence of extrinsic acts was allowed at trial). That admission of such extrinsic act evidence would necessarily damage the defendant's defense is of no moment. "Relevant evidence is inherently prejudicial . . . . To the extent that the defendant perceives Rule 403 as a tool designed 'to permit the court to "even out" the weight of the evidence, to mitigate a crime, or to make a contest where there is little or none,' he is mistaken." *United States v. Bradley*, 145 F.3d 889, 893 (7th Cir. 1998) (internal citations omitted).

Furthermore, introduction of the government's extrinsic act evidence will not cause undue delay. The government can and will introduce evidence concerning the other acts through limited testimony and documents presented by a handful of witnesses, most of whom will already be testifying about the charged conduct.

Finally, the risk of jury confusion is not substantial here. There is no reason to believe that this additional evidence will create an undue risk that the jury will be side-tracked. In fact, introduction of the identified evidence will likely reduce the possibility of jury confusion: this

evidence is being offered to shed light on crucial issues regarding the defendant's mental state, his knowledge of the means to smuggle contraband in a particular area (Iraq), and during a specific time period (2007 and 2008). Federal Rule of Evidence 403 therefore presents no bar to admission of the government's 404(b) evidence.

CONCLUSION

For the reasons stated, the United States respectfully requests that the Court permit the government to introduce the identified extrinsic evidence in its case-in-chief.

Respectfully submitted,

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Date: January 28, 2010

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by First Class postage pre-paid mail on January 29, 2010 to:

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