

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON

UNITED STATES OF AMERICA,

PLAINTIFF,

V.

CASE NO.: 2:24-cr-00192

KISHA SUTTON,

DEFENDANT.

**DEFENDANT KISHA SUTTON'S MOTION *IN LIMINE* TO EXCLUDE
EVIDENCE OF OTHER CRIMES, WRONGS, OR ACTS PURSUANT TO
RULES 403 AND 404(b) OF THE FEDERAL RULES OF EVIDENCE**

NOW COMES the Defendant, Kisha Sutton, by and through counsel, Connor Robertson, pursuant to Rules 403 and 404(b) of the Federal Rules of Evidence to prevent the Government from introducing, during its case in chief, any evidence of other crimes, wrongs, or other acts allegedly committed by the Defendant. In support thereof, the Defendant states as follows:

INTRODUCTION

This is a fraudulent scheme prosecution whereby the Indictment alleges that Kisha Sutton prepared and submitted PPP Loan applications containing false personal information of her friends and family. The loan applications were ultimately approved and money was deposited into the bank accounts of her friends and relatives. For consideration of Ms. Sutton's work, her friends and relatives sent a portion of the proceeds back to Ms. Sutton.

There have been three grand jury presentations in this case, each leading to an Indictment. In the Indictment and the Superseding Indictment, Ms. Sutton was charged with one count of Conspiracy to commit Bank Fraud and nine separate counts of aiding and abetting Bank Fraud (one count for each loan application she submitted on her friends' behalf). However, the Government dramatically changed and reduced the scope of its case in the most recent Second Superseding Indictment. Therein, Ms. Sutton is now charged with one count of aiding and abetting Bank Fraud with Shamise Wright and one count of money laundering with Shamise Wright. All other co-defendants have been removed from the Second Superseding Indictment.

Now that the other co-defendants have been removed from the Indictment, the Government nonetheless intends to offer their testimony and various loan documents associated with each individual's fraudulent loan into evidence against Ms. Sutton pursuant to Rule 404(b). This Motion asks the Court to bar this from happening for a variety of reasons set forth below. First, the Government's 404(b) Notice to the Defendant is insufficient.

404(b) NOTICE

Federal Rule of Evidence 404(b)(1) provides that "[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." The government, therefore, "may not introduce evidence of extrinsic offenses to demonstrate the defendant's propensity to commit unlawful acts or to prove that the defendant committed the crime with which he is presently charged." *United States v. Powers*, 59 F.3d 1460, 1464 (4th Cir. 1995) (internal quotation marks omitted). Although "other acts" evidence is not

admissible to prove criminal propensity, such evidence “may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, knowledge, identity, absence of mistake, or lack of accident.” Fed. R. Evid. 404(b)(2).

Because it is the Government’s burden to establish that evidence of a defendant’s prior acts is admissible for a proper purpose, the Government must “identify each proper purpose for which it will use the other acts evidence and explain how that evidence “fits into a chain of inferences - a chain that connects the evidence to [each] proper purpose, no link of which is a forbidden propensity inference.” *United States v. Harold Hall, Jr.*, 858 F.3d 254 (4th Cir. 2017) quoting *United States v. Davis*, 726 F.2d 434, 442 (3d Cir. 2013). Rule 404(b)(3) sets out the three requirements of the Government’s obligation of Notice as follows:

- (3) Notice in a Criminal Case. In a criminal case, the prosecutor must:
 - (A) Provide reasonable notice of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it;
 - (B) Articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and
 - (C) Do so in writing before trial - or in any form during trial if the court, for good cause, excuses lack of pretrial notice.

The notice requirement of Rule 404(b)(3) is specific and was put in place to prevent general 404(b) disclosures. The Committee Notes on Rules for the 2011 Amendment highlight the reason the rule was amended to provide for more specific notice by saying:

“The prosecution must not only identify the evidence that it intends to offer pursuant to the rule but also articulate a non-propensity purpose for which the evidence is offered and the basis for concluding that the evidence is relevant in light of the purpose. The earlier requirement that the prosecution provide notice of only the “general nature” of the evidence was understood by some courts to permit the government to satisfy the notice

obligation without describing the specific act that the evidence would tend to prove, and without explaining the relevance of the evidence for a non-propensity purpose. This amendment makes clear what notice is required.”

Fed. R. Evid. 404(b) advisory committee notes (2011).

GOVERNMENT’S 404(b) NOTICE INSUFFICIENT

The Government’s 404(b) notice is exactly the type of generic catch-all disclosure that the Rule was amended to prevent. In the Second Supplemental Response of the United States of America to Defendant’s Standard Discovery Request and Request of the United States for Reciprocal Discovery (ECF 258), the Government indicates its intention to present 404(b) evidence against Kisha Sutton. The Disclosure is as follow:

“The government intends to present evidence linking defendant Kisha Sutton to the PPP loans applied for and received in the names of Lydia Spencer, Cylena Sutton, Rahmel Meekins, William Powell, Damisha Brown, and Jasmine Spencer. The evidence includes internet protocol addresses (“IP Addresses”), Verizon subscriber information, IRS Form 1040-Schedule C, PPP loan applications, Docusign records, bank account records, CashApp account records and the like.

The government seeks to introduce such evidence for the purpose of proving motive, opportunity, intent, preparation, plan, knowledge identity, absence of mistake and lack of accident, as permitted by Rule 404(b)(2) of the Federal Rules of Evidence.”

This disclosure fails to “precisely articulate the purpose of the proffered [404(b)] evidence.” *United States v. Birch*, 39 F.3d 1089, 1093 (10th Cir. 1994). First, this disclosure simply restates all of the non-propensity exceptions in a broad manner. Second, the disclosure fails to explain the inference each piece of evidence will provide to a particular non-propensity purpose.

This type of broad disclosure has been ruled as inadequate. In *United States v. Kearn*, 863 F.3d 1299 (10th Cir. 2017), the Government 404(b) Notice was very similar. There the government filed a pre-trial motion to introduce evidence found on the Defendants smartphone and computer which included sexually explicit images of minors, nude video clips, and search terms indicating an interest in such material. The government sought to introduce the evidence under Rule 404(b) to show “the defendant’s intent, knowledge, absence of mistake and lack of accident.” *Id.* The *Kearn* Court held the broad statement was inadequate. *Id.* See also *United States v. Birch*, 39 F.3d 1089, (10th Cir. 1994) (“In this case, the government failed to articulate with precision the evidentiary purpose of the Rule 404(b) evidence it offered. Although the government filed a pretrial Notice of Intent to Introduce Evidence Pursuant to Rule 404(b), the Notice stated only that the evidence’s purpose was to “prove the defendant’s knowledge, identity, and absence of mistake.” The Notice does not articulate “the relevant purpose and specific inferences to be drawn from . . . [the] evidence of other acts’ offered by the Government.”).

A district court must make a threshold determination that the offered evidence is probative of a material issue other than character before admitting the evidence under Rule 404(b). *Huddleston v. United States*, 485 U.S. 681, 686 (1998). In this case, the Court could not do so on the broad disclosure. Thus, any 404(b) evidence should be barred.

SUBSTANTIVE 404(b) CHALLENGE

Ms. Sutton cannot, at this point, effectively mount a 404(b) challenge because she has not been properly put on notice of exactly what evidence is being offered, for what purpose, and how it relates to the current charges. “The government bears the burden of establishing that the evidence of a defendant’s prior bad acts is admissible for a proper

purpose. *United States v. Harold Hall, Jr.*, 858 F.3d 254 (4th Cir. 2017) quoting *United States v. Youts*, 229 F.3d 1312, 1317 (10th Cir. 2000). To do so, the Government must meet the following criteria set forth in *United States v. Queen*, 132 F.3d 991 (4th Cir. 1997):

1. “The evidence must be relevant to an issue, such as an element of an offense, and must not be offered to establish the general character of the defendant.”
2. “The act must be necessary in the sense that it is probative of an essential claim or an element of the offense.”
3. “The evidence must be reliable.”
4. “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 factfinding process.” *Id.*

Ms. Sutton can envision mounting multiple attacks to the currently proposed evidence after the Government explains its purpose. However, without knowing how exactly the Government intends to link its proposed evidence to a relevant issue in the case, Ms. Sutton is effectively prejudiced by guessing how the Government will proceed. For that matter, there are aspects of this case that Ms. Sutton may not necessarily dispute and therefore 404(b) evidence would not be anything other than propensity evidence to pile on to an issue not in dispute. If a Defendant does not dispute an issue, then the 404(b) evidences probative value decreases and the prejudicial value increases. See *United States v. Harold Hall, Jr.*, 858 F.3d 254 (4th Cir. 2017) (“But, also like his prior possession conviction, Defendant’s prior convictions for possession with intent to distribute marijuana are of minimal probative value because Defendant did not contest his knowledge of marijuana and because the government did not introduce evidence

suggesting that Defendant's knowledge of marijuana would have permitted him to identify the smell as emanating from the deadbolt-locked bedroom.) *Id.*

Despite Ms. Sutton's disadvantage, should the Court not bar 404(b) evidence outright for failure to provide proper notice, or allow the government to revise the notice, Ms. Sutton challenges the proposed 404(b) evidence as being irrelevant, non-probative to any issue in the case, or its probative value is substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence. The Court should hold a 404(b) hearing prior to trial in order to allow Ms. Sutton the opportunity to challenge the evidence properly.

CONCLUSION

WHEREFORE, for the reasons set forth above, Ms. Sutton respectfully requests that the Court bar the Government from presenting 404(b) evidence as generically identified in its 404(b) disclosure. In the alternative, Ms. Sutton respectfully requests the Court ORDER the Government to revise the disclosure to allow her proper notice of what she must defend. Additionally, and most importantly, hold an evidentiary 404(b) hearing on the matter prior to trial so that a full record can be developed.

Respectfully submitted,
By Counsel

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CERTIFICATE OF SERVICE

I, Connor Robertson, certify that on the 23rd day of June, 2025, a copy of the foregoing motion was served on the United States by ECF, to Jonathan Storage, Assistant United States Attorney to the following:

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