

**UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA)	
Plaintiff)	Criminal Case 21-CR-28
)	
v.)	Trial: February 1 or April 2023
)	
WILLIAM ISAACS)	Judge Amit P. Mehta
Defendant)	

RESPONSE TO THE GOVERNMENT’S RULE 404(b) NOTICE

PLEASE TAKE NOTICE that Defendant William Isaacs (“Mr. Isaacs”), through undersigned counsel, hereby respectfully submits a response to the Government’s Rule 404(b) Notice (ECF Doc. 722-2). The Notice concerns three categories of evidence: (1) certain alleged co-conspirators traveled to Washington, D.C., in November 2020 and organized a Quick Reaction Force (“QRF”), (2) alleged co-conspirator Jeremy Brown transported explosives to the Washington, D.C., area on January 6, 2021, and (3) certain alleged co-conspirators discussed and prepared for further demonstrations during January 6-20, 2021. The third category has been addressed, in part, in Defendant Joseph Hackett’s Omnibus Motion in Limine (ECF Doc. 387) in Criminal Case 22-CR-15-APM, and Defendant Joseph Hackett’s Reply to ECF Doc. 392 and Additional Objections (ECF Doc. 399) in Criminal Case 22-CR-15-APM (both of which Mr. Isaacs has joined), as well in Mr. Isaacs’ Motion in Limine to Exclude Co-Conspirator Statements (included in his Omnibus Motion in Limine (ECF Doc. 782)). The arguments included in this response supplement these prior filings with respect to Mr. Isaacs.

The evidence described in the Government's Notice should be excluded because it is neither intrinsic to the charged conspiracy nor probative of any permissible purpose under Fed. R. Evid. 404(b). Additionally, the evidence warrants exclusion pursuant to Fed. R. Evid. 403 because it is substantially more prejudicial than probative.

ARGUMENT

I. The evidence offered is not intrinsic to the conspiracies alleged.

The Government asserts that the evidence described need not be noticed pursuant to Fed. R. Evid. 404(b) because it is intrinsic to the charged conspiracy. The Government's view is incorrect. While evidence of a defendant's participation in certain uncharged acts in furtherance of an ongoing conspiracy may properly be labeled intrinsic, each item described in the Notice concerns acts *outside* the scope of the charged conspiracy or acts that Mr. Isaacs did not participate in or have any knowledge of. Nor has the Government alleged that Mr. Isaacs had any participation in or knowledge of these acts.

The cases cited by the Government where uncharged acts were found intrinsic to conspiracy charges are plainly distinguishable. See *United States v. Thai*, 29 F.3d 785, 812-13 (2d Cir. 1994); *United States v. Diaz*, 878 F.2d 608, 615-16 (2d Cir. 1989); *United States v. Bates*, 600 F.2d 505, 509 (5th Cir. 1979). In *Thai*, the court considered the defendants' arguments that certain "other crimes" evidence should be excluded under Rule 404(b) and found the evidence was admissible. *Thai*, 29 F.3d at 812-13. There, the defendants had been charged with a conspiracy in connection with street gang activities, and each of the "other crimes" they sought to exclude involved bad acts *by the individual seeking*

exclusion. Id. at 794, 812-13. The court in *Diaz* discussed Rule 404(b) in evaluating the admissibility of a customs receipt as evidence of a cocaine distribution conspiracy. *Diaz*, 878 F.2d at 610, 615. In ruling that the receipt was relevant, the court noted that the seizure of cocaine from the *same vehicle* that the defendants were driving the day they were arrested for the charged conspiracy. *Id.* at 615-16. The intrinsic nature of the evidence considered in *Thai* and *Diaz* is distinguishable; the evidence in *Thai* involved acts that the defendants themselves committed in furtherance of the conspiracy and the evidence in *Diaz* was connected to the defendants through other circumstantial evidence. The same cannot be said for the evidence the Government seeks to admit with respect to Mr. Isaacs: the Government does not allege that Mr. Isaacs was involved in any of the conduct described nor does it even attempt to connect this conduct to Mr. Isaacs' alleged participation in the charged conspiracies.

And while acts committed by other alleged co-conspirators may in some circumstances be admissible as evidence of an ongoing conspiracy, courts generally require some level of awareness or knowing participation by the defendant against whom the evidence is offered. *See Bates*, 600 F.2d at 509. In *Bates*, a defendant in a drug smuggling operation sought to exclude evidence of acts taken by co-conspirators prior to the defendant's involvement. *Id.* In ruling that the evidence was admissible, the court relied on the defendant's later "aware[ness] of the conspiracy's general purpose and scope" and "knowing participation" therein. *Id.*

With respect to the evidence related to certain individuals traveling to Washington, D.C. on November 14, 2020, the Government fails to demonstrate how this

evidence is intrinsic to the conspiracy alleged in this case. First, the November 2020 event was entirely separate from the charged conspiracy and falls outside of the period alleged in the Indictment, i.e., December 2020 through January 2021. Further, the Government provides no explanation of how these two events are connected beyond conclusory assertions that “[t]he defendants’ previous travels to Washington D.C. are directly relevant to their actions on January 6” and that “this first operation in support of the goals of the conspiracy . . . is relevant evidence of the conduct charged in the indictment.” Government’s Rule 404(b) Notice, ECF No. 777-2, at 9. Thus, the only way the November 2020 events appear “relevant” is through a propensity inference impermissible under Fed. R. Evid. 404(b)(1): i.e., because certain alleged co-conspirators traveled to D.C. before and engaged in activities related to QRFs, those same defendants, and others, must have acted similarly on and around January 6. For all the reasons listed above, that argument fails.

Significantly, the Government does not allege that Mr. Isaacs was present on November 20 or that he had any knowledge of this event, which is a significant distinction from the evidence offered in *Thai* and *Diaz*. The Government also fails to allege any awareness of the event after the fact or knowing participation in related events by Mr. Isaacs that might establish the necessary connection under the court’s reasoning in *Bates*.

The Government also seeks to admit evidence related to discussions and conduct of alleged co-conspirators - not Mr. Isaacs - occurring during January 6-20. On this point, Mr. Isaacs respectfully directs this Honorable Court’s attention to his Motion in

Limine to Exclude Co-Conspirator Statements (included in his Omnibus Motion in Limine (ECF Doc. 782)), which addresses the Government's burden in establishing that a statement qualifies as a co-conspirator statement under Fed. R. Evid. 801(d)(2)(E). As neither the Eighth Superseding Indictment nor the Government's Notice allege any awareness of or participation in these discussions by Mr. Isaacs, the Government has failed to meet its burden. For example, after describing the statements, the Government merely notes that these statements were made during the time period alleged in the Indictment. That fact by itself is insufficient to establish that these statements were made as part of the same ongoing conspiracy charged in the Indictment, and, if so, that Mr. Isaacs was a member of that conspiracy when the statements were made. *See Bourjaily v. U.S.*, 483 U.S. 171, 175 (1987) (setting forth findings necessary for the admission of statements under Rule 801(d)(2)(E)).

Finally, with respect to evidence of Jeremy Brown's actions in transporting explosives on January 6, the Government acknowledges that this Court found this evidence was not intrinsic to the offenses alleged in *Rhodes I*. If Brown's conduct, including alleged communications with *Rhodes I* defendants Stewart Rhodes, III, Kelly Meggs, and Kenneth Harrelson, was not intrinsic to the charges against those defendants, it certainly is not intrinsic to the charges against Mr. Isaacs, who is mentioned nowhere in the Government's description of this evidence.

II. The evidence offered is outside the exception provided in Rule 404(b).

Rule 404(b)(1) provides that “[e]vidence of any other crime, wrong, or 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.” This rule, of course, contains an exception: “This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.” Evidence is admissible under Rule 404(b)(2) only if it relates to acts committed by the same individual against whom the evidence is offered. *Huddleston v. U.S.*, 485 U.S. 681, 689 (1988) (“In the Rule 404(b) context, similar act evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor.”); *see also U.S. v. Clarke*, 24 F.3d 257, 263-66 (D.C. Cir. 1994) (applying the *Huddleston* threshold requirements in a case involving a drug distribution conspiracy). That none of the evidence described in the Government’s Notice relates to acts of Mr. Isaacs is alone enough to defeat its admission under Rule 404(b)(2).

Assuming, *arguendo*, that the Government could satisfy the threshold identity requirement, the Government has failed to provide any reasoning to support its contention that the evidence is probative under Rule 404(b)(2). For example, the Government asserts that the evidence is probative of the defendants’ intent, preparation, planning, association, and knowledge in connection with the conspiracy charges. Each of these permissible purposes attempts to prove a certain state of mind on the part of a defendant through circumstantial evidence. But an event simply cannot have any effect on an individual’s state of mind if the individual is not aware that the

event occurred. Mr. Isaacs did not participate in, nor was he aware of, any of the conduct or communications described in the Notice, and the Government makes no arguments or allegations to that effect. Thus, this conduct cannot logically serve as evidence of Mr. Isaacs' state of mind.

III. The evidence offered warrants exclusion under Rule 403.

Even if this Court finds the Government's evidence intrinsic to the alleged conspiracy or within the Rule 404(b)(2) exception, it should nonetheless be excluded pursuant to Rule 403, which permits the exclusion of relevant evidence that is substantially more prejudicial than probative. As explained above, this evidence has no connection to Mr. Isaacs, making its probative value non-existent. Moreover, any value is substantially outweighed by the risk of unfair prejudice that would result from allowing the Government to introduce the acts of alleged co-conspirators of which Mr. Isaacs had no knowledge or participation and which the jury might improperly attribute to him.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that the **RESPONSE TO THE GOVERNMENT'S RULE 404(b)**
NOTICE was filed with the Clerk of the Court via ECF on Friday, December 30, 2022.

Respectfully submitted,

_____/s/_____
Gene Rossi, Esquire