

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA

v.

THOMAS A. SHAY

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CRIMINAL NO. 92-10369-Z

MOTION TO PRECLUDE EVIDENCE
OF ALLEGED USE OF ALIASES

Defendant Thomas A. Shay ("Shay Jr.") hereby moves that this Court prohibit the introduction of evidence of his alleged knowledge and use of fictitious names and aliases, including altered variations of his last name, prior and subsequent to October 28, 1991, which the government has informed us it may seek to introduce at trial, as an exception to Rule 404(b)'s prohibition against character evidence.

Shay Jr. objects to the government's proposed introduction of evidence of alleged use of aliases for the following reasons:

1. Use of aliases in June 1989, January and April 1990, and January 1992, even if proved, are not admissible to show that Shay Jr. used an alias at Radio Shack on October 18, 1991. See Fed.R.Evid. 404(b).

2. As an initial matter, the government's omnibus list of theories for introduction ("intent, plan, knowledge, identity, etc.") fails utterly to adequately particularize the relevance of this evidence. "While admissible in some circumstances, [extrinsic act evidence] is by no means a routine exercise and should not be accepted unless the government articulates with

suitable precision the 'special' ground for doing so." United States v. Flores Perez, 849 F.2d 1, 8 (1st Cir. 1988).

3. Shay Jr.'s defense will simply be that the government's evidence fails to prove that he purchased anything at Radio Shack on October 18, 1991. Lack of intent or knowledge or absence of mistake or accident are not in issue and cannot therefore be rebutted with prior acts. See, e.g., United States v. Rodriguez-Estrada, 877 F.2d 153, 155 (1st Cir. 1989) (other acts not admissible unless they go to a "controverted issue" in the case); United States v. Marvillia, 907 F.2d 216, 223 (1st Cir. 1990) (other acts admissible because defendant raised lack of knowledge and ability); United States v. Powell, 587 F.2d 443, 448 (9th Cir. 1978) (where defendant sought only to show that the source of the drugs was not him, intent was not in issue).

4. Using an alias on other occasions has no relevance to intent to kill or a plan to kill Shay Jr.'s father, where there is no connection in time or other circumstances between the two events. See, e.g., United States v. Lynn, 856 F.2d 430, 435 (1st Cir. 1988) (prior offense inadmissible where there was no evidence indicating a continuing scheme over time, the participants in the two events were completely different, and the two sales were dissimilar in quantity).

5. Evidence of use of aliases on other occasions is inadmissible to show identity, since the other alleged aliases ("Ashay," "Mike Peters," "James Keough") and the alleged use of "Sahy" on October 18, 1991, do not share characteristics that are

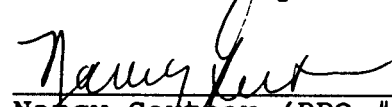
"so idiosyncratic as to constitute a signature." Ingraham v. United States, 832 F.2d 229, 233 (1st Cir. 1987).

6. That a prior act belongs to the same generic class as the act sought to be proved is not enough. See United States v. Pisari, 636 F.2d 855, 859 (1st Cir. 1981) ("fact that in committing a robbery, one invokes the threat of using a knife falls far short of a sufficient signature or trademark upon which to posit an inference of identity"); United States v. Garbett, 867 F.2d 1132, 1135 (8th Cir. 1989) (that both acts involved marijuana is not a "peculiar similarity" warranting admission of prior conviction); United States v. Benedetto, 571 F.2d at 1249 (since passing folded bills by way of a handshake "about as unique as using glassine envelopes to package heroin," evidence inadmissible to show identity); United States v. Miller, 883 F.2d 1540, 1543-44 (11th Cir. 1989) (evidence of other cocaine transaction inadmissible to prove identity where only similarities were the use of a beeper and delivery in a car, which were not shown to be unique).

7. Use of other aliases to raise an inference that Shay Jr. used an alias on October 18, 1991, is precisely what is forbidden by Rule 404(b) and the Due Process Clause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney or record for each other party by mail (by hand) on 6/24/93

Amy Pearson Evans