

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES :
 :
 v. : CRIMINAL No. 05-CR-134
 :
 DARRYL K. BARNES :

MEMORANDUM

Padova, J.

August 12, 2005

On March 9, 2005, Defendant Darryl K. Barnes was charged in a four-count Indictment with possession of more than 50 grams cocaine base, in violation of 21 U.S.C. § 841(a)(1)(Count I); possession of cocaine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1) (Count II); possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c) (Count III); and possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1) (Count IV). Presently before the Court are Defendant's "Motion for Bifurcated Trial", and the Government's "Motion *in Limine* Pursuant to Federal Rule of Evidence 404(b), to Admit Evidence of Defendant Darryl K. Barnes's Uncharged Illegal Narcotics Activity and Prior Narcotics Conviction to Establish Knowledge and Intent." For the reasons that follow, Defendant's Motion is granted and the Government's Motion is denied.

I. BACKGROUND

The following facts are undisputed. On January 14, 2005, Philadelphia Police Officer Timothy Bogan received an anonymous tip that Defendant was selling cocaine and/or cocaine base from his

vehicle, a 2001 Oldsmobile, and two houses located at 2722 Oakford Street and 2625 Manton Street in Philadelphia, Pennsylvania. The source informed Officer Bogan that buyers would purchase drugs from Defendant at 2722 Oakford Street by knocking on the back door of the house, while they would knock on the front door of 2625 Manton Street and then wait across the street to complete the transaction.

On January 20, 2005, Officer Bogan and his partner, Philadelphia Police Officer Deborah Palmer-Long, met with a confidential informant ("CI") and enlisted him to make a series of controlled narcotics purchases from Defendant. Later that same day, the Officers conducted surveillance in the area of 27th and Federal Streets in Philadelphia when they saw Defendant's 2001 Oldsmobile arrive on the scene, and observed Defendant exiting the vehicle. The Officers watched as the CI approached Defendant and handed him \$20 in prerecorded buy money in exchange for two orange tinted packets. The packets were later determined to contain cocaine base.

On February 1, 2005, Officers Bogan and Palmer-Long located Defendant's Oldsmobile on the 2700 block of Oakford Street, and observed Defendant exit the residence at 2722 Oakford Street to retrieve an item from the trunk of his vehicle. The Officers gave the CI prerecorded buy money, and watched as the CI knocked on the back door of the house at 2722 Oakford Street, was admitted by Defendant, and stepped out of the house after approximately 30

seconds with a single clear packet. The packet was later determined to contain cocaine base.

On February 2, 2005, Officers Bogan and Palmer-Long again observed the Oldsmobile on the 2700 block of Oakford Street, and used the same CI to conduct another controlled buy. The CI knocked on the back door of the house, was admitted by an unknown black male, and returned approximately 30 seconds later with two clear packets which were later determined to contain cocaine base.

On February 7, 2005, Officers Bogan and Palmer-Long observed Defendant's Oldsmobile on the 2600 block of Manton Street, and provided the CI with prerecorded buy money to execute a drug purchase from Defendant at the 2625 Manton Street residence. When the CI arrived at 2625 Manton Street, Defendant was standing in front of the house and had just completed a transaction with an unidentified black male. The CI then handed Defendant \$20 in prerecorded buy money, and received a single clear packet that was later determined to contain cocaine base. Upon completion of the drug transaction, Defendant entered the residence at 2625 Manton Street.

Based on the evidence they had gathered, Police Officers Bogan and Palmer-Long were issued a search warrant for the Oakford and Manton Street residences. On February 9, 2005 at approximately 2:20 pm, Police Officers Bogan, Brian Dietz, and other members of the Philadelphia police force executed the search warrant for a

residence located at 2625 Manton Street. As a result of the search the officers seized a packet of cocaine base from the sofa where Defendant had been seated, \$318 and two cellphones from Defendant's person, as well as a loaded 9mm handgun, three magazines, approximately 125 grams of powder cocaine, and an additional \$7,871 from a safe in the basement. Moreover, the Officers recovered 116 grams of cocaine base from the kitchen of the residence, two scales, two pots, and two spoons, all of which contained cocaine residue, as well as numerous unused packets. The charges brought against Defendant in the instant Indictment are based solely on the items seized during the execution of the search warrant, and do not rely on the controlled drug transactions Defendant engaged in with the CI.

In his Motion to Bifurcate, Defendant moves the Court to sever the trial of this matter and have all evidence relating to Counts I, II and III, which charge Defendant with drug related offenses, presented separately from the evidence relating to Count IV, which charges Defendant with possession of a firearm by a convicted felon. The Government, in turn, has moved the Court *in limine* to admit evidence of Defendant's prior felony drug conviction as well as evidence of two uncharged drug transactions Defendant engaged in with the CI. The Government has not objected to Defendant's Motion to Bifurcate should the Court deny its own Motion *in limine* to Admit Evidence. (Govt. Mot. at 5 n.2.)

II. LEGAL STANDARD

Federal Rule of Evidence 404(b) provides in relevant part that:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident

Fed. R. Evid. 404(b). For evidence of prior bad acts to be admissible, the evidence must (1) have a proper purpose under Rule 404(b); (2) it must be relevant under Rule 401; (3) the court must determine that its probative value is not substantially outweighed by its potential for unfair prejudice; and (4) the court must, upon request, charge the jury to consider the evidence only for the limited purpose for which it is admitted. Huddleston v. United States, 485 U.S. 681, 691-92 (1988); see also United States v. Vega, 285 F.3d 256, 261 (3d Cir. 2002).

III. DISCUSSION

The Government seeks to introduce evidence at trial regarding two drug transactions between Defendant and the CI which took place on January 20, 2005, and February 7, 2005, and which were observed in their entirety by police witnesses. The Government further seeks to introduce evidence at trial regarding Defendant's November 2004 felony conviction for possession of cocaine base with intent to distribute.

A. Evidence Intrinsic to Charged Offenses

The Government first argues that evidence of Defendant's uncharged narcotics activities is admissible because it provides a complete picture of the chain of events leading up to the charged conduct and, therefore, establishes Defendant's intent and motive with respect to the charges brought against him. "Rule 404(b) 'does not extend to evidence of acts which are 'intrinsic' to the charged offense.'" United States v. Cross, 308 F.3d 308, 320 (3d Cir. 2002) (quoting Fed. R. Evid. 404(b) Advisory Committee's Note). The United States Court of Appeals for the Third Circuit ("Third Circuit") has held that, although "most circuit courts view evidence as intrinsic if it is 'inextricably intertwined' with the charged offense . . . or if it 'completes the story' of the charged offense," in this Circuit acts are intrinsic only "when they directly prove the charged [offense]." Id. Here, the Government does not argue that evidence of the uncharged drug activities directly proves the charged offenses. Rather, the Government merely contends that such evidence would provide a complete picture of Defendant's activities in the days leading up to February 9, 2005. The Court independently finds that Defendant's prior uncharged drug activities are not direct proof of Defendant's intent with respect to the controlled substances and drug paraphernalia seized from the 2625 Manton Street residence, and could thus only be used to provide background for the events

alleged in the Indictment. In this Circuit, such evidence does not fall within the intrinsic evidence exception to Rule 404(b).¹ See id. Accordingly, the Court concludes that evidence of Defendant's uncharged drug activities can only be presented at the trial of this action if it is admissible under Rule 404(b).

B. Evidence of Prior Bad Acts under Rule 404(b)

The Government argues that evidence of Defendant's uncharged drug activities and Defendant's previous felony conviction for possession of a controlled substance with intent to distribute should be admitted under Rule 404(b) because it shows that Defendant had knowledge and intent relevant to the charged offenses, and the probative value of the evidence outweighs any potential for unfair prejudice.

1. Proper purpose and relevancy

The Third Circuit has recognized that "Rule 404(b) is a rule of inclusion rather than exclusion." United States v. Givan, 320 F.3d 452, 460 (3d Cir. 2003). Accordingly, the admission of evidence of other criminal conduct is favored "if such evidence is

¹ The Court further notes that, in the Third Circuit, intrinsic evidence exception to Rule 404(b) has been applied only "[i]n cases where the incident offered is part of the *conspiracy* alleged in the indictment." United States v. Gibbs, 190 F.3d 188, 217 (3d Cir. 1999) (quoting 22 Charles A. Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure, §5239, at 450-51 (1978))(emphasis added); see also Cross, 308 F.3d at 320 ("For our court, acts are intrinsic when they directly prove the charged *conspiracy*.") (emphasis added). Here, Defendant has not been charged with a conspiracy.

'relevant for any other purpose than to show a mere propensity or disposition on the part of the defendant to commit the crime.'" Id. (quoting United States v. Long, 574 F.2d 761, 765 (3d Cir. 1978)). "Knowledge, intent, and lack of mistake or accident are well-established non-propensity purposes for admitting evidence of prior crimes or acts." Id. at 461. However, "a proponent's incantation of the proper uses of such evidence under the rule does not magically transform inadmissible evidence into admissible evidence." United States v. Morley, 199 F.3d 129, 133 (3d Cir. 1999). Thus, although "the burden on the government is not onerous," United States v. Sampson, 980 F.2d 883, 888 (3d Cir. 1992), "the proponent [of Rule 404(b) evidence] must clearly articulate how that evidence fits into a chain of logical inferences, no link of which may be the inference that the defendant has the propensity to commit the crime charged." United States v. Himelwright, 42 F.3d 777, 782 (3d Cir. 1994).

With respect to Defendant's prior uncharged drug trafficking activities, the Government argues that this evidence is relevant to Defendant's knowledge and intent with respect to Counts I and II of the Indictment, which charge Defendant with possession of a controlled substance and possession of a controlled substance with intent to distribute, respectively. However, "prior bad acts [are not] intrinsically relevant to 'motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake.'"

Sampson, 980 F.2d at 888. The Government, therefore, cannot establish the relevancy and admissibility of Rule 404(b) evidence by simply reciting "the litany of 'knowledge, intent, absence of mistake, etc.'" Id. Here, the Government has not articulated any logical chain of inferences consistent with its case which explains how the proposed evidence is relevant to establish Defendant's knowledge and intent with respect to Counts I and II of the Indictment. See Himelwright, 42 F.3d at 782. "Where the government has not clearly articulated reasons why the evidence is relevant to any legitimate purpose, there is no realistic basis to believe that the jury will cull the proper inferences and material facts from the evidence." Sampson, 980 F.2d at 889. Accordingly, the Court concludes that evidence of Defendant's uncharged drug activities is not admissible under Rule 404(b) for purposes of proving Defendant's knowledge and intent with respect to Counts I and II of the Indictment.

The Government also argues that evidence of Defendant's uncharged drug activities is probative of Defendant's intent to possess the firearm recovered from the 2625 Manton Street residence in furtherance of drug trafficking, as charged in Count III of the Indictment. Specifically, the Government argues that it would be possible to conclude that somebody in whose house a firearm was found and who was observed selling drugs the day before the seizure

possession that firearm in furtherance of his drug trafficking. (06/23/2005 N.T. at 140.) Courts have held that evidence of prior drug dealing is relevant under Rule 402 and admissible under Rule 404(b) to show a motive to possess firearms in furtherance of drug trafficking. United States v. Frederick, 406 F.3d 754, 761 (6th Cir. 2005); United States v. Smith, 292 F.3d 90, 99-100 (1st Cir. 2002); United States v. Fuller, 887 F.2d 144, 147 (8th Cir. 1989).² This Court agrees that evidence of Defendant's uncharged drug activities in the days leading up to the search of the 2625 Manton Street residency and the recovery of the gun is relevant under Rule 402 and offered for a proper purpose under Rule 404(b) with respect to Count III of the Indictment. It is undisputed that Defendant's intent is an essential element of the Government's burden of proof with respect to Count III, and Defendant's uncharged drug activities are "evidence that the jury could consider as shedding light on key issues" of whether Defendant possessed the firearm in furtherance of drug trafficking. Givan, 320 F.3d at 461. This

² The Court notes that these courts admitted evidence of prior drug dealing for purposes of showing the defendant's motive to possess firearms in furtherance of drug trafficking under Rule 404(b) on grounds that these facts were direct evidence of Defendant's motive. See Frederick, 406 F.3d at 761; Smith, 292 F.3d 90; Fuller, 887 F.2d at 147. As discussed above, in this Circuit Defendant's uncharged drug activities do not rise to the level of direct evidence, and thus do not fall within the intrinsic evidence exception to Rule 404(b). See Cross, 308 F.3d at 320. Accordingly, these cases are cited only for the proposition that evidence of a defendant's prior drug dealing is probative of the defendant's motives for possessing a firearm.

evidence is particularly probative under the facts of this case, as the uncharged drug activities took place mere days before the search of 2625 Manton Street and the recovery of the firearm. Moreover, this evidence is admissible to establish something other than to "show a mere propensity or disposition on the part of the [D]efendant to commit the crime," id. at 460 (internal quotation omitted), because the prior uncharged drug activities did not involve the use or display of any firearms and are substantively distinct from the charge of possession of a firearm in furtherance of drug trafficking. Accordingly, the Court concludes that, for purposes of Count III of the Indictment, evidence of Defendant's uncharged drug activities is relevant under Rule 402 and offered for a proper reason under Rule 404(b).

With respect to Defendant's prior felony conviction for possession of a controlled substance with intent to distribute, the Government argues that this conviction, which occurred on November 10, 2004, less than three months before the events giving rise to the current charges, is relevant under Rule 402 and admissible under Rule 404(b) for two purposes. First, the Government maintains that this evidence will "help the [G]overnment meet its burden of proving that [D]efendant knew that the substance that he possessed was a controlled substance [because] [D]efendant's prior possession of a controlled substance makes it more likely that he knew that the substance he possessed this time was also a

controlled substance." (Govt. Mot. at 13.) Second, the Government argues that the evidence of Defendant's prior conviction "is relevant to prove that [D]efendant did not possess the crack and cocaine with an intent to use them or that he was somehow innocently associated with the narcotics." (Id.)

"There is no question that, given a proper purpose and reasoning, drug convictions are admissible in a trial where the defendant is charged with a drug offense." Sampson, 980 F.2d at 887. Evidence of a prior drug conviction is, therefore, admissible under Rule 404(b) "[i]nasmuch as a showing of knowledge, intent and lack of mistake or accident [are] essential for the government to meet its burden of proof in this case, and the [prior] felony drug conviction [i]s evidence that the jury could consider as shedding light on key issues of whether [Defendant] knew of the drugs." Givan, 320 F.3d at 461. The Third Circuit has held that evidence that a defendant has previously been convicted of distribution of a controlled substance makes the defendant's knowledge of the presence of a controlled substance more probable than it would have been without the evidence, "as it indicates that [the defendant] had knowledge of drugs and drug distribution, and thus that it was less likely that he was simply in the wrong place at the wrong time." Id. Accordingly, such evidence is relevant under Rule 402 and offered for a proper purpose under Rule 404(b). Id.

Here, the Government seeks the introduction of Defendant's

prior drug conviction for purposes of establishing that Defendant had knowledge of the drugs at issue and was familiar with the drug trade, thus making it less likely that Defendant possessed the cocaine and cocaine base innocently or for his own use. This evidence is particularly probative in the instant case, as Defendant was convicted of possession of a controlled substance with intent to distribute less than three months prior to the events giving rise to the current charges. The Court, therefore, concludes that Defendant's prior felony drug conviction is relevant under Rule 402 and offered for a proper purpose under Rule 404(b).

2. Probative value and undue prejudice

Although Defendant's uncharged drug activities and prior felony drug conviction are relevant under Rule 402 and offered for a proper purpose under Rule 404(b), Rule 403 further provides that "relevant evidence may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury" Fed. R. Evid. 403. "In making this determination, the trial judge must appraise the genuine need for the challenged evidence and balance that necessity against the risk that the information will influence the jury to convict on improper grounds." United States v. Scarfo, 850 F.2d 1015, 1019 (3d Cir. 1988). The balancing of probative value and unfair prejudice "lies within the broad discretion of the trial court." Sampson, 980 F.2d at 889.

The need for 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." United States v. Sriyuth, 98 F.3d 739, 748 (3d Cir. 1996) (quoting United States v. Cook, 538 F.2d 1000, 1003 (3d Cir. 1976)). With respect to Defendant's prior uncharged drug activities, the Court finds that the Government is in possession of a considerable amount of other evidence which could be used to establish Defendant's intent. Indeed, the Court has previously held that the Government may at trial introduce a statement made by Defendant that he resided at 2625 Manton Street. (08/08/2005 Memorandum and Order at 9-11.) The Government will also be able to introduce evidence that the firearm was seized from Defendant's residence, that it was loaded, and that it was kept in the same safe as the cocaine and a substantial amount of cash. The Court, therefore, concludes that the Government does not have a significant need for evidence of Defendant's uncharged drug activities to prove the charges in Count III of the Indictment.

Similarly, with respect to Defendant's prior felony conviction for distribution of a controlled substance, the Government is in possession of a substantial amount of other evidence to establish Defendant's knowledge and intent with respect to Counts I and II of the Indictment. At trial, the Government may introduce statements made by Defendant that he had just finished "cooking product" in

the kitchen, and that he resided at 2625 Manton Street. (08/08/2005 Memorandum and Order at 9-11.) Moreover, the Government will be able to introduce physical evidence of a 9mm handgun, three magazines, approximately 125 grams of powder cocaine, and \$7,871 that was seized from a safe in the basement of the 2625 Manton Street residence. (Id. at 8.) Additional physical items that were seized from the 2625 Manton Street residence and could be presented at trial include a packet of cocaine base that was found inside the sofa where Defendant had been seated, two cellphones that were seized from Defendant's person, numerous unused packets that were discovered in the living room, and two scales, two pots, and two spoons, all of which contained cocaine residue. In view of the substantial amount of other evidence which is available to the Government to prove Defendant's knowledge and intent to possess controlled substances with the intent to distribute, the Court concludes that the Government does not have a significant need for the evidence of Defendant's prior felony drug conviction to prove the charges brought against him in Counts I and II of the Indictment.

The Court further finds that there is a substantial risk that the proposed evidence will unduly prejudice Defendant and influence a jury to convict Defendant on improper grounds. See Scarfo, 850 F.2d at 1019. A risk of conviction on improper grounds exists where there is a "danger that the jury will be inflamed by the

evidence to decide that because the accused was the perpetrator of the other crimes, he probably committed the crime for which he is on trial as well." Sriyuth, 98 F.3d at 748 (quoting Cook, 538 F.2d at 1003.) With respect to evidence of Defendant's uncharged drug activities, the Government has advised the Court that it will not be calling the CI as a witness and does not intend to divulge the CI's identity to Defendant, but will instead call two police officers, who observed the two transactions in their entirety, to testify. If this evidence were admitted, Defendant would be deprived of an opportunity to confront and cross-examine the CI, who was a participant in the alleged transactions and could be in a position to exculpate Defendant. Moreover, this evidence could properly be admitted only to establish Defendant's intent to possess the firearm in furtherance of drug trafficking. However, there is a significant danger that the jury will also consider this evidence with respect to Counts I and II of the Indictment, charging Defendant with possession with intent to distribute of a controlled substance. The Court further finds that the evidence of Defendant's uncharged drug activities is so powerful that, regardless of any limiting instructions given by the Court, a substantial danger remains that the proffered evidence would "lure the fact finder into declaring guilt on a ground different from proof specific to the offense charged." Old Chief v. United States, 519 U.S. 172, 180 (1997). Accordingly, "[e]ven the most

carefully crafted limiting instruction might not eliminate the prejudicial effect of the proffered evidence." United States v. Gilliard, Crim. No. 04-355, 2004 WL 1279098, at *4 (E.D. Pa. May 25, 2005). The Court, therefore, concludes that the probative value of Defendant's uncharged drug activities is substantially outweighed by the danger of unfair prejudice to Defendant, and the Government is precluded from presenting evidence of Defendant's uncharged drug activities at trial.

With respect to evidence of Defendant's prior felony conviction for possession of cocaine base with intent to distribute, the Court finds a clear danger that, upon being presented with evidence of Defendant's prior conviction for drug distribution, the jury will be "inflamed by the evidence to decide that because [Defendant] was the perpetrator of the other crime[], he probably committed the crime for which he is on trial as well." Sriyuth, 98 F.3d at 748. This danger is particularly serious in the instant case, because Defendant's previous drug conviction occurred less than three months prior to the events leading up to the instant, substantially similar charges. In light of these facts, the Court finds that the risk of the jury convicting Defendant on improper grounds cannot be adequately curtailed by limiting instructions. See Gilliard, 2004 WL 1279098, at *4. The Court, therefore, concludes that the probative value of Defendant's prior felony conviction for possession of a controlled substance

with intent to distribute is substantially outweighed by the danger of unfair prejudice, and the Government is precluded from presenting evidence of Defendant's prior conviction at trial. Accordingly, the Government's "Motion *in Limine* Pursuant to Federal Rule of Evidence 404(b), to Admit Evidence of Defendant Darryl K. Barnes's Uncharged Illegal Narcotics Activity and Prior Narcotics Conviction to Establish Knowledge and Intent" is denied.

C. Bifurcation of the Proceedings

Defendant has moved the Court to bifurcate the proceedings and sever Count IV, which charges Defendant with possession of a firearm by a convicted felon, from Counts I, II, and III, which charge Defendant with possession of cocaine base, possession of cocaine with intent to distribute, and possession of a firearm in furtherance of a drug trafficking crime, respectively. Under this approach, the jury would deliberate and return a verdict on Counts I, II, and III and, should the jury find that Defendant had possessed a firearm, the jury then would hear evidence as to Defendant's prior felony conviction and deliberate on Count IV. Pursuant to Fed. R. Crim. P. 14, if "a consolidation for trial appears to prejudice a defendant . . . , the court may order separate trials of counts . . . or provide any other relief that justice requires." Fed. R. Crim. P. 14. "Severance decisions under Rule 14 require the district court to weigh the potential for prejudice to the defendant from joinder against the conservation of

judicial resources that joinder will occasion." United States v. Joshua, 976 F.2d 844, 847 (3d Cir. 1992). The Third Circuit has specifically endorsed bifurcation of proceedings in the manner suggested by Defendant for felon in possession cases. See id. at 848.

Here, Defendant has advised the Court that he will stipulate to his prior felony conviction. The Court, therefore, finds that bifurcation of the trial "strikes an appropriate balance between the concern about prejudice to the [D]efendant and considerations of judicial economy." Joshua, 976 F.2d at 848. Accordingly, Defendant's "Motion for Bifurcated Trial" is granted.

IV. CONCLUSION

For the foregoing reasons, the Government's "Motion *in Limine* Pursuant to Federal Rule of Evidence 404(b), to Admit Evidence of Defendant Darryl K. Barnes's Uncharged Illegal Narcotics Activity and Prior Narcotics Conviction to Establish Knowledge and Intent" is denied, and Defendant's "Motion for Bifurcated Trial" is granted.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES :
 :
 v. : CRIMINAL No. 05-CR-134
 :
 DARRYL K. BARNES :

O R D E R

AND NOW, this 12th day of August, 2005, upon consideration of Defendant's "Motion for Bifurcated Trial" (Doc. No. 32), and the Government's "Motion *in Limine* Pursuant to Federal Rule of Evidence 404(b), to Admit Evidence of Defendant Darryl K. Barnes's Uncharged Illegal Narcotics Activity and Prior Narcotics Conviction to Establish Knowledge and Intent" (Doc. No. 39), all submissions received in response thereto, and the hearing held on June 22 and 23, 2005, **IT IS HEREBY ORDERED** that:

1. Defendant's "Motion for Bifurcated Trial" (Doc. No. 32) is **GRANTED**; and
2. the Government's "Motion *in Limine* Pursuant to Federal Rule of Evidence 404(b), to Admit Evidence of Defendant Darryl K. Barnes's Uncharged Illegal Narcotics Activity and Prior Narcotics Conviction to Establish Knowledge and Intent" (Doc. No. 39) is **DENIED**.

BY THE COURT:

/s/ John R. Padova

John R. Padova, J.