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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
UNITED STATES OF AMERICA :
 :
- against - :
 :
VIKTOR KOZENY and :
FREDERIC BOURKE, JR., :
 :
Defendants :
----- X

05 Crim. 518 (SAS)

**MEMORANDUM OF LAW IN SUPPORT OF BOURKE'S MOTION
IN LIMINE TO EXCLUDE GOVERNMENT'S PROPOSED RULE 404(b) EVIDENCE
(CORRECTED VERSION)**

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Defendant Frederic A. Bourke, Jr. respectfully submits this memorandum in support of his motion under Fed. R. Evid. 404(b) and 403 and the Fifth Amendment Due Process Clause to exclude two categories of "other acts" evidence that the government intends to offer at trial: (1) evidence that Viktor Kozeny and Mr. Bourke brought two Russian prostitutes on a plane trip in the spring of 1997, and (2) evidence that Mr. Bourke believed his business partner, Peter Dooney, was injecting him with a harmful substance and took steps to protect himself. Declaration of John D. Cline ["Cline Dec."], Exhibits A, B. The proposed evidence has no relevance to any issue in the case. It will cause Mr. Bourke substantial unfair prejudice, confuse the jury, and waste time.

BACKGROUND

The government's Rule 404(b) notice declares its intention to "offer at trial evidence that, during the defendant Frederic Bourke's trip with co-conspirator Viktor Kozeny through Europe and Asia in the spring of 1997 on Kozeny's private plane, Kozeny and Bourke obtained the services of two prostitutes in Moscow, Russia, who were transported with Kozeny and Bourke to, among other places, Baku, Azerbaijan, before being returned to Russia." Cline Dec., Exhibit A. The government explains the purported relevance of the prostitute evidence as follows:

This evidence will be offered for the purpose of showing the background of the conspiracy, particularly the close relationship of Kozeny and Bourke, insofar as they engaged in other illegal or otherwise scandalous conduct together, in addition to the charged offenses. Kozeny and Bourke's joint conduct in this regard contrasts with their relationship with other of the investors in the Azerbaijan venture, and therefore serves to rebut the anticipated defense that if other investors were unaware of Kozeny's corrupt scheme, Bourke was also unlikely to have been aware of it. Moreover, the conduct is probative of the false statements offense and of Bourke's consciousness of guilt because Bourke omitted mention of the two Russian women as passengers when he described in his interview with the Government this trip and the passengers who accompanied Kozeny and him on Kozeny's jet.

Cline Dec., Exhibit A.

The government has also notified the defense that it may present evidence of Mr. Bourke's fears that agents of his business partner, Peter Dooney, "were secretly injecting the defendant with a harmful substance, fear of which caused the defendant to request from Viktor Kozeny's chief of security a detail to foil [the former business partner's] efforts." Cline Dec., Exhibit B. The government has not explained the relevance of this evidence.

ARGUMENT

I. GENERAL PRINCIPLES.

The government may not offer "other act" evidence "to show a defendant's criminal propensity." *United States v. Garcia*, 291 F.3d 127, 136 (2d Cir. 2002) (quotation omitted); *see, e.g., Huddleston v. United States*, 485 U.S. 681, 687 (1988). To be admissible, such evidence must be (1) "offered for a proper purpose"; (2) "relevant to a disputed issue"; and (3) have probative value that is not "substantially outweighed by the danger of unfair prejudice" or by other Rule 403 concerns. *United States v. Lombardozzi*, 491 F.3d 61, 78 (2d Cir. 2007); *see Huddleston*, 485 U.S. at 691-92 (citing these requirements as sources of "protection against . . . unfair prejudice" from the admission of "other act" evidence).¹ As the proponent of the evidence, the government has the burden of establishing that it is admissible. *See, e.g., Bourjaily v. United States*, 483 U.S. 171, 175 (1987); *United States v. Stein*, 521 F. Supp. 2d 266, 268 (S.D.N.Y. 2007).

Under these standards, the Court should exclude both the prostitute evidence and the injection evidence.

¹ In addition, if the district court admits the evidence, it should "administer[] an appropriate limiting instruction." *Lombardozzi*, 491 F.3d at 78 (quotation omitted); *see, e.g., United States v. Laflam*, 369 F.3d 153, 157 n.2 (2d Cir. 2004) (discussing content of limiting instruction).

II. THE "OTHER ACTS" EVIDENCE IS INADMISSIBLE.

The government cannot meet its burden of showing that the prostitute evidence and the injection evidence is "offered for a proper purpose" and "relevant to a disputed issue."

Lombardozzi, 491 F.3d at 78. Moreover, the unfair prejudice, jury confusion, and waste of time this evidence would cause far outweigh its (nonexistent) probative value.

A. The Prostitute Evidence.

The government asserts that the prostitute evidence is relevant to show an unusually close relationship between Kozeny and Mr. Bourke and to show "consciousness of guilt." Cline Dec., Exhibit A. Neither of these theories of relevance is convincing.

The alleged fact² that Kozeny and Mr. Bourke "obtained the services of two prostitutes in Moscow, Russia," and flew with them to Baku and back has nothing to do with this case. The "closeness" of the relationship between Kozeny and Mr. Bourke is relevant here only to the extent it bears on whether Kozeny told Mr. Bourke that he was bribing Azeri officials. Their shared involvement with prostitutes does not make it more likely that Kozeny confided his alleged bribery to Mr. Bourke.

The timing of the prostitute episode further drains it of relevance. According to the government, Kozeny and Mr. Bourke made the trip with the prostitutes in "the spring of 1997." According to the superseding indictment, however, Kozeny did not begin paying bribes to the Azeris until "in or about August 1997," and Mr. Bourke did not first invest in Oily Rock, Ltd. until March 1998. Superseding Indictment ¶¶ 7, 18. When the prostitute episode allegedly occurred, Kozeny was months away from paying his first bribe, and Mr. Bourke was almost a

² We assume solely for purposes of this motion that the government can produce sufficient evidence on both theories from which a jury "could reasonably find" the asserted facts. *Huddleston*, 485 U.S. at 690-92.

year away from investing in Oily Rock. Thus, even if it could be inferred that in the company of the prostitutes Kozeny was unusually willing to spill his secrets to Mr. Bourke, he had not yet begun to bribe and thus could not have spilled the only secret that matters in this case. And the fact of the trip with the prostitutes in spring 1997 does not make it remotely more likely that in August 1997 (when the bribery allegedly began) or in March 1998 (when Mr. Bourke first invested) Kozeny told Mr. Bourke about his bribery.

Nor does Mr. Bourke's asserted failure to mention the prostitutes to the FBI in an interview conducted five years after the trip show "consciousness of guilt"--or at least not consciousness of guilt of the charges in this case. Assuming the truth of the government's allegations about the prostitutes, consciousness of guilt *of bribery* is among the least likely explanations for Mr. Bourke's failure to mention their presence to the FBI. He might have been embarrassed that he had been in the company of prostitutes; he might have thought the presence of the prostitutes too inconsequential to mention; he might have forgotten about the prostitutes when remembering the trip five years later--all of these explanations are more plausible than that Mr. Bourke omitted the prostitutes because he thought their presence would somehow implicate him in Kozeny's bribery (which had not yet begun at the time of the trip).

The prostitute evidence can (and should) be excluded under Rules 401 and 402 because it lacks relevance to any disputed issue in the case. But the evidence is even more clearly excludable under Rule 403. That rule permits the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403. Rule 403 is a critical safeguard against the "unfair prejudice" to which "other act" evidence can give rise. *See, e.g., Huddleston*, 485 U.S. at 691;

United States v. Barnes, 2005 U.S. Dist. LEXIS 17151, at *16-*22 (E.D. Pa. Aug. 17, 2005) (excluding relevant "other acts" evidence under Rule 403). Indeed, "because prior acts evidence carries with it such a high risk of confusion and misuse . . . there is a heightened need for the careful application of the principles set out in Rule 403." *United States v. Johnson*, 27 F.3d 1187, 1193 (6th Cir. 1994).

The prostitute evidence presents an obvious and substantial risk of unfair prejudice. Apart from possible illegality, prostitution and the use of prostitutes' services have powerful moral and religious implications. The recent and swift downfall of New York's governor and other government officials for obtaining the services of prostitutes demonstrates the inflammatory nature of the evidence the government proposes to present. *See, e.g.*, Paul Duggan, *Escort Service Boss Found Guilty*, Washington Post, Apr. 16, 2008, at B1 (available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/04/15/AR2008041501564.html>). That unfair prejudice substantially outweighs any conceivable probative value the prostitute evidence might have.

The Rule 403 balance tilts especially heavily against admission of the prostitute evidence because the government has a substantial amount of other, nonprejudicial evidence to establish that, until Mr. Bourke detected Kozeny's fraud in late 1998, the two men enjoyed a warm relationship.³ "The need for ['other acts'] evidence is determined 'in view of the contested issues and other evidence available to the prosecution, and the strength of the evidence in proving the issue.'" *Barnes*, 2005 U.S. Dist. LEXIS 17151, at *17 (quoting *United States v. Sriyuth*, 98 F.3d

³ The parties will, of course, draw different inferences from Kozeny's desire to be close to Mr. Bourke. The government will contend that the relationship tends to show that Kozeny and Mr. Bourke were co-conspirators in a bribery scheme. The defense will contend that Kozeny developed the relationship with Mr. Bourke because he wanted to part Mr. Bourke from his money (which he succeeded in doing). Despite these dueling inferences, however, there will be ample, uncontested evidence that the men had a warm relationship before late 1998.

739, 748 (3d Cir. 1996)) (emphasis added; internal quotation omitted). Where, as here, the government has several witnesses who can describe the relationship between Kozeny and Mr. Bourke, the probative value of the highly prejudicial prostitute evidence is negligible.

For all of these reasons, the Court should exclude the government's prostitute evidence.

B. The Injection Evidence.

The injection evidence should be excluded as well. The government has not attempted to explain the relevance of that evidence, and we cannot imagine how it has any bearing on the case. We will address in our reply any theory of relevance the government constructs.

The Rule 403 balance weighs overwhelmingly against admission of the injection evidence. As far as we can tell, that evidence has no probative value on any disputed issue. On the other hand, the evidence presents a substantial danger of unfair prejudice, if only because it permits the government to paint Mr. Bourke as eccentric. And, more important for these purposes, the injection evidence would almost certainly "confus[e] the issues," "mislead[] the jury," cause "undue delay," and "waste . . . time." Fed. R. Evid. 403; *see, e.g., Stein*, 521 F. Supp. 2d at 271-73 (excluding "other act" evidence under Rule 403 in part on these grounds). Mr. Bourke and his business partner Dooney have had a lengthy, complex dispute. If the government presents evidence of Mr. Bourke's concern about injection, the defense will need to put his concern in the context of that dispute. An explanation of Mr. Bourke's dispute with Dooney, even if presented in streamlined form, will take substantial time and carry the jury far afield from the issues in this case.

CONCLUSION

For the reasons set forth above, the Court should grant Mr. Bourke's motion to exclude evidence of (1) the prostitutes on Kozeny's plane, and (2) Mr. Bourke's concerns about Dooney and his efforts to allay those concerns.

Dated: May 7, 2009

By: /s/ Harold A. Haddon

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