UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,

vs. **Case No. 11-20583-CR (Seitz)**

JOSE M. NOA,

Defendant.
_____/

RESPONSE TO GOVERNMENT NOTICE AND PROFFER OF EVIDENCE OF OTHER CRIMES,WRONGS, OR ACTS

Defendant Jose Noa, through undersigned counsel, hereby responds to the government´s notice and proffer of evidence of other crimes, wrongs or acts under Rule 404(b), Fed.R.Evid. The government seeks to introduce evidence of three prior cocaine convictions in state court that even include a judicial adjudication that Noa is a "*habitual felony offender*." Doc. 162-1 at pp.17, 19 (Case No. F99-037101). The prosecution transparently offers inflammatory evidence to underscore predisposition fully advised that the defense has removed the issues of intent and knowledge from the case. Noa ***concedes*** both his intent to distribute a controlled substance, albeit marijuana, and his knowledge of the conspiracy to distribute marijuana. Noa contests only the drug type and the amount. Therefore, Noa submits that his prior state convictions are inadmissible under Rule 404(b), which precludes the admission of such propensity evidence at trial whenever its probative value is substantially outweighed by its prejudicial effect.

MEMORANDUM OF LAW

While "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character," Rule 404(b)(1), such "evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Rule 404(b)(2).

The Eleventh Circuit applies a three-part test to determine whether a trial court abuses its discretion by admitting evidence of prior bad acts under Rule 404(b): "First, the evidence must be relevant to an issue other than the defendant's character. Second, as part of the relevance analysis, there must be sufficient proof so that a jury could find that the defendant committed the extrinsic act." *United States v. Miller*, 959 F.2d 1535, 1538 (11th Cir.1992) (*en banc*); *see also United States v. Beechum*, 582 F.2d 898, 901 n.1 (5th Cir.1978) (*en banc*). Third, the probative value of the evidence must not be "substantially outweighed by its undue prejudice, and the evidence must meet the other requirements of Rule 403." *Miller*, 959 F.2d at 1538. Prior convictions satisfy the second part of the test. However, the government fails to satisfy the first and third prongs of the "*Miller* test" given that Noa has clearly removed both intent and knowledge from the issues at trial. Only drug type and amount are in dispute.

THE PRIOR STATE CONVICTIONS ARE NOT ADMISSIBLE

Any relevant "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed.R.Evid. 403.

The extrinsic evidence depicting Noa as a "habitual felony offender" is of the kind that would inflame the jurors´ senses. Exclusion is required when there is a genuine risk that the emotions of the jury may be provoked to irrational behavior, and the risk is disproportionate to the probity of the proffered evidence. The Rule 403 calculus leads to the conclusion that the probative value of the prior convictions is substantially outweighed by the danger of unfair prejudice here because "conspiratorial intent" is admitted. Given these defense concessions, the argument that the evidence of the prior convictions is "central" to the government´s case strains credulity. "***If the defendant's intent is not contested***, then the incremental probative value of the extrinsic offense is inconsequential when compared to its prejudice; therefore, in this circumstance, ***the evidence is uniformly excluded***." *Beechum* at 914 (emphasis added). The convictions must be excluded because the defendant´s intent and knowledge are not contested issues as Noa has affirmatively taken the issues of intent to distribute a controlled substance and knowledge of the conspiracy out of the case.

See United States v. Delgado, 56 F.3d 1357, 1365 (11th Cir. 1995) ("A defendant who enters a not guilty plea makes intent a material issue, imposing a substantial burden on the government to prove intent; the government may meet this burden with qualifying 404(b) evidence ***absent affirmative steps by the defendant to remove intent as an issue***.") (emphasis added); *see also United States v. Cardenas*, 895 F.2d 1338, 1342 (11th Cir. 1990) ("One factor to consider in determining whether the evidence of prior acts is admissible to prove intent is whether it appeared at the commencement of trial that intent would be a contested issue."). Inasmuch as Noa has clearly indicated that conspiratorial intent will ***not*** be a contested issue at the trial of this single-count conspiracy indictment, the government has no need to present Noa´s prior convictions to prove intent. ***The prior convictions cannot be used to show involvement with cocaine***. *See United States v. Figueroa*, 618 F.2d 934, 940-41 (2d Cir. 1980) (it was error to admit prior conviction where counsel had removed issue of intent from the case; "[e]vidence of similar acts or crimes is relevant to the issue of intent, *not to the issue of the nature of the substance*") (emphasis added).

The government´s cases are misapplied here because intent was at issue in each instance. *See United States v. Calderon*, 127 F.3d 1314, 1330 (11th Cir.1997) ("the trial judge admitted the evidence for the limited purpose of establishing ... intent ... which he found had been put in issue by

[the defendant's] not guilty plea and by his defense that he was merely present at the scene of the drug activity in order to give his brother ... a ride."); *see also United States v. Lampley*, 68 F.3d 1296 (11th Cir. 1995) (defendant presented a "mere presence" defense placing intent at issue); *United States v. Pollock*, 926 F.2d 1044 (11th Cir.1991) (defendant claimed he lacked knowledge that there was any cocaine inside rented car and the evidence of conspiratorial intent was limited); *United States v. Cardenas*, 895 F.2d 1338, 1342-44 & nn.3-4 (11th Cir.1990) (holding that extrinsic offense evidence was admissible to prove intent where "the prosecutor stated that she anticipated [the defendant] would deny his intent to be involved in the charged offense" and "defense counsel did not even mention that he would refrain from contesting the intent issue").

Although the defense concession as to conspiratorial intent in this one-count conspiracy case requires exclusion of all the prior convictions, "[t]he judge should also consider how much time separates the extrinsic and charged offenses: temporal remoteness depreciates the probity of the extrinsic offense." *Beechum*, 582 F.2d at 915. The government wishes to introduce a cocaine trafficking conviction involving a 1994 traffic stop that resulted in the seizure of *one kilogram of cocaine* from the vehicle where Noa was a passenger. The contraband was found under the driver´s seat. *See* Doc. 162-1 at pp.10-11 (Case No.F94-9116A).

Aside from the ancient Florida conviction stemming from the early 1994 traffic stop, the government also wants to "pollute the waters" with a 1999 case involving the possession of cocaine and cannabis (marijuana) convicted under a second degree felony statute reserved for small quantities that still resulted in Noa being adjudicated a "*habitual felony offender*." *See* Doc. 162-1 at pp.17, 19 (Case No. F99-037101); *id*. at p.23 (police report not specifying cocaine or cannabis quantities). Therefore, two of the three prior state convictions are ***too remote*** in time, ***too dissimilar*** from the charged conspiracy exposed by a federal wiretap, and ***too inflammatory*** given the "habitual felony offender" adjudication, for the district court to admit these "priors" as extrinsic evidence where the intent to distribute a controlled substance and knowledge of the conspiracy is admitted by the defendant. *See United States v. Mejia-Uribe*, 75 F.3d 395 (8th Cir.1996) (prior conviction of conspiracy to possess cocaine with intent to distribute, which involved single sale more than 15 years earlier, was not admissible as "other crimes" evidence to show knowledge and intent in prosecution for possession with intent to distribute and conspiracy to distribute cocaine involving ongoing, large-scale operation; conviction was too remote in time, was insufficiently similar, and was more prejudicial than probative in light of other available evidence as to defendant's knowledge and intent). The 2009 case involving mere ounces of cocaine must also be excluded.

Introduction of Noa´s prior convictions would only serve to suggest that defendant has a "habitual" propensity to commit cocaine-related offenses. In this conspiracy case, where conspiratorial intent and knowledge of the conspiracy is admitted, none of the prior convictions are admissible as they only tend to suggest criminal predisposition. *See United States v. Avarello*, 592 F.2d 1339, 1346 (5th Cir. 1979) ("danger inherent in evidence of prior convictions is that juries may convict a defendant because he is a 'bad man' rather than because evidence of the crime of which he is charged has proved him guilty.") (citations omitted).

The Court must balance the probative value of the proffered evidence against its prejudicial impact. Because the prior convictions are ostensibly offered to prove knowledge and intent, issues that Noa has conceded and removed from the case, the probative value of the prior convictions is substantially outweighed by the unfair prejudice their admission would cause to a defense that only disputes the drug type and quantity involved. *Cf., United States v. Kindred*, 931 F.2d 609 (trial court abused discretion in prosecution for possession of unregistered firearm by admitting defendant´s 11-year old conviction for failing to register handgun as prior conviction was offered to prove something that was not a material element of offense). If admitted during the government´s case-in-chief, the "priors" will inject reversible error into the trial record. The court must exclude the extrinsic.

CONCLUSION

For all of the foregoing reasons, the trial court should not admit the extrinsic evidence establishing any of defendant´s prior drug convictions obtained in state court. *See* Rules 403 and 404(b), Fed.R.Evid.

Respectfully submitted,

LAW OFFICES OF STEPHEN H. ROSEN, P.A.
100 Almeria Avenue, Suite 205
Coral Gables, Florida 33134
Ph: (305) 448-9900
Fax: (305) 448-9337

s/Stephen H. Rosen
STEPHEN H. ROSEN
Counsel for Defendant
Florida Bar No. 154144
E-MAIL: ATTNYROSEN@AOL.COM

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 23, 2012, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

s/Stephen H. Rosen
STEPHEN H. ROSEN