

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

UNITED STATES OF AMERICA,)
)
V.)
)
JAMES MCDANIEL)
)
_____)

No. 3:08-CR-051-L
ECF

**DEFENDANT’S MOTION IN LIMINE REGARDING PRIOR CONVICTIONS
AND UNCHARGED CONDUCT**

COMES NOW James McDaniel, by and through his counsel Sam Ogan, Assistant Federal Public Defender, and files this his Motion In Limine Regarding Prior Convictions and Uncharged Conduct. McDaniel files this motion in limine to prohibit the government from presenting evidence concerning McDaniel’s criminal record or any uncharged criminal conduct alleged committed by McDaniel.

I.

McDaniel is charged by indictment with maintaining a drug house, possession with intent to distribute cocaine, and with weapons violations relating to those offenses. He is also charged with possession with intent to distribute controlled substances that resulted in death.

II.

McDaniel has a prior conviction for murder. He served a lengthy sentence for that conviction and was released on parole, which has since been revoked. In addition, discovery has made it clear that the government intends to introduce evidence of other crimes and wrongdoings involving, *inter alia*, allegations that McDaniel ran a gambling house, and that he has threatened various people with firearms or with physical violence. Finally, the government or its witnesses

might attempt to mention to the jury that McDaniel was charged in Dallas county with a sexual assault which was recently dismissed.

III.

A defendant has a basic and fundamental right to be tried for the particular offense charged, not as a criminal generally. A number of rules and statutes seek to protect that right. Rule 609 of the Federal Rules of Criminal Procedure governs the admissibility of prior convictions if an individual testifies. Prior felony convictions and convictions for theft-type offenses are generally admissible against a witness, but even then there are protections for the witness and the accused. See United States v. Barnes, 622 F.2d 107 (5th Cir. 1980). Rule 608 F.R.Cr.P. prohibits introduction of evidence of specific instances of misconduct except in limited circumstances. McDaniel submits that the prejudice to him of admitting the prior murder conviction substantially outweighs its limited probative value. The jury might all too easily give improper consideration to the conviction, and assume that McDaniel is guilty of the charges in the indictment merely because he has this prior conviction, and thus a propensity to commit crimes.

IV.

Further, McDaniel submits that his prior conviction and any uncharged extraneous conduct are prohibited by Rule 404 of the Federal Rules of Evidence. Rule 404(a) prohibits proof of a defendant's character as evidence that he acted in conformity therewith. Similarly, Rule 404(b) prohibits evidence of other crimes as evidence that he acted in conformity with such crimes. Therefore, neither McDaniel's conviction nor any alleged unadjudicated extraneous offenses are admissible under 404(b). Before admitting evidence under Rule 404(b), the Court must determine whether the probative value of such evidence is substantially outweighed by the potential for unfair prejudice, pursuant to Rule 403 of the Federal Rules of Evidence. *Huddleston v. United States*, 485

U.S. 681, 108 S.Ct. 1496 (1988). This determination must be made on the record. *United States v. Zabaneh*, 837 F.2d 1249 (5th Cir. 1988); *United States v. Robinson*, 700 F.2d 205 (5th Cir. 1983).

WHEREFORE, defendant McDaniel requests that this Court prohibit the government from presenting any evidence regarding McDaniel's prior murder conviction and to redact any such reference to the conviction from any exhibit offered into evidence. In addition, prior to the government introducing any evidence of uncharged extraneous criminal conduct, McDaniel requests that the Court require the government to request a hearing, outside the presence and hearing of the jury, to determine the admissibility of such evidence.

Respectfully submitted,

/s/ Sam Ogan

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CERTIFICATE OF CONFERENCE

On December 19, 2008, counsel for defendant was unable to reach AUSA McCarthy regarding this motion, but assumes that the government would oppose the relief requested.

/s/ Sam Ogan
Sam Ogan

CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2008 I electronically filed the foregoing document with the clerk of the court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. The electronic case filing system sent a “Notice of Electronic Filing” to the following attorneys of record who have consented in writing to accept this notice as service of this document by electronic means: brandon.mccarthy@usdoj.gov. A copy of the foregoing document was also served by hand-delivery to Mr. McCarthy at 1100 Commerce St., Third Floor, Dallas, Texas 75242.

/s/ Sam Ogan
Sam Ogan