IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	
	)	
v.	)	**Criminal No. 09-276 (JR)**
	)	
STEWART DAVID NOZETTE,	)	
	)	
Defendant.	)	
	)	

GOVERNMENT'S NOTICE OF INTENT TO INTRODUCE EVIDENCE OF PRIOR CONDUCT OF THE DEFENDANT

The United States, through its undersigned attorneys, respectfully gives notice that it may seek to introduce evidence of prior conduct of the defendant for one or more of the following purposes: (a) as direct evidence of the defendant's attempt to commit espionage in the government's case-in-chief; (b) as evidence offered to dispel, contradict, or rebut matters raised by the defense in any statement, question, testimony, other evidence, or argument at trial; and/or (c) to otherwise establish defendant's intent, knowledge, absence of mistake, and motive, pursuant to Federal Rule of Evidence 404(b).

This notice is before the Court, well in advance of any motion hearing or trial date, after a claim by the defense that during the time pending trial in this matter, the government will discover additional crimes committed by the defendant. As it is its duty to do so, the government will continue to investigate any wrongdoing by the defendant.

Pursuant to the Court's request, however, the government respectfully offers the following early notice of specific prior acts of the defendant that it is aware of, to date, that the government may seek to introduce at trial for myriad reasons, including: direct evidence; rebuttal evidence; or evidence of other crimes, wrongs or acts by the defendant under Federal Rule of

Evidence 404(b). At this nascent point in the litigation, and without benefit of any notice of affirmative defenses, rulings by the Court on discovery disputes, or motions under the Classified Information Procedures Act or otherwise, it is impossible for the government to pinpoint which theory of admissibility is most appropriate for each item of evidence. This notice is therefore intended as a broad snapshot of the evidence known at this time relating to prior conduct that potentially could be used against the defendant.

I. Factual Background

For approximately twenty years, the defendant worked as a noted astrophysicist in various capacities for the United States government on highly classified space-related systems. In early 2007, as part of a fraud and tax evasion investigation, a search warrant was executed at the defendant's home in Chevy Chase, Maryland. Analysis of computer drives located in the defendant's home revealed classified material. Through the course of this investigation, agents also learned that the defendant had received payments from an Israeli-government owned aerospace company, totaling approximately $225,000 that the defendant had failed to claim as income for purposes of his income taxes. Agents also learned that Nozette had informed a colleague that if the government tried to imprison him for fraud, he would move to "Israel, India or China" and "tell them everything" he knows.

In September and October of 2009, a team of Federal Bureau of Investigation (FBI) counterintelligence agents conducted a false flag operation in which defendant passed classified information to an undercover FBI employee (UCE) posing as an Israeli intelligence officer. During his first contact with the UCE, after the UCE identified himself as an Israeli intelligence officer, the defendant told the UCE he was "happy to be of assistance" and stated, "I thought I

was working for you already." On October 19, 2009, FBI agents arrested Nozette pursuant to an arrest warrant. On October 21, 2009, a federal grand jury in the District of Columbia returned a two-count indictment against Nozette, charging him with Attempted Espionage, in violation of 18 U.S.C. § 794.

As part of the investigation, the FBI obtained a number of search warrants. On October 19, 2009, FBI agents executed a search warrant for defendant's residence in Chevy Chase, Maryland. On October 23, 2009, FBI agents executed a search warrant for defendant's safe deposit box in La Jolla, California. Classified information was discovered on several computer systems seized pursuant to these search warrants.

On March 17, 2010, the grand jury returned a superseding indictment against defendant. Count Two of the superseding indictment adds an additional charge of Attempted Espionage. The same classified information which underlies this Count was found in both the La Jolla safe deposit box and the Chevy Chase residence.

II. Prior Conduct of the Defendant

The following proposed items of evidence may be offered, *inter alia*, as direct evidence, as rebuttal evidence, or as evidence under Fed. R. Evid. 404(b)[1]:

[1] Rule 404(b) of the Federal Rules of Evidence governs the admission of other crimes, wrongs or acts of a defendant. To the extent that it is not intertwined with the charged offenses, evidence of other crimes, wrongs or acts is admissible under Fed. R. Evid. 404(b) if offered for a permissible purpose. Such permissible purposes include proof of intent, motive, opportunity, plan, knowledge, identity or absence of mistake or accident. United States v. Miller, 895 F.2d 1431, 1436 (D.C. Cir. 1990), cert. denied, 498 U.S. 825 (1990). "[U]nder Rule 404(b), any purpose for which bad acts evidence is introduced is a proper purpose so long as the evidence is not offered solely to prove bad character." Id. In determining whether such evidence is admissible, the Court undertakes a two part analysis. First, the Court considers whether the evidence is "probative of some material issue other than character." United States v. Clarke, 24 F.3d 257, 264 (D.C. Cir. 1994). The federal rule is one of inclusion, not exclusion; the evidence may be offered for any purpose, so long as the evidence is not offered solely to prove character. See United States v. Bowie, 232 F.3d 923, 929 (D.C. Cir. 2000); United States v. Crowder, 141 F.3d 1202, 1206 (D.C. Cir. 1998) (en banc); United States v. Johnson, 802 F.2d 1459 (D.C. Cir. 1986). The D.C. Circuit has recognized that "Rule 404(b) evidence will often have . . . multiple utility, showing at once intent, knowledge, motive, preparation and the like." United States v. Crowder, 141 F.3d at

A. Defendant Retained Classified Information at his Residence and in a Safe Deposit Box in La Jolla, California.

During the false flag operation, the defendant told the UCE he had secreted classified materials in safe deposit boxes because he knew the information would become valuable one day. Specifically, in a face-to-face meeting with the UCE on October 19, 2009, Nozette stated he had two safe deposit boxes, "one here and for further safeness . . . I have one in California . . . in La Jolla . . . It's all backed up out of state." Nozette explained that he had "had that box there since, you know, the nineties. You know so it's been there for awhile." When asked by the UCE why he kept the safe deposit boxes, Nozette replied that he wanted to protect the contents – classified information pertaining to a DoD satellite program including "all the technical specifications," – from "anybody coming into my house and searching it." Nozette also told the UCE that he had just been to La Jolla and "got some stuff off of [the safe deposit box]."

Also on October 19, 2009, Nozette asked the UCE for a computer thumb drive with more memory so that he could download a large amount of material from the safe deposit box for the "Mossad." Nozette stated, *inter alia*:

UCE: . . . if there's anything you want me to take back to the homeland personally, let's show it to me while we're here together. This would be a good op-, time and opportunity for you to do so.

NOZETTE: Um, do you have, um a larger coded memory stick?

UCE: Okay, alright, well. . .

1208. If the Court deems the evidence to be relevant, the Court should exclude the evidence only if its probative value "is substantially outweighed by the danger of unfair prejudice." Fed. R. Evid. 403. See also United States v. Long, 328 F.3d 655, 662 (D.C. Cir. 1993); United States v. Day, 591 F.2d 861, 878 (D.C. Cir. 1978). In close cases, the rule tilts toward the admission of the uncharged conduct evidence. See United States v. Johnson, 802 F.2d at 1463-64 ("the balance should generally be struck in favor of admission when the evidence indicates a close relationship to the event charged") (quoting United States v. Day, 591 F.2d 861, 878 (D.C. Cir. 1978)).

NOZETTE: I need at least an eight gig one.

In a subsequent interview that same day, two FBI agents asked Nozette about the location of safe deposit boxes. Nozette told them about the boxes in Alexandria, Virginia, and Manhattan Beach, California, but not the box in La Jolla.

On October 19, 2009, during a search of Nozette's residence, FBI agents recovered computers and computer media later determined to contain classified information. Agents also found a rental agreement with a Bank of America branch located in La Jolla, California, for a safe deposit box. During a post-arrest inventory, agents found the key to the La Jolla safe deposit box in defendant's wallet.

1. Alexandria, Virginia and Manhattan Beach, California Safe Deposit Boxes

In late October 2009, search warrants were obtained for the Alexandria, Virginia and Manhattan Beach, California safe deposit boxes that the defendant identified for the FBI agents. Both boxes were empty and had not been accessed by Nozette in years.

2. La Jolla, California Safe Deposit Box

An October 2009 search of the La Jolla safe deposit box, pursuant to a search warrant, revealed several hard drives as the defendant had described to the UCE, but not to the FBI agents. Subsequent computer forensic analysis established that those hard drives contained classified material identical to that found in the defendant's home and on a thumb drive passed by the defendant to the UCE on September 16, 2009.

B. Defendant Sought to Improperly Obtain Information Related to a Classified Program.

On October 17, 2002, defendant went to the Navy Research Laboratory (NRL) facility in Washington, D.C. Defendant was fuming, pointed at the classified computer where certain classified program material was stored and yelled, "give me my fucking information. I want it now. I paid for it." It is believed that defendant had a security pouch for transporting classified information with him.

On the afternoon of November 4, 2002, Nozette contacted Employee A at the NRL and asked for a disc containing unclassified portions of a program he had been working on while at the NRL. Soon thereafter, Employee B at the NRL received a phone call from defendant saying he would be stopping by to pick up the disc. Employee B understood that he/she could not release the disc to Nozette without authorization from Employee C because the disc had to be reviewed to ensure that it did not contain any classified information. Within 45 minutes, Employee B received an e-mail purportedly from Employee C saying "Give Stu [Nozette] the . . . Disc." Employee C did not send this e-mail. When confronted, Nozette did not deny sending the e-mail to try to obtain the disc before it had been reviewed for classified information. The program information Nozette sought on the disc could have been used to assist in the complete reconstruction of a classified program. It is information regarding this classified program that underlies Count Two of the superseding indictment.

Also, on or about October 19, 1009, Nozette told the UCE the following with regard to improperly obtaining and retaining classified information in the La Jolla safe deposit box:

NOZETTE: Well it's part of my program so in other words I, I developed it all as part of the program.

UCE: Okay.

NOZETTE: And I downloaded it off of the servers.

UCE: Okay.

NOZETTE: But I had access to the servers.

C. Defendant's Acts of Fraud and Tax Evasion

If appropriate, the government may seek to introduce any and all prior fraudulent acts which prompted defendant's guilty plea before this Court in United States v. Stewart D. Nozette (Crim. No. 08-371) to: (1) Conspiracy to Defraud the United States in violation of 18 U.S.C. § 371 (Count 1); (2) Tax Evasion, in violation of 26 U.S.C. § 7201. See Rule 608, Fed. R. Evid.

D. Defendant's Statements to Colleagues

Defendant stated, *inter alia*, that if the U.S. government prosecuted him or put him in jail as a result of the fraud investigation against him he would move to India or Israel or China and "tell them everything" and words to the effect, "It's not a crime if you don't do the time."

E. Defendant's Statements to the UCE Relating to What the Defendant Believed Were Prior Espionage-Related Activities

The Government hereby gives notice that it intends to introduce any and all statements by the defendant made during the course of the undercover operation, including, but not limited to, the following:

On September 3, 2009, during the false flag operation, defendant stated the following:

NOZETTE: I don't get recruited by Mossad every day. I knew this day would come by the way.

UCE: How's that?

NOZETTE: (Laughs) I just had a feeling one of these days.

UCE: Really?

NOZETTE: I knew you guys would show up.

UCE: How you, um . . .

NOZETTE: (Laughs) And I was amazed it didn't happen longer . . .

UCE: Hm. I'm s-, I'm sure my, back at home, one of the few people had actually said it, but I, people did say I'm surprised you guys didn't come sooner than this but, um, um, but you . . .

NOZETTE: I thought I was working for you already. I mean that's what I always thought [the foreign company] was just a front.

F. Defendant's Admissions to the FBI Relating to Previous Disclosures of Classified Information to Foreign Nationals

On October 19, 2009, the defendant was interviewed by FBI agents. During the interview, the defendant told the FBI, among other things, that he had previously made statements to several named foreign individuals in which defendant "connected the dots" concerning specific aspects of a classified program or programs.

III. Conclusion

As stated previously, given the very early stage of this case, it is premature for the government to predict which of the proffered evidence is relevant for a given purpose. For example, should the defense attempt to mount an entrapment defense in this case, the government maintains that any prior misconduct involving defendant's predisposition to commit crime, and notably acts which the defendant believed were espionage or government fraud-related offenses, could be broadly introduced as rebuttal evidence.[2] Without such a defense

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[2] The defense of entrapment "has two related elements: government inducement of the crime, and a lack of predisposition on the part of the defendant to engage in the criminal conduct." Mathews v. United States, 485 U.S. 58, 63, (1988); see also United States v. Evans, 216 F.3d 80, 90 (D.C. Cir. 2000); United States v. Glover, 153 F.3d 749, 754 (D.C. Cir.1998). When a defendant claims entrapment, he first bears the burden of showing "that he was induced by the Government to commit a crime he otherwise would not have committed." United States v. Ramsey, 165 F.3d 980, 985 n.6 (D.C. Cir. 1999). If the defendant is successful, "the burden then shifts to the government to prove the defendant was predisposed to commit the crime." Glover, 153 F.3d at 754.

The case of United State v. Squillacote, 221 F.2d 542 (4th Cir. 2000) is particularly noteworthy. It involved a false flag operation. In discussing the predisposition evidence, the court stated as follows:

> Squillacote's predisposition to commit espionage is also evidenced by her statements to the undercover agent during their first meeting. In that meeting, the agent identified himself as being with the South African Intelligence Service, and he explained that "there are still operations being conducted without the full knowledge of everybody in the state, for reasons, I guess, you can well understand." Squillacote responded that "[t]his is an area that's not unfamiliar to me." Squillacote then elaborated that she had been associated with similar activities "in another kind of capacity" for many years, "so, you should understand that this is not a *tabula rasa* for me. I'm coming with history." . . . . In our view, these statements clearly show that Squillacote was more than willing, without any encouragement from the government, to commit espionage.
>
> And perhaps the most compelling evidence of Squillacote's predisposition is related to the documents she passed to the undercover agent at their second meeting. The government's evidence established that Squillacote obtained one of the documents sometime before her *first* meeting with the undercover agent . . . . And extra copies of two of the documents were found in Squillacote's home when the government executed its search warrant. Thus, even before she first met the undercover agent, Squillacote had already violated 18 U.S.C.A. § 793(b) by taking or copying classified national defense information. Clearer evidence of predisposition is difficult to imagine.

Squillacote, 221 F.3d at 570-71. See United States v. Orenuga, 430 F.3d 1158, 1164-65 (D.C. Cir. 2005) (concluding court did not abuse its discretion by permitting videotape to be played at defendant's trial on charge of receipt of bribe by public official, regarding defendant's statement about future deals and types of people with whom he preferred to deal, although statements obviously were prejudicial; any prejudice to which defendant was subjected was related to his culpability and statements were germane to his entrapment defense in that it was reasonable to believe jury would have

being raised, however, certain of this evidence may otherwise only be admissible, for example, to establish defendant's knowledge or intent with regard to a single charge of Attempted Espionage. Accordingly, the government respectfully requests that the Court allow the government leave to seek specific rulings on the admissibility of the proffered evidence, including any evidence which may be appropriately propounded under Federal Rule of Evidence 404(b), at more appropriate stages throughout the pendency of this litigation.

Respectfully submitted,

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found defendant's comments highly probative in assessing whether he acted voluntarily and deliberately).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing was electronically served upon John C. Kiyonaga, Esq., counsel for defendant, on this 17th day of March, 2010.

/s/
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