

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 05-60307-CR-COHN

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UNITED STATES OF AMERICA

v.

SANTIAGO ALVAREZ  
and  
OSVALDO MITAT,

Defendants.

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**GOVERNMENT'S RESPONSE IN OPPOSITION TO  
DEFENDANTS' MOTION TO EXCLUDE 404(B) EVIDENCE**

The United States, by and through the undersigned Assistant United States Attorneys, files this response in opposition to the defendants' motion to exclude extrinsic acts evidence admissible pursuant to Rule 404(b), and states the following:

Evidence of the defendants' involvement in criminal activities leading up to the weapons seizures giving rise to the charges in the indictment, as well as evidence of earlier extrinsic acts, is both inextricably intertwined in the offenses charged and admissible to show the defendants' motive, opportunity, intent, preparation, plan, knowledge, identity, and/or absence of mistake or accident. The admissibility of such evidence is particularly important in this case, where in motions filed both defendants have disavowed any knowledge that there were weapons in the cooler seized on November 18, 2005, or intent to possess those weapons or the partial machine gun seized on November 19, 2005. Further, the defendants have alleged that they were set up by the confidential informant, who they accuse of being an agent of the Cuban government. The defendants have made a show piece of this case their status as "icons" of the anti-Castro Cuban-American community and avid anti-Castro activists. Evidence concerning the defendants' previous anti-Castro activities, both

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on earlier occasions and in the months leading up to the weapons seizure in this case, is admissible to show that it was no accident or mistake that these defendants possessed a container full of military-grade armaments and that they fully intended to possess these arms in furtherance of their anti-Castro militant activities.

## MEMORANDUM OF LAW

### **I. Facts.**

The defendants are charged with conspiring to possess unlawful firearms and weapons between November 2004 and November 19, 2005. They also are charged with substantive possession offenses on November 18, 2005, relating to a cooler full of firearms seized from Osvaldo Mitat, and Alvarez is charged with possessing an illegal firearm seized from a store room at Inverrary Apartments in Broward County on November 19, 2005.

On November 18, 2005, Osvaldo Mitat was arrested after he accepted delivery of a large marine cooler full of illegal machine guns, a grenade launcher, grenades, a silencer, and other items. The cooler had been transported by an informant from the Inverrary Apartments in Broward County, where the informant was given the arms by Santiago Alvarez, who told him to deliver them to Mitat. Agents had been aware that since as early as November 2004, Alvarez had been storing firearms at the Inverrary Apartments for a number of months, having been alerted by the informant.

After the arms were seized, agents obtained a search warrant for Alvarez's store room at Inverrary. There they found additional evidence that firearms had been stored in that location, as well as a component of another illegal machine gun. The search was executed on November 19, 2005, the day after Santiago sent the firearms to Mitat and the two men were arrested. On November 18, 2005, federal agents had executed a search warrant at the offices of Caribe Foundation, which is owned and operated by Alvarez. The search warrant was obtained as a result

of an earlier seizure of a fraudulent Guatemalan passport purporting to be for Santiago Alvarez, but illegally issued in Guatemala. During the execution of the Caribe search warrant, agents had discovered a wealth of documents concerning Alvarez's anti-Castro activities over the years, including documents reflecting his involvement in the planning and execution of an armed incursion into Cuba in April 2001 which resulted in the capture and imprisonment of the men Alvarez had recruited and equipped for that mission. Also found were hundreds and hundreds of pages reflecting Alvarez's support for Luis Posada Cariles during his incarceration and trial in Panama for his role in the attempted assassination of Fidel Castro in Panama. Alvarez was very active in raising funds for and organizing Posada's defense and had a number of documents which show that he had attempted to procure travel documents for Posada. Alvarez also had documents showing that he was involved in efforts to bring Posada illegally to the United States following his release in Panama; the government has other evidence showing that Alvarez was directly involved in smuggling Posada into the United States in March 2005. Alvarez also had documents showing that he had illegally procured the fraudulent Guatemalan passport which led to the execution of the search warrant.

Finally, in August 2005, federal agents and Bahamian authorities recovered a large cache of munitions and explosives hidden on Guinchos Cay, an operation conducted after agents learned that Alvarez was storing and maintaining this arsenal.

The United States intends to offer evidence of the foregoing activities at trial.

## **II. Argument.**

For years, the defendants have been involved in a struggle against Fidel Castro and the Cuban government and have been very active in militant anti-Castor activities. As part of that struggle, the defendants have been involved in planning and staging insurgent para-military operations against Cuba. The weapons seized in this case have been acquired and stored by the

defendants in support of these past, present and future efforts. The evidence referred to above is relevant and admissible to prove that the defendants' knowingly and intentionally possessed the weapons seized in this case as part of that effort.

**A. The Evidence of the Defendants' Prior Activities is Admissible Under the "Inextricably Intertwined" Doctrine.**

This Court has broad discretion to determine the admissibility of evidence. *United States v. Ross*, 131 F.3d 970, 987 (11th Cir.1997). While Fed.R.Evid. 404(b) prohibits the introduction of evidence of other crimes, wrongs, or bad acts to prove propensity, the Eleventh Circuit has made clear that

[e]vidence of criminal activity other than the charged offense is not extrinsic under Rule 404(b) if it is (1) an uncharged offense which arose out of the same transaction or series of transactions as the charged offense, (2) necessary to complete the story of the crime, or (3) inextricably intertwined with the evidence regarding the charged offense.

*United States v. McLean*, 138 F.3d 1398, 1403 (11th Cir. 1998)(citation omitted). Indeed, "[e]vidence not part of the crime charged but pertaining to the **chain of events explaining the context, motive, and set-up of the crime** is properly admitted if **linked in time and circumstances** with the charged crime, or forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury." *Id.* (citation omitted)(emphasis added).

The defendants in this case have for years been involved with activities leading up to the weapons seizure on November 18. Through testimony and documents seized from Caribe Foundation, a center for Alvarez's militant anti-Castro activities, evidence shows that the defendants were involved in the planning and execution of an armed incursion into Cuba in April 2001 which resulted in the capture and imprisonment of the party of commandos assembled, funded and supported by Alvarez and dispatched to Cuba to commit acts of violence against the government of

Cuba. For example, documents evidencing the planning and procurement of arms, munitions and equipment for the 2001 incursion were seized from Caribe Foundation, along with documents setting forth details of the attack plan and personnel required. While not specifically tied to any particular firearm or weapon seized in this case, these documents list weapons, ammunition and ordinance similar in type and character and serve as direct evidence that the defendants were accumulating stockpiles of weapons for past and future missions. Evidence of these earlier activities of the defendant's previous possession of assault weapons and other military gear should be admitted because it forms "an integral and natural part of an account of the crime, [and] is necessary to complete the story of the crime for the jury." *Id.*

Also admissible in this case is evidence concerning the defendants' support for and role in smuggling accused terrorist Luis Posada Cariles into the country in March 2005, as well as the ensuing coverup. In the eyes of anti-Castro extremists like Alvarez and Mitat, there is no more iconic figure than Posada Cariles, an accused terrorist who has admitted his role in the bombing of a Cuban commercial passenger airliner and whose release from custody in Panama for his role in an attempted assassination of Fidel Castro was due in no small part to the support of Alvarez and his supporters. Alvarez and Mitat's efforts to bring Posada Cariles here and clear his name are as much a part of this case as the cooler full of weapons, since these efforts will explain to the jury that Alvarez and Mitat were fully committed to their war against Castro and were making every effort to assemble both the means and the personnel to continue planning these activities.

Also admissible in this case is evidence concerning a large cache of firearms and weapons maintained by Alvarez and Mitat on Guinchos Cay in the Bahamas. The maintenance of this weapon stockpile flows naturally with the stockpile of weapons seized in this case, again to show the defendants' planning for militant activities by stockpiling weapons for use in those activities.

Also inextricably intertwined with the offenses charged in this case is evidence regarding a fraudulent passport seized by the Department of Homeland Security prior to the execution of the search warrant at Caribe Foundation. This passport, which was a fraudulently issued Guatemalan passport with Santiago Alvarez's name, photograph and biographical data, not only contributed to the probable cause determination which led to the search of Caribe Foundation, and thus to the seizure of evidence to be used in this trial, but also is further evidence of Alvarez's international anti-Castro militant activities, which were to be furthered through the use of false travel documents.

Evidence of the former criminal activity is vital to understanding the government's case against Defendant and is inextricably intertwined with the government's proof of the charged offense. The evidence explains the crime in its entirety and provides the trier of fact with a chain of events explaining the crimes committed by the defendant. Without the evidence of the former criminal activity, the jury will be unable to make a proper determination as to the defendant's guilt or innocence.

The United States therefore respectfully requests that this Court admit the evidence of the uncharged offenses arising out of defendant's previous possession of assault weapons, invasion of Cuba, possession of false travel documents, and smuggling of one of their most revered leaders into the country, as part of "the chain of events explaining the context, motive, and set-up of the crime," and as necessary "to complete the story of the crime for the jury." *McLean*, 138 F.3d at 1403.

**B. In the Alternative, the Evidence of Defendants' Other Activities is Admissible Under Federal Rule of Evidence 404(b).**

In the Eleventh Circuit, admission of other crimes, wrongs, or acts is evaluated under a three part test: (1) the evidence must be relevant to an issue other than the defendant's character; (2) the act must be established by sufficient proof to permit a jury finding that the defendant committed the

extrinsic act; and (3) the probative value of the evidence must not be substantially outweighed by its undue prejudice, and the evidence must meet the requirements of Rule 403. *United States v. Zapata*, 139 F.3d 1355, 1357 (11th Cir. 1998); *see United States v. Beechum*, 582 F.2d 898 (5th Cir. 1978).

### **1. Relevant to an Issue other than Defendant's Character**

While Rule 404(b) evidence cannot be used to prove character it is admissible to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Fed.R.Evid. 404(b). The Eleventh Circuit has ruled that intent becomes an issue as soon as a defendant pleads not guilty. *United States v. Eirin*, 778 F.2d 722, 730 (11th Cir. 1985)(citation omitted). Once a defendant pleads not guilty the next step is to determine whether the extrinsic evidence is relevant to the charged offenses. “The relevancy of extrinsic offense evidence of intent is determined by comparing the state of mind of the defendant in perpetrating both--the extrinsic and contemporaneous--offenses.” *Id.* (citation omitted). In *Eirin*, the court stated that the “relevancy of extrinsic evidence is measured by the similarity of the extrinsic offense to the offense charged.” *Eirin*, 778 F.2d at 731.

The seminal case on the admission of Rule 404(b) evidence in the Eleventh Circuit is *United States v. Beechum*, 582 F.2d 898, 911-18 (5th Cir 1978), *cert. denied*, 440 U.S. 920 (1979); *see Huddleston v. United States*, 485 U.S. 681, 685 (1988) (confirming the *Beechum* analysis). In *Beechum*, the court explained what is required to prove similarity. The Eleventh Circuit stated that:

. . . similarity means more than that the extrinsic and charged offense have a common characteristic. For the purposes of determining relevancy, ‘a fact is similar to another only when the common characteristic is the significant one for the purpose of the inquiry at hand.’

*Beechum*, 582 F.2d at 911(citation omitted). The Court explained that when the issue is “intent to

commit the offense charged, the relevancy of the extrinsic offense derives from the defendant's indulging himself in the same state of mind in the perpetration of both the extrinsic and charged offense." *Beechum*, 582 F.2d at 911.

With regard to this case, the evidence is relevant to show the defendants' intent to possess illegal arms and munitions. Alvarez's involvement in the 2001 incursion, including evidence of assembling the arms and supplies needed and the creation of a battle plan, and the plan's execution, dovetail precisely with the charged crime. Thus, admission of the evidence is critical to show that the defendants possessed the requisite intent, an issue raised by the defendants' not guilty pleas.<sup>1</sup> *See United States v. Simpson*, 152 F.3d 1241, 1248-49 (10th Cir.1998) (court properly admitted as 404(b) evidence uncharged images of child pornography found on defendant's computer to show that defendant's possession of child pornography was not a mistake or accident and that he had knowledge of the material he was receiving).

## **2. Sufficient Evidence to Find that Defendant Committed the Extrinsic Act**

Evidence of other crimes, wrongs, or bad acts need not be proven by clear and convincing evidence, rather, the evidence "should be admitted if there is sufficient evidence to support a finding by the jury that the defendant committed the similar act." *United States v. Huddleston*, 485 U.S. 681, 685 (1988); *United States v. Cohen*, 888 F.2d 770, 776 (11th Cir. 1989). In the present case, testimony and documents seized from Caribe show that the defendants engaged in the activities described above. Accordingly, the jury will have sufficient basis to conclude that these events occurred and that the defendants were involved in them, and so the evidence should be admitted.

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<sup>1</sup> In addition to establishing the defendants' intent, the evidence provides a motive for the defendants' possession of the firearms in the cooler and in the Inverrary store room. The evidence also rules out mistake or inadvertence.



### **3. The Probative Value Outweighs Any Potential Undue Prejudice**

In *United States v. Mitchell*, 666 F.2d 1385, 1390 (11th Cir.), *cert. denied*, 457 U.S. 1124 (1982), the Eleventh Circuit set forth the factors to be considered in determining whether the probative value outweighs the undue prejudice: (1) the strength of the government's case on the issue of intent; (2) the overall similarity of the extrinsic and charged offenses; (3) the amount of time separating the extrinsic and charged offenses; and (4) whether it appeared at the commencement of trial that the defendant would contest the issue of intent.

In the present case, the government has no direct evidence on the issue of defendant's intent to possess the firearms in issue. The government's proof rests primarily on the testimony of the confidential informant, as well as on circumstantial evidence of defendants' guilt. The extrinsic act evidence is clear proof that the defendants possessed intent to commit the charged violation; without such evidence the burden becomes difficult to fulfill. The defendants have clearly indicated that a major component of their defense in this case will be that they did not know what was in the cooler and that they were set up by the informer, who they accuse of being in league with the Cuban government. Moreover, Alvarez has indicated that his defense to possession of the firearm found in his store room at Inverrary is his alibi of being in custody on November 19, the day of the seizure. His efforts to assemble weapons and stock pile them and other wise plot the overthrow of Castro will serve to overcome this defense and prove that Alvarez had possessed that firearm, and the others. The evidence of the uncharged offense is necessary to rebut the defendants' claim of ignorance.

With regard to the second prong of the test, the defendants possessed the same state of mind in committing both the charged offenses and the previous activities, which were all part of an ongoing plan to depose Castro.

With regard to the third element, most of the events occurred during the time frame of the

conspiracy. The failed incursion occurred a number of years before, but is part of the defendants' ongoing struggle against Castro, which will not end until he dies or is deposed.

Finally, it appears as if the defendants plan to make intent a key part of their defense is that they lacked the requisite knowledge and intent, as reflected in their motions and pleadings. Accordingly, evidence of the uncharged conduct is vital for the government to overcome this defense.

**C. The Defendants Have Been Given Sufficient Notice of the Government's Intent to Offer 404(b) Evidence.**

Finally, the defendants contend that all evidence which the government seeks to introduce pursuant to Rule 404(b) should be suppressed because the government has failed to provide timely notice of intent to rely on such evidence. The court should consider three factors in determining the reasonableness of pretrial notice of the government's intent to introduce evidence of other bad acts under Rule 404(b). *United States v. Perez-Tosta*, 36 F.3d 1552 (11<sup>th</sup> Cir. 1994). The court must consider:

- (1) When the Government, through timely preparation for trial, could 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) How significant the evidence is to the prosecution's case.

*Id.* at 1562. "The policy behind 404(b) is 'to reduce surprise and promote early resolution on the issue of admissibility.'" *Id.* at 1561. The same policy is reflected in Local Rule 88.10(H) and the Standing Discovery Order.

In *Perez-Tosta*, the court held that 404(b) evidence was admissible, despite the fact that the government provided notice just before jury selection. *Id.* at 1560. Under the three-part analysis, the court found that the prosecutor was unaware of the availability of the witnesses offering the

404(b) testimony until a few days before the trial began, the defendant could point to no specific course of action he would have taken had he had earlier notice, and the evidence was significant to overcome the defendant's mere presence defense. *Id.* at 1562.

Here, these factors weigh in favor of allowing the government to introduce the evidence of the defendants' other illicit activities. This case began as a reactive case in which the prosecutors only began to debrief the informant through whom much of the 404(b) evidence will come after initial discovery in this case. That debriefing remains incomplete at this writing. Moreover, much of the evidence alluded to is contained within the boxes of evidence seized from Alvarez's office. Review of that evidence was only recently completed. The defendants were advised that any and all evidence located in those boxes would be introduced as either direct evidence or under Rule 404(b). Yet while the government has made this evidence available to the defendants on at least three separate occasions, counsel have spent no more than a few hours at a time reviewing the evidence, and have finally decided to simply copy most of the evidence. Thus, the circumstances surrounding notice of the government's intent to use this evidence weighs in favor of admitting the evidence.

Second, the prejudice to the defendants is minimal. The defendants still have weeks to prepare for trial. They have had access to the boxes of materials containing this evidence, which, since it comes from Alvarez's offices, they already are familiar with. The evidence goes to their activities as anti-Castro activists, which they have announced an intent to make an issue at trial. Prejudice to the defendants due to the timing of this notice is minimal.

Finally, the evidence is crucial to the government's case. Both Mitat and Alvarez have indicated through their pleadings that they were unaware of the contents of the cooler and that they were set up by the informant. Their past activities of amassing arms to fight Castro and their support

of Posada (whose testimony they intend to introduce at trial) are vital to show that they knowingly and intentionally possessed these firearms.

**CONCLUSION**

WHEREFORE, the United States respectfully requests that this Court deny the defendants' motion to exclude Rule 404(b) evidence.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by U.S. mail this 27<sup>th</sup> day of March 2006 to:

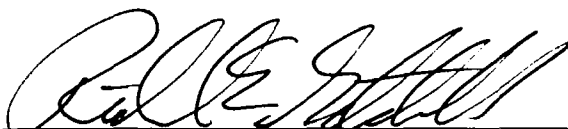
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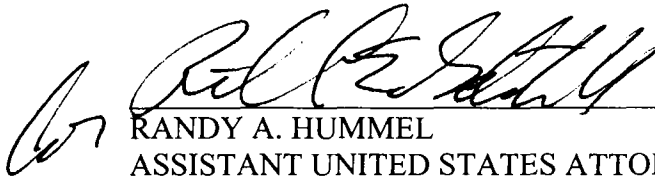
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