

**404(B) EVIDENCE AS  
A SWORD AND A SHIELD\***

**Defending a Federal Criminal Case**

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## **I. THE RULE: EVIDENCE OF CHARACTER IS GENERALLY NOT ADMISSIBLE TO PROVE CONDUCT UNLESS OFFERED BY THE ACCUSED OR TO PROVE SOMETHING ELSE.**

Federal Rule of Evidence 404. Character evidence not Admissible to prove Conduct; Exceptions; Other Crimes

**(a) Character evidence generally.** Evidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

**(1) Character of accused.** In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution.

**(2) Character of alleged victim.** In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor.

**(3) Character of witness.** Evidence of the character of a witness, as provided in rules 607, 608, and 609.

**(b) Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case 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.

## **II. IS CHARACTER RELEVANT?**

Character evidence is generally excluded not because it is irrelevant but because it may be unduly prejudicial. Thus, courts “almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant’s evil character to establish a probability of guilt.” Michelson v. United States, 335 U.S. 469, 475 (1948). This principle is embodied in Rule 404(b)’s prohibition on proof of character to “show action in conformity therewith.” As the Supreme Court explained:

The [character] inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.

Michelson, 335 U.S. at 475-76 (citations omitted). See also Old Chief v. United States, 519 U.S. 172, 180-82 (1997)(Rule 404(b) reflects common law exclusion of propensity evidence).

#### **A. Bad Character**

In spite of the prohibition on bad character evidence, some prosecutors just don't get it. For example, in United States v. Brown, 327 F.3d 867 (9th Cir. 2003), the Ninth Circuit reversed where a prosecutor argued that if a person "is willing to cheat a little bit over here, wouldn't he be willing to cheat just a little bit over here?" Id. at 872. Prosecutors may also try to present evidence of a third party's bad character in the hope that the jury will infer the defendant's evil doings from those of his associates. See United States v. Roenigk, 810 F.2d 809, 816 (8th Cir. 1987).

#### **B. Good Character**

The same common law tradition recognizes that a person may defend a case on the ground that a person of good character would not have committed such an offense. The Supreme Court has held that evidence of good character may, in some circumstances, "be enough to raise a reasonable doubt of guilt and that in the federal courts a jury in a proper case should be so instructed." Michelson, 335 U.S. at 476 & n. 11 (citing Edgington v. United States, 164 U.S. 361 (1896); Wigmore, Evidence (3d ed. 1940) § 56; Underhill, Criminal Evidence (4th ed. 1935) § 165; 1 Wharton, Criminal Evidence (11th ed. 1935) §§ 330, 336). A defendant has a right to present evidence of good character in his defense. See United States v. John, 309 F.3d 298, 303-04 (5th Cir. 2002); United States v. Han, 230 F.3d 560, 563-64 (2d Cir. 2000) (harmless); United States v. Darland, 626 F.2d 1235, 1237 (5th Cir. 1980). For example, in John, a defendant charged with unlawful sexual contact with a minor presented evidence from his wife and friends that he had a good marriage, was a good step-parent and had no history of sexual misconduct. The Fifth Circuit held that the failure to give an instruction that such evidence was a defense was reversible error. John, 309 F.3d at 303-04.

Consistent with the common law tradition, Federal Rule of Evidence 404(a) permits a defendant in a criminal case to present evidence of a "pertinent" character trait. Character for being law abiding and honest is "always pertinent." In re Sealed Case, 352 F.3d 409, 412 (D.C. Cir. 2003). On the other hand, being a nice guy may not be pertinent to whether a person is an alien smuggler. United States v. Santana-Camacho, 931 F.2d 966, 967-68 (1st Cir. 1991).

A defendant may prove character by reputation or opinion but not by specific acts, Fed. R. Evid. 405(a), unless the character trait is an element of the offense or defense. Fed. R. Evid 405(b). As discussed *infra*, cross-examination on "relevant" specific conduct is permitted. Fed. R. Evid. 405(b).

A defendant who presents good character evidence is generally entitled to an instruction that such evidence may itself create a reasonable doubt. Edgington v. United States, 164 U.S. 361 (1896). Such an instruction should remind the jurors that the burden of proof remains on the

prosecution. There is some disagreement among the circuits over whether a court must instruct the jury that good character “standing alone” is sufficient to create a reasonable doubt. See Spangler v. United States, 487 U.S. 1224, 1224 (1988) (White, J. dissenting from denial of certiorari). The Fifth Circuit has a useful example of an appropriate character instruction:

Where a defendant has offered evidence of good general reputation for truth and veracity, or honesty and integrity, or as a law-abiding citizen, you should consider such evidence along with all the other evidence in the case.

Evidence of a defendant’s reputation, inconsistent with those traits of character ordinarily involved in the commission of the crime charged, may give rise to a reasonable doubt, since you may think it improbable that a person of good character in respect to those traits would commit such a crime.

You will always bear in mind, however, that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Fifth Circuit Pattern Jury Instructions No. 1.09 (West, 2001); United States v. Callahan, 588 F.2d 1078, 1085-86 (5th Cir. 1979). The prosecutor should not be permitted to argue that good character is no excuse, thereby suggesting to the jury that the defense asks them to let a guilty man go free. See United States v. Lange, 528 F.2d 1280, 1287 (5th Cir. 1976); United States v. Harris, 533 F.2d 306, 307 (5th Cir. 1970).

### **C. Rebuttal**

Once a defendant puts her character in issue, the prosecutor is entitled to present rebuttal, Fed. R. Evid. 404(a)(1), either in the form of opinion or reputation evidence. Fed. R. Evid. 405(a). On the other hand, while a defendant’s presentation of character testimony opens the door to rebuttal, such rebuttal must be limited to the character traits at issue in the trial. United States v. Wilson, 244 F.3d 1208, 1217 (10th Cir. 2001); United States v. Nixon, 777 F.2d 958, 970 (5th Cir. 1985). In Wilson, the appellate court questioned whether there is any character trait essential for drug crimes and held that cross-examination concerning the defendant’s use or sale of drugs was barred under Rule 404(b). 244 F.3d at 1217. Even testimony that a defendant is law-abiding does not open the door to cross-examination about irrelevant character traits. See e.g. Salgado v. United States, 278 F.2d 830, 833 (1st Cir. 1960) (testimony that defendant was law abiding does not authorize questioning about hot checks and homosexuality in a drug trial); Aaron v. United States, 397 F.2d 584 (5th Cir. 1968) (testimony that defendant had good reputation for honesty did not open door to questions about affair with coworker in embezzlement trial).

The prosecutor can also cross-examine the defendant’s character witnesses on “relevant” specific instances of conduct. Fed. R. Evid. 405(b). The idea is that a character witness should be familiar with both the good and bad information about the defendant so this cross-examination is designed to test the witness’s expertise. It is, however, a bizarre and potentially highly prejudicial line of inquiry, exposing the jury to rumor and innuendo. See Michelson, 335 U.S. at 480. Therefore, trial courts have a “heavy responsibility” “to protect the practice from misuse.” Id. at 480-81. The examiner must have a good faith basis for the question, i.e. he must target an actual

event. Id. The court may well decide to exclude remote incidents that the defendant may have lived down. Id. at 484. In United States v. Mondelerne, 77 F.3d 1086 (8th Cir. 1996), the Eighth Circuit disapproved questions about the defendant's perjury before a grand jury, noting that this conduct would not normally be common knowledge in the community because grand jury proceedings are secret. Id. at 1098. Finally, the court should instruct the jury not to consider this line of questioning as evidence that the defendant actually did the foul deed. Michelson, 335 U.S. at 484-85.

The prosecutor cannot ask hypotheticals that assume the defendant's guilt. For example, the prosecutor cannot ask if the witness's opinion would change if he knew the defendant had committed the charged offense. See e.g. United States v. Shwayder, 312 F.3d 1109, 1120 (9th Cir. 2002) (not plain error). Such questions undermine the presumption of innocence and therefore violate due process. Id. at 1120 (citing United States v. Mason, 993 F.2d 406, 408-09 (4th Cir. 1993)); see also United States v. Guzman, 167 F.3d 1350, 1352 (11th Cir. 1999); United States v. Williams, 738 F.2d 172, 177 (7th Cir. 1984); United States v. Candelaria-Gonzalez, 547 F.2d 291, 294 (5th Cir. 1977).

### III. OTHER CRIMES, WRONGS, AND ACTS

#### A. Procedure

Evidence of other bad acts by the defendant is not admissible to prove that he acted in conformity therewith. It may, however, be admissible for other purposes. Fed. R. Evid. 404(b). Though couched as a rule of exclusion, courts generally treat the rule as favoring admissibility if the evidence proves one of the listed purposes. See e.g. United States v. Beechum, 582 F.2d 898, 910 n.13 (5th Cir. 1978) (en banc).

First, if requested by the accused, the prosecution must give "reasonable notice in advance of trial," or show good cause for the failure to do so. Fed. R. Evid. 404(b). The government should not be permitted to offer a laundry list of permissible purposes but must identify which purpose is addressed by the proffered evidence. See United States v. Fortenberry, 860 F.2d 628, 632 (5th Cir. 1988). See also United States v. Davis, 547 F.3d 520, 526 (6th Cir. 2008); United States v. Anderson, 933 F.2d 1261, 1272 (5th Cir. 1991).

In Huddleston v. United States, 485 U.S. 681 (1988), the Supreme Court set forth the basic procedure to be followed by the trial court in deciding whether to admit evidence of extrinsic acts:

- 1) the evidence must be offered for a proper purpose;
- 2) the evidence must meet the conditional relevance standard set forth in Federal Rule of Evidence 104(b), i.e., the jury could reasonably find that the defendant committed the extrinsic act;
- 3) the court must determine under Rule 403 whether the probative value of the evidence is substantially outweighed by its potential for unfair prejudice, and
- 4) the court should, upon request, instruct the jury that the evidence should be considered only for the proper purpose for which it was admitted.

485 U.S. at 691-92. Long before Huddleston, the Fifth Circuit adopted a similar procedure. Beechum, 582 F.2d at 911. The proponent must first demonstrate that the evidence is relevant,

which includes proof that the defendant committed the extrinsic offense. Id. at 911-12. Second, the court must determine whether the “incremental probative value is substantially outweighed by the danger of undue prejudice.” Id. at 913-14. The court should also give a limiting instruction to the jury. Id. at 917. Upon request, the trial court must conduct the Rule 403 balancing on the record. United States v. Zabaneh, 837 F.2d 1249, 1262 (5th Cir. 1988); United States v. Robinson, 700 F.2d 205, 213 (5th Cir. 1983).

The Fifth Circuit emphasized in Beechum that the extrinsic act evidence must be relevant to an issue raised in the case. 582 F.2d at 911. If offered to prove intent, the relevance of extrinsic evidence “is a function of its similarity to the offense charged,” in other words, the intent must be the same or similar. Id. The Fifth Circuit carefully explained, however, that the nature of the evidence depends on the purpose for which it is offered. If offered to show motive, there might not be any similarity at all. For example, the prosecution might establish that a defendant is in desperate financial straits as a motive for robbery. Beechum, 582 F.2d at 912 n. 15. On the other hand, if offered to establish identity, similarity is crucial. The conduct must be so unique that “it marks the offenses as the handiwork of the accused.” Id. In Beechum itself, the Fifth Circuit held that the evidence of the defendant’s possession of other stolen goods along with the charged materials was admissible. 582 F.2d at 916-17.

In some instances, the prosecution may have no need of the evidence because the issue is not in dispute. In Old Chief v United States, 519 U.S. 172 (1997), the Supreme Court held that the prosecution had no need to present details concerning the defendant’s prior felony where he had stipulated that he was a convicted felon. 519 U.S. at 186. See also United States v. Spletzer, 53 F.2d 950, 956 (5th Cir. 1976) (escape case). In most instances, however, the courts have held that a stipulation does not preclude the adverse party from presenting its case in “full evidentiary force.” Old Chief, 519 U.S. at 186 (citing Parr v. United States, 255 F.2d 86, 88 (5th Cir. 1958)); see also United States v. Crowder, 141 F.3d 1202, 1207-09 (D.C. Cir. 1998) (en banc). The court can place limits on the details presented concerning the extrinsic offense. See e.g. United States v. Burke, 948 F.2d 23, 26-27 (1st Cir. 1991) (no need to state defendant grabbed child during prior incident).

### **B. Time of the Extrinsic Act**

While there is no presumptive bar on evidence of remote conduct, see e.g. United States v. Walker, 410 F.3d 754, 758-59 (5th Cir. 2005) (admitting sixteen-year-old drug conviction), the timing of the prior incident is a factor to be weighed in determining probative value. See e.g. United States v. Garcia, 291 F.3d 127, 138 (2d Cir. 2002) (twelve-year-old conviction had minimal probative value). Acts subsequent to the charged offense may also be admissible. See e.g. United States v. Hinostroza, 297 F.3d 924, 927-28 (9th Cir. 2002); United States v. Osum, 943 F.2d 1394, 1402 (5th Cir. 1991); United States v. Terebecki, 692 F.2d 1345, 1349 (11th Cir. 1982). A subsequent possession of drugs, however, is not probative of the defendant’s earlier intent to distribute. United States v. Haywood, 280 F.3d 715, 720 (6th Cir. 2002); see also United States v. Ramos, 537 F.3d 439, 449-52 (5th Cir. 2008) (government witness), cert. denied, 129 S.Ct. 1615 (2009).

### C. Is it Extrinsic?

The protections of Rule 404(b) apply only to extrinsic conduct, not to conduct that is “intrinsic.” Intrinsic evidence is generally evidence that is part of the charged scheme, e.g. United States v. Watkins, 591 F.3d 780, 784-85 (5th Cir. 2009) (uncharged drug deals were part of drug conspiracy); United States v. Stouffer, 986 F.2d 916, 924 (5th Cir. 1993) (uncharged misrepresentations by financial planners); see generally Beechum, 582 F.2d at 912 n.15. A defendant is not entitled to pretrial notice under Rule 404(b) of “intrinsic” conduct. See United States v. Miranda, 248 F.3d 434, 440 (5th Cir. 2001) (prior drug deals). Similarly, the court need not give a limiting instruction concerning intrinsic deeds. Stouffer, 986 F.2d at 926. The question, however, is what conduct is “intrinsic.”

Many courts describe “intrinsic” offenses as conduct that is “inextricably intertwined” with the offense. See e.g. Watkins, 591 F.3d 780, 784-85 (5th Cir. 2009). The government often insists that the evidence is needed to “complete the story.” See e.g. United States v. Edwards, 581 F.3d 604, 608 (7th Cir. 2009), cert. denied, 130 S.Ct. 1301 (2010); see also United States v. Williams, 585 F.3d 703, 707-08 (2d Cir. 2009) (government contended evidence was necessary background without explanation of why this was so). The Fifth Circuit recently concluded that the defendant’s clients’ substance abuse was not intrinsic to a scheme to commit healthcare fraud. In doing so, the court looked at the separation in geography and time and the lack of similarity in the conduct but ultimately held that the error was harmless. See United States v. Girod, 646 F.3d 304 (5th Cir. 2011). Courts have criticized the intrinsic act doctrines “as a vague theory that tempts prosecutors to expand the exceptions to Rule 404(b) beyond the proper boundaries of that rule.” United States v. Klebig, 600 F.3d 700, 712-13 (7th Cir. 2010) (citation omitted); see also United States v. Bowie, 232 F.3d 923, 927-29 (D.C. Cir. 2000). Such terms “lack clarity,” and obscure the real issue of whether the evidence is relevant and unduly prejudicial. Edwards, 581 F.3d at 608.

Courts have prohibited the use of such “background” or “context” evidence where it was not relevant or it was unnecessarily inflammatory. For example, in Klebig, the defendant was charged with possession of an unregistered sawed off shotgun and a silencer. The only issue in dispute was whether he knew that the firearm was a sawed-off rifle and whether he intended a modified oil filter to be a silencer. Over objection, agents testified that, in addition to some twenty firearms and other materials, they observed a sign that said “Nothing is worth dying for,” and surveillance cameras on Klebig’s property. The government maintained that this evidence was inextricably intertwined with other evidence that Klebig was obsessed with protecting his property. As the Seventh Circuit recognized, evidence that Klebig was security conscious had no bearing on whether he knew the nature of the two items in question. Instead, the purpose of the evidence was to scare the jury:

The government’s explanation simply does not make sense. It does not take much of a stretch to imagine the real relevance of the sign and the surveillance system to a jury. In combination with his legally owned guns, the vast amounts of clutter, . . . and the collection of unidentified but apparently caustic chemicals, the sign and the surveillance cameras make Klebig appear to be a dangerous and perhaps unbalanced man, an oddball, perhaps a survivalist or a gun nut. . . . This is all character evidence, which is generally inadmissible . . . This evidence that Klebig posted a threatening sign on his door, filled his home with security cameras, and stowed adult magazines

under his bed is wholly irrelevant to whether Klebig knew the sawed-off gun was a rifle or a pistol and whether he intended to use the oil filter as a silence or a flash suppressor.

600 F.3d at 712.

In Williams, officers responding to a 911 call observed defendants Williams and Jackson outside an apartment. Both men fled. An officer believed he spotted a gun in Jackson's pocket and retrieved a firearm near the place where Jackson was arrested. At trial, the government offered "eye witness testimony" that Jackson had been in possession of items found during a search of the apartment the following day including ammunition, a knife, machete, cocaine, marijuana, scales and \$4000.00. Williams, 585 F.3d at 706. The government described the evidence as "necessary background," and claimed that it showed the defendant's "opportunity, plan, and lack of mistake in possessing" the gun. Id. In closing argument, the government explained that the evidence was presented to let the jury "*know who the defendant really is,*" and in rebuttal, argued "drug dealers don't let you just walk into their apartments." According to the prosecutor, Jackson's access to the apartment, allowed the jury to "make a reasonable conclusion about the defendant and whether he had a gun ... that night." Id. at 707 (emphasis in opinion).

On appeal, the government argued, as usual, that the evidence was inextricably intertwined with the offense and claimed that the evidence was relevant to prove Jackson's opportunity and motive. Williams, 585 F.3d at 708. As the Second Circuit noted, however, motive was irrelevant. The issue was whether there was sufficient evidence that Jackson possessed a gun, not whether he had a reason to have one. Instead, the government's argument that a drug deal was going on that day and its "delphic" reference to "who the defendant really is," was nothing more than the type of character assassination prohibited by Rule 404(b). Id.

Sometimes the government improperly adds to the story rather than completing the story. In United States v. Sumlin, 489 F.3d 683 (5th Cir. 2007), an officer who was "looking for persons that are trafficking large amounts of illegal drugs down the highway," stopped the defendant for a traffic violation. 489 F.3d at 684. A search of the vehicle revealed a partially smoked marijuana cigarette in the ashtray and a loaded pistol in Sumlin's bookbag. Sumlin was arrested and ultimately prosecuted for being a felon in possession of a firearm. Id. at 685. Neither the trooper nor the prosecutor were satisfied with this evidence. At trial, the officer testified that a canine unit had been called to check the car and the dog alerted to the front but no drugs were found. The officer explained further that he obtained a warrant to search the undercarriage because he noticed that the body of the car had loose screws and drug traffickers frequently hide drugs in the vehicle. Still no drugs were found. After the prosecutor presented all of this testimony, the trial court reminded the prosecutor that this was a firearm case, not a drug case, adding: "This is a bunch of nonsense you're going into. All the search didn't reveal any drugs. All you're talking about is drugs." The court warned it was about to declare a mistrial, but it did not. 489 F.3d at 686.

The Fifth Circuit reversed, essentially holding that testimony about suspicions that do not amount to proof cannot be considered intrinsic evidence. The officer testified about what was not found, rather than what was. The rest was "conjecture and irrelevant." Sumlin, 489 F.3d at 689-90. The Court was guided by its previous decision in United States v. Ridlehuber, 11 F.3d 516 (5th Cir. 1993), where it held that evidence of materials commonly used to manufacture methamphetamine

was not admissible in a trial for possession of an illegal firearm. In Ridlehuber, the court noted: “The problem is that *the government did not prove the existence of a drug lab* - it did not have sufficient evidence to do so. . . .The *only ‘criminal episode’ proven here was possession of a short-barreled shotgun. The rest is conjecture.*” 11 F.3d at 521 -22 (emphasis added).

#### **D. Defendant’s Responsibility for the Extrinsic Act**

Extrinsic evidence is only relevant if the extrinsic conduct can be tied to the defendant. Beechum, 582 F.2d at 912-13. The evidence need only meet the conditional relevance standard of Fed. R. Evid. 104(b), that is, the jury could reasonably conclude that the defendant committed the act. Huddleston, 485 U.S. at 690. While conditional relevance is not a high hurdle, the government must at least present some reliable evidence that the defendant committed the prior offense. In an interesting twist, the Seventh Circuit held that a defendant’s admission that he had kidnapped and murdered other children was not sufficiently reliable where his entire confession may have been false. See United States v. Hall, 93 F.3d 1337, 1346 (7th Cir. 1996). The government can present evidence of conduct orchestrated by the defendant even if he did not personally undertake it. United States v. Cooks, 589 F.3d 173, 182-83 (5th Cir. 2009) (defendant directed others to engage in uncharged mortgage transactions), cert. denied, 130 S.Ct. 1930 (2010).

An acquittal does not bar presentation of evidence of misconduct. Dowling v. United States, 493 U.S. 342 (1990), but the defendant can also show that he was never charged. United States v. Bailey, 319 F.3d 514, 517-19 (D.C. Cir. 2003). Of course, a mere arrest does not establish that the defendant committed the extrinsic act. See e.g. United States v. MaCarthur, 6 F.3d 1270, 1279 (7th Cir. 1993); United States v. Flores-Perez, 849 F.2d 1, 5 (1st Cir. 1988); see also FDIC v. Bakkebo, 506 F.3d 286, 296 (4th Cir. 2007) (indictment). Nor can the government use evidence obtained in violation of the Constitution. United States v. Hill, 60 F.3d 672, 677-81 (10th Cir. 1995) (Fourth Amendment violation).

The government must present at least some evidence that the defendant committed the extrinsic act, not just evidence that he could have or had a motive to commit the offense. The defendant in United States v. Fortenberry, 860 F.2d 628 (5th Cir. 1988), was charged with arson and possession of an unregistered firearm because he had allegedly placed an explosive device on a car belonging to his ex-wife’s father. This device had caused minimal damage. Fortenberry had lost custody of his children to his wife during their divorce.

At trial, the government devoted a significant portion of its case to evidence of other attacks on the former Mrs. Fortenberry’s attorney and at her father-in-law. Crossbow arrows were shot at the attorney and the father-in-law and additional arrows discovered in the ex-wife’s home. A small pipebomb exploded at a restaurant owned by the father-in-law and another restaurant was damaged by fire. A fire also damaged the attorney’s home and vehicles. Fortenberry had a crossbow and weapons training and indicated that he felt he was at “war” with the people who had taken his sons from him, but the government never proved that he had committed the extrinsic offenses. 860 F.2d at 631-32. Instead, the government convinced the trial court that Fortenberry must be the perpetrator because the attacks were against people linked only by their opposition to the defendant. Id. at 632.

The Fifth Circuit reversed, noting that the government had failed to establish that Fortenberry had committed the extrinsic offenses, or even, that a single person was responsible for them. Fortenberry, 860 F.2d at 633. Moreover, the government’s “pattern of activity” involved incidents

far more serious than the charged offense and these were highly prejudicial. In arguing to the jury that Fortenberry was a man “who took the law into his own hands,” a man whose game was “intimidation, harassment, and threats, and fear in controlling other people’s lives,” who made people pay if he didn’t like them, the prosecutor improperly obtained a conviction based on bad character rather than evidence of a crime. 860 F.2d at 634-35.

In United States v. Ridlehuber, 11 F.3d 516 (5th Cir. 1993), the government failed to establish that a crime had been committed, much less that the defendant had committed it. Ridlehuber was indicted for possession of a sawed off shotgun found in his home. During the search of the home and his father’s home, agents found materials commonly associated with the manufacture of methamphetamine although two essential precursors were missing. Moreover, Ridlehuber’s father had a legitimate use for these chemicals and most were returned to him by the agents. Nevertheless, most of the government’s trial focused on how these materials could be used to manufacture methamphetamine. The reversible error consisted of the fact that the government was unable to prove that Ridlehuber was operating a clandestine lab. 11 F.3d at 523.

As in Fortenberry, 860 F.2d at 632, there was also concern that the “extrinsic” evidence was the tail wagging the dog. The government offered the evidence of a methamphetamine lab to explain why the gun was in the house. But the proof of motive “took center stage at trial; the gun itself, like a corpse that opens a detective story, served more as a prop around which the government’s theory of the case revolved.” Ridlehuber, 11 F.3d at 519.

#### IV. SPECIFIC PURPOSES

##### A. Knowledge and Intent

The prosecution often introduces extrinsic evidence to establish the defendant’s knowledge or intent to commit the crime. See e.g. United States v. Adair, 436 F.3d 520, 526-27 (5th Cir. 2006) (money laundering); United States v. Peters, 283 F.3d 300, 312 (5th Cir. 2002) (drugs); United States v. Hernandez-Guevara, 162 F.3d 863, 870-71 (5th Cir. 1998) (alien smuggling where defendant claimed to be at wrong place at wrong time); United States v. Cihak, 137 F.3d 252, 258 (5th Cir. 1998) (fraud). Normally, a defendant’s not guilty plea to a specific intent crime places intent in issue. See e.g. United States v. Lattner, 385 F.3d 947, 957 (6th Cir. 2004); United States v. Booker, 334 F.3d 406, 411 (5th Cir. 2003) (conspiracy); United States v. Crowder, 141 F.3d 1202, 1209 (D.C. Cir. 1998). On the other hand, such evidence should not be admissible where the offense requires only general intent, that is, the proscribed act itself gives rise to the requisite intent. See e.g. United States v. Owens, 424 F.3d 649, 654 (7th Cir. 2005).

In Owens, the government offered evidence in a bank robbery case that the defendant had robbed the same bank eight years earlier. The government claimed this evidence supported the codefendant’s testimony that Owens had directed the robbery and that the evidence was probative of the absence of mistake or accident. 424 F.3d at 653. The Seventh Circuit noted that none of these questions were at issue in the bank robbery trial. Either the defendant directed the robbery or he did not. Certainly he was not claiming that he robbed the bank by accident. The only value of the evidence of the prior bank robbery was the defendant’s propensity to commit robberies. Nor was the evidence necessary to complete the codefendant’s story. Instead of showing self-restraint, the

“government got greedy, invoked the specter of the 1995 robbery,” and thereby tainted the entire trial. Owens, 424 F.3d at 656.

The Fifth Circuit reversed under another general intent scenario. In United States v. Jones, 484 F.3d 783, 787-91 (5th Cir. 2007), the court held that the defendant’s prior conviction for being a felon in possession of a firearm was inadmissible where the trial issue was whether he actually possessed the firearm, not whether he had access to it. In other words, if the defendant actually possessed the gun, there was no need to show that he knew what a gun was. See also United States v. King, 254 F.3d 1098, 1100-01 (D.C. Cir. 2001) (knife not relevant in felon in possession case but harmless). On the other hand, such evidence might be admissible in a constructive possession case. See United States v. Williams, 620 F.3d 483, 489-90 (5th Cir. 2010).

As the Fifth Circuit emphasized in Beechum, 582 F.2d at 911, the similarity between the charged and extrinsic offenses is a critical factor in assessing the probative value of intent evidence. For example, in United States v. Anderson, 933 F.2d 1261, 1267-72 (5th Cir. 1991), the government failed to establish that the defendant had the requisite similar intent in setting prior fires. In another arson case arising out of a fire that destroyed the defendant’s restaurant, the Eleventh Circuit held that evidence that the defendant’s home had burned down three years earlier and that he had threatened to burn out a tenant two years later was inadmissible. United States v. Utter, 97 F.3d 509 (11th Cir. 1996). At trial, the government was unable to establish that the first fire was even the result of arson. The tenant incident did not involve the same intent: the charged offense was allegedly committed to obtain insurance proceeds while the tenant incident was at most an angry threat. The government offered this evidence of how the defendant reacted to financial stress, which the court recognized was classic prohibited character and propensity evidence. Utter, 97 F.3d at 514.

As the foregoing demonstrates, violent offenses are particularly susceptible to questions about the similarity of intent. In United States v. Levario-Quiroz, 854 F.2d 69, 73 (5th Cir. 1988), the defendant was charged with assaulting a federal officer. The Fifth Circuit held that his prior assault case was inadmissible because he had claimed self-defense. While not a violent offense per se, the Ninth Circuit held that an inmate’s subsequent fight with an inmate was inadmissible with respect to a charge of possession of a prohibited object in prison. United States v. Rodriguez, 45 F.3d 302, 307 (9th Cir. 1995). Rodriguez had a sharpened object which he admitted he knew to be prohibited but he claimed that he used it to tighten his crutches, not as a weapon. Id. at 304. This was the difference between a felony or a misdemeanor conviction. The government argued that the fight was evidence of Rodriguez’s need for a weapon. The Ninth Circuit rejected this classic propensity evidence offered merely to establish that the defendant was violent. Id. at 307.

Drug cases are a prime example where the government should be required to demonstrate the similarity and relevance of prior drug offenses. As the Second Circuit explained, a defendant who denies the existence of a drug transaction may have “‘squarely placed in issue’ his knowledge and intent.” United States v. Garcia, 291 F.3d 127, 137 (2d Cir. 2002). This does not, however, permit the government “to offer, carte blanche, any prior act of the defendant in the same category of crime. The government must identify a similarity or connection between the two acts that makes the prior act relevant to establishing knowledge [and intent].” Id.

In Garcia, the government offered evidence that twelve years prior to the charged 1.1 kilogram cocaine deal, the defendant had sold two grams of cocaine. This evidence purportedly demonstrated that Garcia knew that the taped phone conversation about asbestos was really a coded

drug transaction. The Second Circuit reversed, emphasizing the span of time between the two cases and the significant disparity in the amount of contraband. *Id.* at 138-39. See also United States v. Gordon, 987 F.2d 902, 909 (2d Cir. 1993) (same). The Second Circuit has also held that it is error to admit evidence of a defendant's other international travel when the government cannot prove that the other trips were drug related. See United States v. Afjehei, 869 F.2d 670, 674 (2d Cir. 1989). Citing Garcia, the Seventh Circuit held evidence of a six-year-old drug robbery inadmissible to prove that the defendant understood the code because there was no evidence of use of a code in the previous case. United States v. Ortiz, 474 F.3d 976, 981 (7th Cir. 2007) (harmless).

In United States v. Lynn, 856 F.2d 430 (1st Cir. 1988), the First Circuit held that a six-year-old street level sale was not admissible to prove intent to join a large scale conspiracy to import drugs from Asia. The court noted that the jury could either believe the codefendant's testimony that Lynn was a conspirator or not. The government should not have been permitted to present evidence that Lynn was a drug dealer. 856 F.2d at 435-36.

Even in a specific intent case, extrinsic evidence may not be relevant where the defendant unequivocally denies committing the acts charged in the indictment. See e.g. United States v. Ortiz, 857 F.2d 900, 904 (2d Cir.1988). The Fourth Circuit prefers a case-by-case approach. See United States v. Hernandez, 975 F.2d 1035, 1040 (4th Cir. 1992). In Hernandez, the informant claimed that he had arranged to purchase crack from Hernandez in Virginia, a claim Hernandez disputed. 975 F.2d at 1036. A second witness was permitted to testify that he had met Hernandez six months earlier and she had informed him that she knew a recipe for cooking crack and HAD previously sold it in New York. *Id.* The Fourth Circuit held that this evidence was at most minimally relevant to her defense. She did not claim that she had never sold drugs or that she had handled the drugs without the requisite knowledge or intent. She claimed that the incident did not occur. 975 F.2d at 1039. As in Lynn, the issue was the credibility of the government's witness. The prior crime was nothing more than evidence of propensity.

As in Hernandez, extrinsic conduct is rarely admissible to rebut a claim of mistaken identity. Instead, the government improperly uses this evidence to suggest that the government has the right guy because the defendant engaged in similar conduct in the past. In United States v. Jackson, 339 F.3d 349 (5th Cir. 2003), the government offered evidence of a prior theft conviction supposedly to establish the defendant's intent to conspire to commit jewelry theft. In closing, the prosecutor referred to the defendant as the "local talent." The Fifth Circuit held the evidence inadmissible where the defense was mistaken identity. *Id.* at 356-57. In United States v. Simpson, 479 F.3d 492 (7th Cir. 2007), the defendant was prosecuted for a single crack delivery. He denied that he was the seller on the charged date but when questioned by police admitted that he had previously engaged in similar transactions, and, in fact, had been a crack dealer for three years. He could not specifically remember the transactions. 479 F.3d at 494. Again, the prosecutor could not help himself in closing argument, telling the jury that the defendant had admitted to being a crack dealer. "The inference being he's done so many that he couldn't remember this one." 479 F.3d at 495. The Seventh Circuit reversed, noting that Simpson's previous crack deals established nothing more than his propensity to deal crack. Simpson, 479 F.3d at 499.

Sometimes knowledge simply is not in issue. In United States v. Oreira, 29 F.3d 185 (5th Cir. 1994), the defendant was charged with a currency structuring offense. The government presented evidence that a canine had alerted on the seized money to prove that the defendant knew

that the money was the proceeds of a drug transaction. The Fifth Circuit reversed noting that knowledge of the nature of the funds was not an element of the offense. Oreira, 29 F.3d at 190. Furthermore, the evidence established at best that at some time some of the money had come into contact with drugs, not that the defendant knew it. Id.

Even where knowledge is at issue, the court must determine whether the prior conduct is actually probative of knowledge. For example, a defendant's prior drug possession does little to establish that the defendant knew what was in an unopened package. See United States v. Jenkins, 345 F.3d 928, 934-37 (6th Cir. 2003); see also United States v. King, 254 F.3d 1098, 1100-01 (D.C. Cir. 2001); In United States v. Aguilar-Aranceta, 58 F.3d 796 (1st Cir. 1995), the First Circuit recognized that a defendant's prior conviction for possession of cocaine under similar circumstances could be relevant. In both the prior case and the current case, the packages containing cocaine had been mailed to the defendant. The court noted that the prior four-year-old incident was remote, and that the defendant had maintained possession of the packages for a significant period of time while she had just retrieved the new packages after a confusing conversation with the window clerk. 58 F.3d at 801. The Court held that any probative value was overshadowed by the danger of unfair prejudice. It was all too likely that the jury would draw the forbidden inference, that because she had been guilty under nearly identical circumstances, she must be guilty again, especially where there was no other evidence suggesting that she was in knowing possession of the cocaine. Id.

In conducting its balancing test, one factor is the government's need for the Rule 404(b) evidence. See Old Chief, 519 U.S. at 186. "Sometimes the prosecution should be careful what it asks for," lest it unfairly engage in "piling on." United States v. Jenkins, 593 F.3d 480, 482 (6th Cir. 2010). The government had "ample evidence" to convict Mr. Jenkins, who was found along with several other individuals in a house where drugs and guns were in plain view in virtually every room. An expert testified that the drug quantities, firearms and scales were consistent with distribution rather than personal use. The government was permitted to introduce evidence that Jenkins had been convicted eight years earlier of possession with intent to distribute four baggies of marijuana in a vehicle parked outside of the residence where the federal offense occurred. Id. at 482-84. While recognizing that Jenkins' plea of not guilty placed knowledge and intent "at least nominally in issue," where the drugs were in plain view, knowledge was subsumed by possession and intent to distribute could be inferred from the quantity. Id. at 485. The probative value was "microscopic at best," and "meanwhile, there looms, Kong-like, the prejudicial effect of the prior conviction." Id. at 485-86. The government argued on appeal that the error was harmless in light of the overwhelming evidence of knowledge and intent. The Sixth Circuit disagreed, emphasizing that the question at trial was Jenkins' possession of the items lying around the home he was visiting, an issue as to which the prior conviction was nothing more than "piling on" by the government. Id. at 482, 486.

### **B. Common Scheme or Plan**

A defendant's extrinsic acts may be admitted as evidence of a common scheme or plan. For example, evidence that two alleged coconspirators engaged in previous transactions may be admissible to prove their relationship. See United States v. Stitt, 250 F.3d 878, 888 (4th Cir. 2001). Prior drug transactions may be considered evidence of the plan itself. United States v. Watkins, 591 F.3d 780, 784-85 (5th Cir. 2009). In these cases, the timing of the offenses may be significant. The

remoteness of the prior offense may reveal that it is not evidence of a common scheme. See e.g. United States v. Davis, 657 F.2d 637, 639-40 (4th Cir. 1981); see also United States v. Temple, 862 F.2d 821, 823-24 (10th Cir. 1988) (1986 alien smuggling not part of charged 1987 scheme). A difference in motive may also be significant. For example, in United States v. Bradley, 5 F.3d 1317, 1321-22 (9th Cir. 1993), the Ninth Circuit held that murder of the defendant's wife involved a motive different from the charged conspiracy to kill a witness and therefore was not part of the same scheme.

In United States v. Himelwright, 42 F.3d 777 (3d Cir. 1994), the government had a creative reason for offering evidence of the defendant's possession of firearms in a trial for making threats and committing extortion. The government offered evidence that the defendant had two firearms as evidence of intent and preparation, but really offered the firearms as evidence that he was capable of carrying out the threat. 42 F.3d at 782-83. The Third Circuit's introduction of the Rule 404(b) standard is telling:

Despite our characterization of Rule 404(b) as a rule of admissibility, ... we have expressed our concern that, although the proponents of Rule 404(b) evidence "will hardly admit it, the reasons proffered to admit prior act evidence may often be potemkin village, because the motive, we suspect, is often mixed between an urge to show some other consequential fact as well as to impugn the defendant's character."... Thus, when evidence of prior bad acts is offered, the proponent must clearly articulate how that evidence fits into a chain of logical inferences, no link of which may be the inference that the defendant has the propensity to commit the crime charged. . . But even where the proffered evidence tends to prove some fact besides character, admissibility depends upon whether its probative value outweighs its prejudicial effect.

Himelwright, 42 F.3d at 781-82 (citations omitted).

With respect to the threat charge, the court noted that the only intent at issue was the intent to make the calls, not the specific intent to injure anyone. Nor was there need to prove planning or preparation. At best, the firearms were indicative of capability to carry out the threat, but, again, this was not an element of the offense. As the court noted, while the "government's argument was cloaked in terms of Himelwright's intent, the goal here was actually something different: it was to portray Himelwright a person who possessed the wherewithal to do what he said he would do." Id. at 782-83. Use of the evidence to show capability was a "disguised attempt to accomplish exactly what is disallowed, namely, to show that 'more than likely' the defendant intended to do that with which he or she stands charged" merely because his character included possessing firearms. Id. The court concluded that the firearms were "marginally relevant" to the extortion charges but the potential for prejudice outweighed any minimal probative value. Id. at 784. As is so often the case, the government placed disproportionate emphasis on the firearms, portraying the defendant as a "violence-prone postal worker who was a danger to society and who needed to be removed for the protection of the public." Id. at 786.

### **C. Motive**

As the Fifth Circuit recognized, extrinsic conduct offered to prove motive need have no similarity with the charged offense. See Beechum, 591 F.2d at 912 n15. For example, financial desperation may be admissible to establish the motive for a person to commit fraud. United States v. Williams, 264 F.3d 561, 575 (5th Cir. 2001) (defendant lost his home); see also Utter, 97 F.3d at 511, 515 (false gift letter was part of proof of financial straits which provided motive to commit arson). On the other hand, the Ninth Circuit held that a defendant's poverty was not admissible in a bank robbery trial because poverty is not a crime. The court noted that most people, rich and poor, have a desire for more money, but few of them steal to get it. United States v. Mitchell, 172 F.3d 1104, 1107-10 (9th Cir. 1999) (harmless).

Courts have been reluctant to accept the government's claims that drug use supplies a motive for committing financial offenses absent evidence that an addiction rendered the defendant financially in need. See e.g. United States v. Madden, 38 F.3d 747, 751-52 (4th Cir. 1994); see also United States v. Sutton, 41 F.3d 1257, 1258-5 (8th Cir. 1994) (harmless). Nor would a fraud offense be admissible to establish that a defendant committed a drug offense. United States v. Harvey, 845 F.2d 760, 762 (8th Cir. 1988).

### **D. Opportunity**

Extrinsic conduct may be admissible to show that the defendant had the opportunity to commit the offense. For example, the Seventh Circuit upheld the admission of evidence of gang membership to prove the defendant had the opportunity to traffic in firearms. United States v. Hodges, 315 F.3d 794, 800-01 (7th Cir. 2003). On the other hand, opportunity must be relevant. As discussed above, the Third Circuit rejected evidence of the defendant's possession of a firearm in an extortion case offered as evidence that the defendant was capable of carrying out the threat. The court noted that capacity is not even one of the purposes listed in Rule 404(b) and, in any event, the government need only prove that the defendant made the threat, not that he had the wherewithal to carry it out. Further, the two incidents involved different motives. Himelwright made the threat because he was upset about a job transfer. He had obtained the firearm long before he became aware of the transfer. United States v. Himelwright, 42 F.3d 777, 781-82 (3d Cir. 1994); see also United States v. Philibort, 947 F.2d 1467, 1470-71 (11th Cir. 1991).

### **E. Identity**

Normally, similarity is the sine qua non of evidence offered to prove identity. Compare United States v. Brown, 71 F.3d 1158, 1162 (5th Cir. 1996) (prior drug deals not admissible); United States v. Carrillo, 981 F.2d 772, 775-76 (5th Cir. 1993) (same); see also United States v. Jenkins, 479 F.3d 492, 497-99 (7th Cir. 2007) (prior drug deals not admissible); United States v. Luna, 21 F.3d 874, 878-82 (9th Cir. 1994) (bank robberies not admissible); United States v. Myers, 550 F.2d 1036, 1044-48 (5th Cir. 1977) (alleged similarities not distinctive, common to most bank robberies); but see United States v. Smith, 103 F.3d 600, 603 (7th Cir. 1996); United States v. Sanchez, 988 F.2d 1384, (5th Cir. 1993) (unusual deals in same location).

In United States v. Tubol, 191 F.3d 88 (2d Cir. 1999), not only was the other conduct substantially different, but it was far more serious than the charged conduct. Tubol robbed a bank claiming to have a bomb, which was a fake. He had previously planted a real bomb at the residence

of a couple in Israel with whom he was having a dispute. The Second Circuit noted that not only was there virtually no similarity between the two offenses but the potential for prejudice was huge. 191 F.3d at 95-96.

There is one context where dissimilar evidence may be offered to prove identity, that is, where it is offered to establish that the defendant was at the location of the offense. See e.g. United States v. Torres-Flores, 827 F.3d 1031, 1034 (5th Cir. 1987) (distinguished in Carrillo, 981 F.2d at 775-76). As with other 404(b) purposes, evidence of other conduct is admissible only if identity is disputed. United States v. Williams, 985 F.2d 634, 637 (1st Cir. 1993); United States v. Fountain, 2 F.3d 656, 668 (6th Cir. 1993).

#### **F. Something to Hide?**

A person's behavior after commission of a crime may be admissible as circumstantial evidence of guilt. Such evidence is considered "consciousness of guilt." See Thomas v. State, 372 Md. 342, 812 A.2d 1050, 1055 (2002). Conduct typically proffered to show consciousness of guilt includes flight after the crime, escape from confinement, use of an alias, and destruction or concealment of evidence. See United States v. Myers, 550 F.2d 1036, 1049 (5th Cir. 1977) (quoting 2 J. Wigmore, Evidence § 276, p. 111 (3d ed. 1940) (other citations omitted); see also United States v. Murphy, 996 F.2d 94, 96 (5th Cir. 1993) (flight); United States v. Kalish, 690 F.2d 1144, 1156 (5th Cir. 1982) (alias). The use of such evidence has been criticized, however, because it is "only marginally probative as to the ultimate issue of guilt or innocence." Myers, 550 F.2d at 1049 (quoting United States v. Robinson, 475 F.2d 376, 384 (D.C. Cir. 1973)); see also Turner v. McKaskle, 721 F.2d 999, 1002 (5th Cir. 1983) (holding that evidence of flight should not have been admitted). Of course, the defendant's commission of the offense must be at issue. In United States v. Kang, 934 F.2d 621, (5th Cir. 1991), the defendant claimed that he was entrapped but admitted committing the offense. Under such circumstances, consciousness of guilt was not in issue and therefore the defendant's flight was irrelevant. 934 F.2d at 628-29.

The probative value of such evidence depends upon the degree of confidence with which four inferences can be drawn:

- (1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt;
- (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged.

Myers, 550 F.2d at 1049; accord Thomas, 372 A.2d at 1056. In other words, the government must demonstrate that the defendant actually fled, that the flight showed consciousness of guilt of the crime charged and that such consciousness was probative of actual guilt. In Myers, the Fifth Circuit was not satisfied that the government had proved flight at all with respect to two instances. Further, the defendant's commission of an intervening bank robbery undermined the inference that he was fleeing because he knew he was guilty of the robbery being tried. Id. at 1058-59.

While not determinative, timing is significant. An incident may be so remote as to have no real value. Thomas, 372 A.2d. at 1059 n.4. This was the case with defendant Thomas's refusal to submit voluntarily to a blood test more than three years after the murder for which he was ultimately

charged. *Id.* at 1060. As the Fifth Circuit recognized, the “immediacy requirement is important. It is the instinctive or impulsive character of the defendant’s behavior, like flinching, that indicates fear of apprehension and gives evidence of flight such trustworthiness as it possesses.” *Myers*, 550 F.2d at 1051.

### **G. Non-Criminal Conduct**

The government cannot bootstrap a civil regulatory violation into a criminal offense. See *United States v. Christo*, 614 F.2d 486, 492 (5th Cir. 1980). In *Christo*, the government’s case of misapplication of funds rested on the defendant’s violation of civil banking statutes. Citing *United States v. Britton*, 107 U.S. 655 (1882), the Fifth Circuit emphasized that maladministration is not misapplication. *Christo*, 614 F.2d at 491. The court also warned against introduction of evidence of cease and desist orders based on civil violations, which it deemed unduly prejudicial. *Id.* at 494.

On the other hand, proof of civil regulations and violations may provide evidence of the defendant’s knowledge or motive for making a false statement. See *United States v. Cordell*, 912 F.2d 769, (5th Cir. 1990). In *Cordell*, the defendant was charged with making a false entry in bank records and willfully misapplying bank funds based on his concealment of a customer’s overdraft. The Fifth Circuit held that the bank’s history of lending violations supplied the motive for Cordell’s concealment in the charged transaction. The bank’s prior violations had led the bank examiners to create a watch list and Cordell’s record entries were designed to hide the transaction from watchful eyes. *Id.* at 775.

While civil violations may provide a motive for criminal activity, when conduct is offered to prove criminal intent, the extrinsic conduct must also be criminal. See *United States v. Riddle*, 103 F.3d 423 (5th Cir. 1997); see also *United States v. Mikolajczuk*, 137 F.3d 237, 244 (5th Cir. 1998) (lawful tax protest not admissible). In *Riddle*, the government introduced evidence of four unrelated loans, purportedly to demonstrate that the defendant “systematically withheld information from the bank in order to direct loan proceeds for his personal benefit.” 103 F.3d at 432. The problem was that the bank examiners had concluded that the violations were not willful or intentional, but merely the result of a misunderstanding. The government failed to present the requisite evidence that Riddle’s intent with respect to the earlier loans was criminal. *Id.* at 433. As in *Christo*, the evidence demonstrated that the defendant was an irresponsible banker, but he was on trial for criminal misapplication not irresponsibility. *Riddle*, 103 F.3d at 433.

Indeed, the lending violations were but one of the government’s “trial tactics [that] resulted in an unfair trial” in *Riddle*. 103 F.3d at 428. Again, as in *Christo*, the government presented bank examinations and cease and desist orders detailing a history of civil violations, which included an “ominous diagnosis” that the bank was lurching toward failure. *Id.* at 430-31 & n.1. This evidence put Riddle “at the center of a spectacular bank failure. But Riddle was not on trial for being an ineffective or even a corrupt banker.” He was on trial for lying and misapplication of bank funds. *Id.* at 431. As is so often the case, the government impermissibly put Riddle on trial for the way he did business, rather than for criminal activity. *Id.* at 432.

Evidence of non-criminal activity may also come up in contexts other than fraud. In these cases, the extrinsic conduct need not be criminal. In *United States v. Caldwell*, 586 F.3d 338, 345-46 (5th Cir. 2009), the Fifth Circuit upheld the admission of evidence that the defendant had recently downloaded photographs of adult bestiality in his child pornography trial to show that he knew what

was on his computer.

### H. Entrapment

As discussed previously, evidence of character may normally be admitted only if offered by the defendant, or to rebut such evidence. Fed. R. Evid. 404(a). Moreover, proof of character is normally by testimony as to the defendant's reputation, or by opinion testimony. Fed. R. Evid. 405(a). Proof may be made of specific conduct only if character is an "essential element of a charge, claim, or defense." Fed. R. Evid. 405(b). An entrapment case is just such a case.

In federal court, the elements of an entrapment defense are: (1) that a government agent induced the defendant to commit the crime, (2) that the defendant was not predisposed to commit. See Jacobsen v. United States, 503 U.S. 540, 549 (1992); Sorrells v. United States, 287 U.S. 435, 448 (1932).<sup>1</sup> Predisposition, or lack thereof, is character evidence, which is an essential element of the defense of entrapment. Thus, character evidence, both favorable and unfavorable, is admissible under Fed. R. Evid. 405(b) in an entrapment case. See United States v. Thomas, 134 F.3d 975, 978 (9th Cir. 1998) (noting that Solicitor General conceded as much in United States v. Donoho, 575 F.2d 718, vacated, 439 U.S. 811 (1978)). Evidence of relevant prior good acts is also admissible under Rule 404(b) to prove the defendant's state of mind or intent. Thomas, 134 F.3d at 979. The government conceded in Thomas that proof of no prior bad acts was the equivalent of proof of prior good acts. Id. at 979 n.6.

The issue in Thomas was whether the defendant could offer evidence that he had no prior criminal history. The Ninth Circuit held that testimony that a defendant had never been arrested permitted an inference that he had not engaged in prior bad acts or bad conduct and thus was admissible in support of Thomas's entrapment defense. 134 F.3d at 979. Relying on Government of Virgin Islands v. Grant, 775 F.2d 508, 512 (3d Cir. 1985), the dissent questioned whether a clean arrest record was evidence of good conduct. "[T]estimony that one has never been arrested is especially weak character evidence; a clever criminal, after all, may never get caught." Thomas, 134 F.3d at 981 (quoting Grant, 775 F.2d at 512). This complaint really goes to the strength of the inference not to whether any inference is permissible. Moreover, Grant involved general proof of character, governed by Fed. R. Evid. 405(a), not evidence of character as an element of the defense. 775 F.2d at 511-513.

Because character, in the form of predisposition, is an essential element of an entrapment defense, the government may also offer evidence of prior bad acts but only if they are similar to the charged crime. See United States v. Mendoza-Prado, 314 F.3d 1099, 1105 (9th Cir. 2002) (theft, escape and extortion not similar to drug trafficking) (citing United States v. Bramble, 641 F.2d 681, 682 (9th Cir. 1981) (possession of marijuana not similar to distribution of cocaine); see also United States v. Privett, 58 F.3d 101, 105 (5th Cir. 1995) (burglary, theft, escape and armed robbery not similar to felon in possession). As the Ninth Circuit explained:

When a defendant argues that he was not predisposed to commit a *particular*

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<sup>1</sup>Some jurisdictions focus only on government inducement. See e.g. Tx. Penal Code § 8.06.

crime, the only relevant response from the government is one that bears on his propensity to engage in *that kind* of criminal activity.

Mendoza-Prado, 314 F.3d at 1104 (emphasis in original). In Mendoza-Prado, however, while the court agreed that the defendant's boasting of his exploits of theft and extortion were not pertinent to drug trafficking, he ultimately opened the door to this evidence by presenting himself as a hard working, family man who lacked the time, courage or inclination to deal drugs. Id. at 1105.

The remoteness of a defendant's past is also a consideration. See generally Michelson, 335 U.S. at 484. A trial court should be "extremely cautious about admitting old convictions [as evidence of predisposition] because their prejudicial impact may frequently outweigh their probative value." United States v. Simtob, 901 F.2d 799, 808 (9th Cir. 1990). Indeed, in Sherman v. United States, 356 U.S. 369 (1958), the Supreme Court found entrapment as a matter of law even though the defendant had previous, albeit fairly old, drug convictions. The Court held:

[A] nine year old sales conviction and a five year old possession conviction are insufficient to prove petitioner had a readiness to sell narcotics *at the time* [the informant] approached him, particularly when we must assume from the record that he was trying to overcome a narcotics habit at the time.

356 U.S. at 375-76 (emphasis added); accord Simtob, 901 F.2d at 808. Similarly, the Fifth Circuit rejected the government's argument that evidence of the defendant's eight prior felony convictions for burglary, theft, escape and armed robbery, which were more than ten years old, was admissible to rebut the defendant's claim that he was a well-intentioned grand-fatherly individual duped by a con artist into possessing a firearm. Privett, 58 F.3d at 105. The court, however, deemed the error to be harmless. Id.

## V. THIRD PARTIES

### A. Complaining Witnesses

The government often offers extrinsic evidence to prove the officers' state of mind, for example, the arresting officer's. Usually, the third party's state of mind is not relevant. See e.g. Sumlin, 489 F.3d at 689-90 (officer's reason for searching vehicle is not relevant). In United States v. Kang, 934 F.2d 621, 624-27 (5th Cir. 1991), the government offered hearsay testimony about the defendant's prior conduct purportedly to rebut an entrapment defense. The Fifth Circuit held that such evidence was not admissible because the agent's intent was not relevant. See also United States v. Silva, 380 F.3d 1018, 1020 (7th Cir. 2004); United States v. Hernandez, 750 F.2d 1256, 1257 (5th Cir.1985).

Similarly, the government normally should not be able to introduce evidence to establish the complainant's motivation. In United States v. Heidebar, 122 F.3d 577 (8th Cir. 1997), the defendant's wife discovered child pornography on his computer, which resulted in federal charges. At trial, she was permitted to explain that she had searched his computer because he had previously molested his stepdaughter. The Eighth Circuit reversed, holding that her reason for the search was

irrelevant. 122 F.3d at 580.

In United States v. Fulmer, 108 F.3d 1486 (1st Cir. 1997), the defendant was charged with threatening and harassing an agent who had failed to act on his complaint that his family was involved in fraud. The defendant had warned that the “silver bullets were coming.” Id. at 1489. In addition to testifying that he felt threatened, the agent was permitted to explain that he took the threat very seriously due to the recent Oklahoma City bombing, which he described in detail. id. at 1497. The First Circuit held that any limited relevance of this evidence was substantially outweighed by the danger of unfair prejudice. Id.

### **B. Codefendants and Associates**

The government cannot use a third party’s extrinsic acts as evidence against the defendant. United States v. Taylor, 210 F.3d 311, 317-18 (5th Cir. 2000) (codefendant’s prior convictions). Such evidence is commonly referred to as “guilt by association” evidence. See e.g.; United States v. Polasek, 162 F.3d 878, 884 & n.2 (5th Cir. 1998). Evidence that one is associated with a criminal simply “does not support the inference that that person is a criminal or shares the criminal’s guilty knowledge.” United States v. Singleterry, 646 F.2d 1014, 1018 (5th Cir. Unit A June 1981). Because such evidence is highly prejudicial, it should be excluded. United States v. Parada-Talamantes, 32 F.3d 168, 170 (5th Cir. 1994).

Even if evidence is admissible against a codefendant, the court must consider the possibility that the spillover will deprive other defendants of a fair trial. Severance may be required if the codefendant’s bad acts are numerous and more serious than the charged offenses. See e.g. United States v. Cortinas, 142 F.3d 242, 248 (5th Cir. 1998). In United States v. Johnson-Dix, 54 F.3d 1299 (7th Cir. 1995), the government admitted evidence of a prior cocaine deal between a coconspirator and the defendant’s mother at the home the two of them shared. The Seventh Circuit agreed that the evidence was not admissible against the defendant, but held that any error was cured by the trial court’s limiting instruction and the defendant’s own testimony. 54 F.3d at 1307-08.

### **C. Reverse 404(b)**

A defendant can introduce evidence of someone else’s extrinsic conduct if it tends to negate the defendant’s guilt. This is known as “reverse 404(b) evidence.” See United States v. Wilson, 307 F.3d 596, 601 (7th Cir. 2002). As discussed previously, the primary purpose behind Rule 404(b)’s limitation on proof of character is to protect the defendant from undue prejudice. Therefore, the courts recognize that “the standard of admissibility when a criminal defendant offers similar acts evidence as a shield need not be as restrictive as when a prosecutor uses such evidence as a sword.” United States v. Aboumoussalem, 726 F.2d 906, 911 (2d Cir. 1994); see also United States v. Wright, 625 F.3d 583, 608 (9th Cir. 2010); United States v. McCourt, 925 F.2d 1229, 1233-34 (9th Cir. 1991). Nevertheless, the defense must still proffer the evidence for some purpose other than a person’s criminal propensity. See United States v. Williams, 458 F.3d 312, 317 (3d Cir. 2006) (citing McCourt, 925 F.2d at 1234 n.8; Aboumoussalem, 726 F.2d at 911)). The court recognized, however, that even this prohibition would presumably be subject to a defendant’s constitutional right to present a complete defense. Williams, 458 F.3d at 318 n.5.

The most widely accepted use of reverse 404(b) is evidence proffered to suggest that someone else committed the crime. Indeed, use of such evidence was approved in the nineteenth

century. See Alexander v. United States, 138 U.S. 353, 356-57 (1891). In another example, the Second Circuit held that the defendant could introduce evidence that another person had committed two bank robberies to support his defense that he had not committed the third. See United States v. Robinson, 544 F.2d 110, 113 (2d Cir. 1976) (another man who resembled defendant committed two other bank robberies). Significantly, evidence offered to establish that someone else committed the crime need not have the signature characteristics of evidence offered by the government to establish the defendant's identity as the culprit. When offered by the defendant, the courts use a lower standard of similarity. See United States v. Stevens, 935 F.2d 1380, 1404-05 (3d Cir. 1991).

Reverse 404(b) evidence may also be relevant to the defendant's knowledge or intent. In United States v. McClure, 546 F.2d 670, 672-73 (5th Cir. 1997), the defendant proffered evidence in support of his entrapment defense that the informant had coerced three other individuals into selling drugs. The Fifth Circuit held that exclusion of this evidence was reversible error. The third party need not be a government agent. In United States v. Luffred, 911 F.2d 1011 (5th Cir. 1990), the defendant in a bank fraud case claimed that she was one of a number of vulnerable women defrauded by her husband into entering into financial transactions. 911 F.2d at 115. Although the court of appeals reversed on other grounds, the court recognized that such evidence might be relevant to prove that someone else had concocted the scheme without the defendant's knowing participation. Id. (citing United States v. Cohen, 888 F.2d 770 (11th Cir. 1989)).

In United States v. Cruz-Garcia, 344 F.3d 951, 954-55 (9th Cir. 2003), the Ninth Circuit engaged in a meticulous analysis of the difference between evidence of a third party's criminal propensity and evidence properly offered under Rule 404(b). The defendant and his codefendant, Meza-Castro, were arrested and heroin was found in Meza-Castro's jacket. Meza-Castro had a previous drug conviction while Cruz-Garcia did not. Meza-Castro testified on behalf of the government that Cruz-Garcia was the drug dealer who had directed his activities and the government repeatedly claimed that Meza-Castro was too dumb to put the deal together. 344 F.3d at 954. While the fact of Meza-Castro's prior conviction was admitted at trial under Rule 609(a)(1), the government successfully kept out the details of his prior activity where he had repeatedly made his own arrangements for sales to an undercover officer. The Ninth Circuit recognized that this evidence was not offered as proof of the codefendant's propensity to deal drugs but to rebut the government's claim that he was too dumb to deal drugs. Cruz-Garcia, 344 F.3d at 955. The court made short shrift of the government's protestations of prejudice, noting that the only way the evidence was prejudicial was to undermine the government's theory of the case. As courts so often respond to defendants, this is not undue prejudice. Id. at 956-57.

While proof of another's extrinsic criminal activity may be relevant, appellate courts have upheld the trial court's exercise of discretion in excluding such evidence under a Rule 403 balancing. In Aboumoussalem, the defendant's cousins arranged his travel to New York with a briefcase loaded with heroin. The defendant sought to present evidence that they had previously used an unwitting dupe to transport drugs. While recognizing that this evidence could be relevant to the defendant's lack of knowledge, the appellate court upheld the exclusion. Id. at 912. The trial court sought to avoid a trial within a trial over whether the other courier was duped and both courts noted that the cousins' use of an unwitting stranger did not establish that their cousin, the defendant, was equally naive about their activities. Id. Interestingly, the Second Circuit was unconcerned with any potential prejudice to the government. Id. It upheld the exclusion on grounds of confusion and

delay, not prejudice. Id.

The defense must be careful to delineate the difference between prior convictions offered for impeachment under Rule 609 and conduct offered as substantive Rule 404(b) evidence. As noted in Cruz-Garcia, impeachment of the codefendant with his prior drug conviction was no substitute for evidence of his actual activities. 344 F.3d at 957-58. In Wright, the defendant failed properly to preserve his proffer of Rule 404(b) evidence by failing to insist that the evidence was admissible even if the third party did not testify. Wright was charged with possession of child pornography found on his computer. He wanted to show that his roommate had a sexual attraction to minors and that he was prolific with the computer. 625 F.3d at 604-05. The Ninth Circuit held that the former was improper propensity evidence but the roommate's ability to access the computer was relevant to Wright's defense that the roommate was responsible for downloading the pictures. Id. at 608. Unfortunately, the court also held that exclusion was not plain error. Id. at 607-09.

## VI. CONCLUSION

The courts have recognized that character evidence and a person's prior conduct is relevant but in some instances it is perhaps too relevant. The defendant, and only the defendant, normally has the option whether to put her good character in issue. With respect to the defendant's uncharged bad acts, the court must insure that such evidence is probative to a relevant issue besides propensity and then must weigh the probative value of the evidence against the potential for undue prejudice to the defendant. While there are numerous cases approving the use of such evidence, trial counsel must remember that admissibility is subject to the trial court's discretion. Therefore, counsel should try to demonstrate that the government cannot tie the conduct to the defendant, that the conduct is not relevant and that it is overly prejudicial. Counsel can be most successful when the extrinsic conduct is more serious than the charged offense. On the other hand, when the defendant offers reverse 404(b) evidence, there is much less concern about prejudice and counsel should remind the court of its wide latitude in letting such evidence in.

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