Honorable John Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON, SEATTLE

UNITED STATES OF AMERICA, Plaintiff, v. ERIC SHIBLEY, Defendant.	No. CR20-174 JCC DEFENSE REQUEST FOR REASONABLE NOTICE OF GOVERNMENT'S INTENDED USE OF ER 404(b) EVIDENCE, EXPERT WITNESS SUMMARIES, AND CO-CONSPIRATOR ADMISSIONS

Defendant Eric Shibley, by and through undersigned counsel, requests that the government provide him with reasonable notice, in advance of trial, of the general nature of any and all evidence that the government will seek to introduce under ER 404(b) for any purpose, summaries of any purported expert witness's proposed testimony, and the substance of any purported co-conspirator admissions it might seek to introduce.

Relevant background

Mr. Shibley is charged in a 15-count indictment with wire and bank fraud and money laundering arising from various loan applications he made in the spring of 2020 in connection with the federal Paycheck Protection Program and the Economic Injury Disaster Loan program. Until early last year Mr. Shibley was a Washington-licensed physician still practicing medicine, primarily by ministering to a marginalized patient base typically battling drug addiction and mental illness. He was simultaneously trying to kick-start a real estate

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investment career using cheap labor, at least some of whom were marginalized street people and/or people he had known as patients. His approach was unorthodox and undoubtedly suffered from a lack of business convention and full documentation.

The government case is document-intensive with voluminous bank records, assorted applications and supporting documents, witness interview summaries, etc. The government investigation appears to have uncovered evidence of Mr. Shibley's past financial issues (including a bankruptcy), martial difficulties and a contentious divorce, prior domestic violence issues, tax issues, professional licensing issues, and other civil litigation. A court-ordered competency evaluation was also done. Most, if not all, of this evidence lacks sufficient relevance to justify its admission and will likely be the subject of a future motion in limine.

Defense request for notice of intended use of ER 404(b) evidence

In order to effectively investigate the case and prepare for trial the defense must understand as soon as possible what particular evidence, whether cited above or not, the government plans to present as "other crimes, wrongs, or acts" under ER 404(b). That rule explicitly requires the prosecution to provide reasonable notice in advance of trial of its intention to present 404(b) evidence, if the accused has requested the notice.

The policy behind 404(b) is "to reduce surprise and promote early resolution on the issue of admissibility." *United States v. Tosta*, 36 F.3d 1552, 1562 (1^{st} Cir. 1996). In considering the reasonableness of pretrial notice under 404(b) the court should consider several factors: (1) when the government, through timely preparation for trial, could

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have learned of the availability of the evidence; (2) the extent of prejudice to the opponent of the evidence from a lack of time to prepare; and (3) the significance of the evidence to the prosecution's case. *Id.*

The government should specify now what it will seek to admit under the rule so that proper preparation can proceed and appropriate in limine motions considered.

Defense request for written summary of expert testimony proposed under ER 702, 703 or 705

Upon request the government must provide to the defense a written summary of any expert testimony that it intends to use under Rules 702, 703 or 705 during its case-in-chief. CrR 16(a)(1)(G). The government response should include the witness's qualifications, opinions, and the bases for the opinions. See *United States v. Jackson*, 51 F.3d 646, 651 (7th Cir. 1995) (strongly encouraging the government to offer more specific descriptions of the opinions of the witness(es), foundations for their testimony, and their qualifications. An "expert" is any witness offered under Rule 702, 703 or 704. See *United States v. Khan*, 787 F.2d 28, 34 (2d Cir. 1986).

Defense request for any purported co-conspirator admissions

The government may seek to introduce co-conspirator statements as evidence under Fed.R.Evid. 801(d)(2)(E). Prior to doing so, the government must first establish, by at least a preponderance of evidence that (1) a conspiracy existed at the time the

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statement was made, (2) the defendant participated in the conspiracy, and (3) the statement was made in furtherance of the conspiracy. See *Bourjaily v. United States*, 483 U.S. 171, 175 (1987).

To provide fair notice to the defense the government should identify exactly what co-conspirator statements, if any, it intends to utilize. After the statements are identified, the defense can respond in an appropriate manner and lessen the chance for a mistrial on this issue.

Dated this 1st day of October, 2021.

/s/ Michael Nance
Defense Attorney

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Certificate of Service

I hereby certify that on the 1st day of October, 2021, I electronically filed the foregoing with the clerk of the court using the CM/ECF system. Notice of this filing will be sent electronically to counsel of record for other parties.

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