

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

<b>UNITED STATES OF AMERICA</b>	:	<b>CRIMINAL ACTION</b>
	:	
v.	:	
	:	
<b>MICHAEL KATZIN</b>	:	<b>NO. 11-226-2</b>
	:	

**MEMORANDUM**

Pratter, J.

December 22, 2015

**I. INTRODUCTION**

Trial in this matter is currently scheduled to commence on January 8, 2016. Doc. No. 222. Mr. Katzin faces charges for conspiring to engage in pharmacy burglary (Count I), conspiring to possess controlled substances with the intent to distribute (Count II), engaging in pharmacy burglary (Count III), and possessing with intent to distribute controlled substances (Count IV). Before the Court are the Government's two motions *in limine* seeking to introduce at trial certain evidence of the Defendant's prior criminal activity. Doc. Nos. 175 & 192. Also before the Court is the Defendant's motion to strike allegations from the superseding indictment related to certain overt acts in support of the two alleged conspiracies. Doc. No. 200.

The Government's first motion *in limine* seeks permission to impeach Mr. Katzin, pursuant to Federal Rules of Evidence 609(a)(1) and (a)(2), with evidence of three prior offenses on his criminal record: (1) an arrest for possession of burglary tools in Burlington County, New Jersey on March 5, 2004, (2) a conviction for forgery in Philadelphia County on January 31, 2008, and (3) a conviction for providing false identification to law enforcement in Philadelphia County on April 14, 2010. Doc. No. 175.

The Government also filed a second motion *in limine* to admit evidence of certain other bad acts under Federal Rule of Evidence 404(b). Doc. No. 176. This motion was subsequently amended. Doc. No. 192. The amended motion addresses evidence regarding two specific incidents. The Government seeks to introduce evidence that Mr. Katzin burglarized a pizza shop on March 13, 2009 in Burlington County, New Jersey. The Government also seeks to admit evidence that on November 18, 2010, Mr. Katzin, along with his brother, was stopped by police in a parking lot adjacent to a Rite Aid Pharmacy in Feasterville-Trevoze, Pennsylvania.

On September 17, 2015, the Government filed a superseding indictment, which included allegations regarding Michael Katzin's participation in the November 2010 Feasterville-Trevoze incident as an overt act related to the Defendant's conspiracy charge. Doc. No. 186. The Defendant filed a motion to strike reference to evidence regarding this incident from the superseding indictment. Doc. No. 200.

## **II. FACTUAL BACKGROUND**

In the late hours of December 15, 2010, the Government alleges that Mr. Katzin, along with his two brothers, Harry and Mark, drove from the Kensington area of Philadelphia to Hamburg, Pennsylvania. At the time, FBI Special Agent Stephen McQueen was conducting GPS surveillance of Harry Katzin's 2001 Dodge Caravan through the use of a "slap-on" GPS device. Agent McQueen tracked the van from Philadelphia to Hamburg where he observed it stop close to a Rite Aid Pharmacy. The van remained parked outside the Rite Aid from a little before midnight on December 15, 2010, until approximately 2:40 a.m. on December 16, 2010. The Government alleges that Mr. Katzin's two brothers entered the Rite Aid while Mr. Katzin acted as lookout. Investigators determined that the Hamburg Rite Aid had its exterior phone lines cut, which disabled the alarm. Tools were used to force entry through the rear door of the

Rite Aid and then cut open the store safe, a Pennsylvania instant lottery machine and the security gate protecting the store's pharmacy area. Soon after the van left the vicinity of the Rite Aid, Pennsylvania State Troopers stopped the van on eastbound Route I-76. When the troopers searched the van, they found Mr. Katzin and his two brothers. They also discovered approximately \$40,000 worth of Schedule II narcotics, boxes of razor blades, contraceptive aids, a "Wii Sports pack," computer thumb drives, pill bottles and Rite Aid plastic storage bins, along with the pharmacy surveillance system hard drive and burglary tools. Doc. No. 192 at 5-6. The van and its contents were seized and the three brothers were placed in custody.

### **III. ANALYSIS**

#### **a. The Government's Rule 609(a)(1) and (a)(2) Motion *in Limine***

The Government's first motion *in limine* seeks to admit, for impeachment purposes only, evidence of three prior convictions on the Defendant's criminal record. For the reasons discussed below, the Court will allow the Government to impeach the Defendant with evidence of the 2008 forgery conviction and the 2010 false identification conviction. *See* Doc. No. 175 at 7-8. The Court will not, however, allow impeachment related to the 2004 charge for possession of burglary tools.

Under Rule 609, a witness's character for truthfulness may be impeached with evidence of a criminal conviction. Evidence of a conviction for a crime "must be admitted if the court can readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement." Fed. R. Evid. 609(a)(2). As the advisory committee notes explain, crimes which involve sufficient dishonesty or false statements include "perjury, subornation of perjury, false statement, criminal fraud, embezzlement or false pretense, or any other offense in the nature of *crimen falsi*, the commission of which involves some

element of deceit, untruthfulness, or falsification bearing on the witness's propensity to testify truthfully." Fed. R. Evid. 609 (Advisory Committee Note, 2006 Amendments). With regards to crimes not involving dishonest acts, in instances where the defendant is the witness, the Court must admit evidence of a conviction for a crime punishable in the convicting jurisdiction by imprisonment for more than one year, "if the probative value of the evidence outweighs its prejudicial effect to that defendant." Fed. R. Evid. 609(a)(1)(B); *United States v. Caldwell*, 760 F.3d 267, 286 (3d Cir. 2014).

If more than 10 years have passed since the defendant's conviction or release from confinement, however, the evidence of the conviction is admissible only if "its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect" and the proponent of the evidence gives the adverse party reasonable written notice of its intent to use the evidence. Fed. R. Evid. 609(b). The Court of Appeals for the Third Circuit has explained that "convictions over 10 years old will be admitted *very rarely and only in exceptional circumstances.*" *United States v. Shannon*, 766 F.3d 346, 352 n. 9 (3d Cir. 2014) (citing Fed. R. Evid. 609(b) (Advisory Committee Note)) (emphasis in original).

Both the 2008 forgery conviction and the 2010 false identification conviction occurred within the last ten years. Additionally, the Court finds that in order to convict the Defendant for both offenses, the Commonwealth of Pennsylvania was required to establish, as an element of each of the offenses, that Mr. Katzin committed dishonest acts. Under 18 Pa. Stat. and Cons. Stat. Ann. § 4101 (West), in order to be found guilty of forgery, a defendant must have acted "with intent to defraud or injure anyone, or with knowledge that he is facilitating a fraud or injury to be perpetrated by anyone." Likewise, in order to be liable for giving false identification to law enforcement authorities, Mr. Katzin must have "furnishe[d] law enforcement authorities

with false information about his identity after being informed by a law enforcement officer who is in uniform or who has identified himself as a law enforcement officer that [Mr. Katzin was] the subject of an official investigation of a violation of law.” 18 Pa. Stat. and Cons. Stat. Ann. § 4914 (West). Therefore, the Court finds that the Government’s proposed evidence regarding the 2008 forgery conviction and the 2010 false identification conviction are both admissible under Fed. R. Evid. 609(a)(2), for impeachment purposes only.

The Defendant argues that the Court should wait to rule on the Government’s motion until after the Government has presented its case in chief. *See* Doc. No. 181 at 5-6. The Defendant contends that the Court must balance the probative value of the evidence with its prejudicial effect on the Defendant. The Defendant has indicated that he intends to argue at trial that he was asleep during the alleged burglary on the night of December 15-16, 2010 and consequently was unaware of the burglary of the Rite Aid. *See* Doc. No. 181 at 5. Mr. Katzin was the only person alleged to be present in the van during the burglary and it appears that he alone is able to testify as to whether he was asleep. Given the importance of Mr. Katzin’s testimony to establishing his expected defense, as well as the expected strength of the Government’s case overall, the Defendant argues that the Court should consider whether, by allowing the proposed impeachment, the Court will effectively prevent Mr. Katzin from presenting his defense. *See Caldwell*, 760 F.3d at 287.

The Defendant relies principally on *United States v. Caldwell*. *See* Doc. No. 181 at 5-6. The reasoning in *Caldwell*, however, is not on point. There, the Third Circuit Court of Appeals was analyzing the necessary factors for weighing the prejudice and probative value of admitting evidence of a non-*crimen falsi* offense—namely, unlawful weapons possession—for purposes of impeachment at trial. *Caldwell*, 760 F.3d at 285-87. The appeals court explained that admission

of evidence of prior convictions under Rule 609(a)(1)(B) required the district court to determine whether the probative value of the evidence outweighed its prejudicial effect. The appeals court then proceeded to walk through four factors set down to guide the district courts in this balancing. *Id.* at 286.

Rule of Evidence 609, however, only speaks of balancing prejudice with probative value in the context of non-*crimen falsi* offenses when the defendant is a witness. Once the district court has determined the offense does involve dishonest acts or false statements by the defendant, the evidence “must be admitted.” Fed. R. Evid. 609(a)(2); *Walker v. Horn*, 385 F.3d 321, 333 (3d Cir. 2004) (“[I]f the prior conviction involved dishonesty or false statements, the conviction is automatically admissible insofar as the district court is without discretion to weigh the prejudicial effect of the proffered evidence against its probative value.”) (citing *Walden v. Georgia-Pacific Corp.*, 126 F.3d 506, 523 (3d Cir.1997)). Having determined that the 2008 and 2010 prior offenses required establishing the commission of dishonest acts, the Court shall admit them for impeachment purposes.

Mr. Katzin’s 2004 arrest for possession of burglary tools requires a different analysis. Here, the Government seeks to impeach the Defendant with evidence that on March 24, 2005 he was sentenced to two years’ probation for possession of burglary tools. First, possession of burglary tools is not an offense which requires, as an element of the offense, the commission of a dishonest act or false statement. *See* N.J. Stat. Ann. § 2C:5-5 (West). Consequently, the Court would need to evaluate both the prejudicial and probative value of the evidence in order to determine its admissibility. *See Caldwell, supra*. Moreover, given that Defendant was sentenced more than ten years ago, the Court would apply the more stringent Rule 609(b) standard.

The Court, however, is able to dispose of this evidence without reaching the balancing analysis set out in the Rule. The Defendant argues in his response to the Government's motion that he was not actually convicted of possession of burglary tools in 2005. Doc. No. 181 at 4. Rather, Mr. Katzin asserts that he was sentenced to probation and allowed to participate in the New Jersey Pretrial Intervention ("PTI") Program. *Id.* The Government has not disputed this characterization of the disposition of the charge.<sup>1</sup> For purposes of disposing of this motion, the Court will take as accurate the Defendant's assertion that he was allowed to participate in the New Jersey PTI Program after his arrest for possession of burglary tools.

While the Court has not found authority directly addressing whether participation in the New Jersey PTI Program constitutes a "conviction" for purposes of Rule 609, the Third Circuit Court of Appeals has held that participation in the Pennsylvania Accelerated Rehabilitative Disposition ("ADR") Program does not constitute a "conviction" for purposes of Rule 609, *United States v. Zemba*, 59 F. App'x 459, 461 (3d Cir. 2003), and that the Pennsylvania ADR Program is "substantially similar" to the New Jersey PTI Program, *Fernandez v. City of Elizabeth*, 468 F. App'x 150, 154 (3d Cir. 2012) (analyzing the similarity between the PTI and ADR in the context of determining whether dismissal of a civil rights plaintiff's criminal charges following his participation in the New Jersey PTI program constituted a "favorable termination" for purposes of a § 1983 claim). Consequently, the Court holds that Mr. Katzin's participation in the PTI Program following his arrest for possession of burglary tools is not a conviction for purposes of Rule 609. *See Zemba*, 59 F. App'x at 461; *N.L.R.B. v. Jacob E. Decker & Sons*, 569 F.2d 357, 364 (5th Cir. 1978) ("Only convictions are admissible to impeach a witness."); *United*

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<sup>1</sup> At the October 15, 2015 hearing on the Government's Motions, when asked about the Defendant's characterization of the disposition of the 2004 burglary tools charge, Mr. Zaleski, counsel for the Government, indicated he was not sure whether or not Mr. Katzin was actually convicted for possession of burglary tools in 2005. October 15, 2015 Hearing Tr. at 21-22. While he requested the opportunity to further research this issue, as well as research the question of whether participation in the New Jersey PTI program would qualify as a conviction for purposes of Rule 609, no subsequent filing appears on the docket.

*States v. Canniff*, 521 F.2d 565, 569 (2d Cir. 1975) (“[A]n adjudication in a federal court as a juvenile delinquent is not deemed a criminal conviction, and may not be used to attack a defendant's credibility in a later proceeding.”). Therefore, given the evidence the Government seeks to admit does not relate to a criminal conviction, it is not admissible as impeachment under Rule 609.

**b. The Government’s Rule 404(b) Motion *in Limine***

Turning to the Government’s second motion *in limine*, the Government seeks permission to use, in its case-in-chief, evidence of the Defendant’s participation in two attempted pharmacy burglaries—the first is alleged to have taken place in March 2009 in Tabernacle, New Jersey and the second is alleged to have taken place in Feasterville-Trevose, Pennsylvania in November 2010. *See* Doc. Nos. 176 & 192.

Under Federal Rule of Evidence 404(b), evidence of a crime, wrong, or other act, is not admissible to prove “a person’s character in order to show that on a particular occasion the person acted in accordance with the character.” Such evidence may, however, be admissible to prove “motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.” Fed. R. Evid. 404(b)(2). The Third Circuit Court of Appeals has explained that Rule 404(b) is treated like a general rule of exclusion that has certain exceptions. *Caldwell*, 760 F.3d at 276. The proponent of the evidence—in this case the Government—has the burden of showing the applicability of these exceptions. *Id.* When confronted with a Rule 404(b) motion, the Court must analyze four factors to determine if the proposed evidence is admissible:

[P]rior act evidence is inadmissible unless the evidence is (1) offered for a proper non-propensity purpose that is at issue in the case; (2) relevant to that identified purpose; (3) sufficiently probative under Rule 403 such that its probative value is not outweighed by any inherent danger of unfair prejudice; and (4) accompanied by a limiting instruction, if requested.

*Caldwell*, 760 F.3d at 277-78 (citing *United States v. Davis*, 726 F.3d 434, 441 (3d Cir. 2013)); *United States v. Huddleston*, 485 U.S. 681, 691–92 (1988)).

### **i. The Tabernacle Attempted Pharmacy Burglary**

The first attempted pharmacy burglary is alleged to have occurred in Tabernacle, New Jersey on March 13, 2009. At about 1:30 a.m., New Jersey State Police responded to a radio call regarding a possible burglary of a pizzeria in Tabernacle Township. The pizzeria was located in the Yates Plaza shopping center, next to Alfor's Pharmacy. A caller had indicated to police that he observed two men in hoodies behind the pizzeria. After arriving, officers determined that someone had forced their way into the pizzeria, cut the telephone line and forcibly removed an alarm box from the wall. Other officers found a bag of tools in the woods behind the shopping center.

Police also observed an individual in a green Suzuki Forenza with Pennsylvania tags, driving slowly away from the shopping center. Police stopped the car and questioned the driver. During this questioning, the driver's cell phone rung repeatedly and showed the name "Mike Katzin" as the caller. Ultimately, the driver was released.

Later that morning, at approximately 5:20 a.m., officers spotted two men wearing dark-colored pants and black hooded sweatshirts walking north on Route 206, near the Yates Plaza shopping center. They were identified as the Defendant, Michael Katzin, and another man. One of the officers recalled seeing Mr. Katzin's name appear on the driver's cell phone and ultimately both men were taken to the State Police Barracks for questioning. The police informed Mr. Katzin of his *Miranda* rights but Mr. Katzin allegedly waived them.<sup>2</sup> While he initially denied

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<sup>2</sup> The Defendant argues in his papers that a review of the video tape of the Defendant's alleged confession does not include an adequate *Miranda* warning and that the Defendant did not sign any waiver of his right to remain silent or right to have counsel present during questioning. See Doc. No. 210 at 4-5. Consequently, the Defendant argues that the confession evidence likely would have been suppressed if the State went to trial on the burglary charge. *Id.* The

involvement in any burglary, Mr. Katzin eventually admitted to breaking into the pizzeria with the intention of entering the pharmacy through the pizzeria. He indicated to the officers that he was interested in stealing narcotics, including “oxycontin and percocet.”

On July 30, 2010, Michael Katzin pleaded guilty to a charge of Criminal Mischief related to the breaking and entering into the pizza shop. The burglary charges were dismissed, notwithstanding his confession. He was sentenced to 270 days in jail and fined \$785.93.

The Government asserts that evidence regarding the Tabernacle incident is not being introduced to prove the Defendant’s propensity to engage in burglary offenses but rather provides “helpful background” information for the jury, necessary to “complete the narrative” of the charges in the superseding indictment. *See* Doc. No. 192 at 14. The Government argues that, given the similarities between the two incidents, evidence of the Defendant’s participation in the Tabernacle break-in shows his familiarity with the methods used in the Hamburg burglary, his knowledge of the likely presence of Schedule II narcotics in the pharmacy, and ultimately, his intent to participate in the Hamburg burglary.

The Defendant counters by arguing that there are a number of differences between the Tabernacle incident and the Hamburg burglary and that these differences prevent the Court from drawing any inferences from the former to apply to the latter. First, the Defendant points out that the Tabernacle incident occurred 20 months prior to the Hamburg burglary. *See* Doc. No. 210 at 9. Also, unlike the Hamburg burglary, neither of Mr. Katzin’s alleged co-conspirators—his two brothers—were involved in the Tabernacle incident. *Id.* at 8-9. And while the Government alleges that Mr. Katzin only served as the lookout during the Hamburg burglary, in Tabernacle he is alleged to have been the only individual to actually enter the pizzeria.

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Government does not address this argument in its papers. Given that the Court finds that evidence regarding this incident is not admissible under Rule 404(b), the Court does not need to determine whether Mr. Katzin was adequately “Mirandized.”

Ultimately, the Court must agree with the Defendant on this point. While the Government is required to establish intent as an element of both the conspiracy and the burglary charges<sup>3</sup>, there are sufficient differences between the Tabernacle and Hamburg incidents which prevent the Court from finding that evidence of the former can establish the Defendant's knowledge and intent relevant to the latter. In light of the 20 months between offenses, the Court cannot conclude that Government has adequately established that the Tabernacle incident is probative of the Defendant's intent vis-à-vis the Hamburg burglary. Similarly, it is not apparent how the Defendant's participation in an attempted burglary is evidence of his knowledge of a separate burglary occurring 20 months later, which he is alleged to have participated in with different individuals and is alleged to have proceeded in a different manner. Even if evidence of the Tabernacle incident may establish the Defendant's knowledge of conduct relevant to the commission of the Hamburg burglary generally, whatever minimal probative value the Tabernacle incident may have is far outweighed by the prejudicial effect to the Defendant. Ultimately, the Tabernacle incident is only relevant as evidence of Mr. Katzin's propensity to commit acts of burglary and such propensity evidence is not allowed under Rule 404.<sup>4</sup>

**i. The Feasterville-Trevoise Attempted Pharmacy Burglary**

The Government also seeks to introduce evidence related to a second attempted pharmacy burglary of a Rite Aid, which is purported to have taken place on November 18, 2010.

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<sup>3</sup> In order to be found liable under 18 U.S.C. § 2118(b), the government must show that a defendant entered a pharmacy without authorization and "with the intent to steal any material or compound containing any quantity of a controlled substance."

<sup>4</sup> The Government filed a supplemental memorandum of law following the December 14, 2015 hearing on the motions. *See* Doc. No. 220. The Government's additional arguments largely consist of asserting again that Mr. Katzin's intent during the Hamburg burglary can be established by his confession to the Tabernacle burglary. *See id.* at 3-4. But the fact that Mr. Katzin intended to burglarize a pharmacy in 2009 for "business purposes" does not establish his intent to burglarize a pharmacy in 2010. Despite the Government's assertions of the factual similarity between the Tabernacle and Hamburg burglaries--similarities the Court does not find as overwhelming and self-apparent as the Government contends--there is no basis offered for determining that Mr. Katzin's intent to burglarize the Tabernacle pharmacy has any relation to his participation in the Hamburg burglary.

*See* Doc. No. 192 at 9. The Government alleges that at approximately 1:44 a.m., a Lower Southampton Township police officer stopped Mr. Katzin and his brother Harry Katzin behind the shopping center located at the 1800 block of Brownsville Road in Feasterville. A Rite Aid pharmacy was located in the corner of the shopping plaza. The officer had observed the Defendant, along with his brother Harry, and a third unidentified individual, parked in a 2001 Dodge Caravan behind the shopping center. The passengers explained that they were on their way back to Philadelphia after dropping a friend at his home nearby and had stopped behind the shopping center in order to let Michael go to the bathroom. Harry Katzin agreed to a search of the vehicle, which uncovered certain tools, a miner's head lamp, several pairs of work gloves, and dark colored caps. Harry Katzin explained that he was an electrician and that the contents of the van were used in his work. The officer determined there were no outstanding warrants for either of the Katzin brothers or the third male in the van and eventually the police released the three. Later, that day, it was discovered that the telephone lines in the rear of the Rite Aid had been cut, which disabled the store's alarm system. It is not clear when this occurred, however, and when an FBI agent interviewed the manager of the Rite Aid, the manager indicated that there appeared to be no other evidence of a break-in and the phone lines may have been cut as far back as a year earlier, during a previous attempted burglary.

In addition to arguing that evidence of the Feasterville-Trevose incident is admissible under Rule 404(b), the Government filed a superseding indictment on September 17, 2016, which lists under overt acts in furtherance of both the conspiracy to engage in pharmacy burglary (Count I) and the conspiracy to possess with the intent to distribute controlled substances (Count II), three factual assertions about actions taken in furtherance of the alleged conspiracies related to the Rite Aid Pharmacy in Feasterville-Trevose:

The attempted burglary of the Rite Aid pharmacy in Feasterville-Trevo

1. On or about November 18, 2010, at approximately 1:44 a.m., defendant MICHAEL KATZIN, Harry Katzin, and Person #1 drove in a 2001 Dodge Caravan to the rear parking lot at the Trevo Plaza shopping center, where a Rite Aid Pharmacy is located at 1852 Brownsville Rd. Feasterville-Trevo, Pennsylvania.
2. Upon their arrival at the Trevo Plaza parking lot, defendant MICHAEL KATZIN, Harry Katzin, and Person #1 parked the 2001 Dodge Caravan in the parking lot behind the stores in the shopping plaza.
3. Defendant MICHAEL KATZIN, Harry Katzin, and Person #1 brought with them burglary tools and clothing to facilitate burglary, including numerous pairs of mechanic type work gloves, a black baseball cap, a strap-on head lamp, tools and power tools.

Superseding Indictment *United States v. Michael Katzin*, at 3, 6 (September 17, 2015) (Doc. No. 186).

In light of the superseding indictment, the Court finds that evidence regarding the Feasterville-Trevo incident is admissible under Rule 404(b). Evidence which goes to directly prove the charged offense is considered intrinsic and therefore not considered under Rule 404(b)'s analysis. *United States v. Green*, 617 F.3d 233, 248 (3d Cir. 2010); *United States v. Cross*, 308 F.3d 308, 320 (3d Cir. 2002) ("Rule 404(b) does not extend to evidence of acts which are 'intrinsic' to the charged offense."); *United States v. Gibbs*, 190 F.3d 188, 218 (3d Cir. 1999) ("Since the government introduced evidence of Gibbs's use of violence to further the illegal objectives of the cocaine conspiracy by removing threats to himself (since threats to Gibbs meant threats to the trafficking enterprise), the District Court did not abuse its discretion in permitting this evidence to come in.") Evidence of overt acts in support of a conspiracy are not considered "other" bad acts but rather acts necessary to prove the existence of a conspiracy and consequently Rule 404 does not limit their admissibility. *Gibbs*, 190 F.3d at 218.

For the above reasons, the Court will grant the Government's motion *in limine* as to evidence regarding the Feasterville-Trevoise incident but will deny the motion as to evidence regarding the Tabernacle incident.

**c. The Defendant's Motion to Strike Certain Allegations in the Superseding Indictment**

After the Government filed the superseding indictment, the Defendant moved to strike the three factual assertions regarding the Feasterville-Trevoise incident. The Defendant argues that the Government did not present the grand jury with sufficient evidence to establish probable cause to believe Michael Katzin was involved in an "attempted burglary"<sup>5</sup> of a Rite Aid Pharmacy in Feasterville-Trevoise. The Defendant argues that the undisputed lack of factual foundation for alleging the attempted burglary creates a defect in the indictment under Federal Rule of Criminal Procedure 12(b), which necessitates striking the allegations from the indictment. Doc. No. 200 at 7.

Under Federal Rule of Criminal Procedure 12(b)(3)(B), before trial a defendant must raise by motion any alleged defect in the indictment or information. The rule provides a non-exclusionary list of possible defects, including "joining two or more offenses in the same count (duplicity); charging the same offense in more than one count (multiplicity); lack of specificity; improper joinder; and failure to state an offense." Fed. R. Crim. Pro 12(b)(3)(B). The Defendant does not allege the indictment is flawed based upon any of these possible defects. Rather, the Defendant argues that the grand jury was not provided sufficient evidence in order for them to find probable cause to believe Mr. Katzin participated in an attempted burglary of the Feasterville-Trevoise Rite Aid. Doc. No. 200 at 4.

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<sup>5</sup> We note that the Defendant's characterization of the contents of the superseding indictment is not accurate. The Defendant asserts that he has been indicted for attempted burglary of the Feasterville-Trevoise Rite Aid. *See* Doc. No. 200 at 8. This is incorrect. Rather, the superseding indictment alleges certain conduct relative to Mr. Katzin's presence at the Feasterville-Trevoise Rite Aid as overt acts in furtherance of the two charged conspiracies.

At the outset, the Defendant recognizes that a pretrial motion is typically not an appropriate vehicle for attacking the sufficiency of the government's evidence. *See* Doc. No. 200 at 7. An indictment is simply required to "be a plain, concise, and definite written statement of the essential facts constituting the offense charged." *United States v. Huet*, 665 F. 3d 588, 594 (3d Cir. 2012) (citing Fed. R. Crim. Pro. 7(c)(1)). Moreover "[i]t is well-established that an indictment returned by a legally constituted and unbiased grand jury, . . . if valid on its face, is enough to call for trial on the charge on the merits." *Id.* (citing *Costello v. United States*, 350 U.S. 359, 363 (1956)). An indictment is "facially sufficient" when it (1) contains the elements of the offense intended to be charged, (2) sufficiently apprises the defendant of what he must be prepared to meet and (3) allows the defendant to show with accuracy to what extent he may plead a former acquittal or conviction in the event of a subsequent prosecution. *Id.* at 595; *see United States v. Kemp*, 500 F.3d 25, 280 (3d Cir. 2007) ("[N]o greater specificity than the statutory language is required so long as there is sufficient factual orientation to permit a defendant to prepare his defense and invoke double jeopardy.")(citations omitted).

The Defendant, while acknowledging the difficulty of his position, asserts that the "unique facts" of this case permit the Court to find the superseding indictment defective. The Defendant's argument rests almost entirely on *United States v. Wolff*, 840 F. Supp. 322 (M.D. Pa. 1993), a decision which has not been cited by any court since it was issued over 20 years ago. This is likely due in part to the fact that, as Judge McClure notes in the decision, the circumstances of *Wolff* were "unusual." *Id.* at 324.

The pertinent facts are as follows: while Mr. Wolff was in custody, awaiting trial on money laundering and related charges, he was ordered to provide handwriting exemplars to the prosecution. The order stated that these exemplars were to be taken at the federal courthouse in

Harrisburg, PA on or before March 15, 1993. The Government scheduled these exemplars be taken on March 15. Unfortunately, a serious snow storm prevented postal inspectors from taking the exemplars that day. The Government subsequently demanded exemplars from Mr. Wolff on three separate occasions after the 15<sup>th</sup> but Mr. Wolff refused to provide them. The government then sought to bring charges for disobeying the court's order. The grand jury indicted Mr. Wolff for failing to comply with a lawful court order. Mr. Wolff brought a motion to dismiss the charges.

While the Middle District of Pennsylvania noted that a challenge to the sufficiency of the evidence presented to the grand jury is typically not allowed, the court ultimately concluded that the defendant had proven that there was a defect in the indictment. *Wolff*, 840 F. Supp. at 323. The court explained that the relevant facts alleged by both sides were consistent; both sides agreed that the order required the writing exemplar be taken before March 15, 1993 and the exemplar was not taken before March 15, 1993. Given these undisputed facts, the court was able to determine that the indictment was legally flawed because the defendant's refusal to provide an exemplar after March 15, 1993 could not have violated the terms of the court's order. *Id.* at 324. The court explained that, had the case gone to trial, there was "absolutely no doubt that the court would grant defendant's motion for judgment of acquittal at the close of the evidence offered by the government, in accordance with Fed. R. Crim. P. 29(a)." *Id.* at 325. Rather than waste time and money, the court decided to strike the charge from the superseding indictment. The court noted that this situation was abnormal because the indictment involved contempt of the court's own order and the factual record relevant to the charge was undisputed.

Unlike *Wolff*, the Court cannot say that, should the case go to trial, it would "absolutely" grant the Defendant's motion for judgment of acquittal. The factual circumstances surrounding

the incident in Feasterville-Trevoise are disputed. The Court finds that, to the extent *Wolff* described an exception to the general rule that a motion under Rule of Criminal Procedure 12(b)(3) is not the appropriate avenue to challenge the factual support of the Government's case, applying such an exception is not appropriate here. The Government may very well not succeed at trial in establishing the elements of the offenses alleged, but the superseding indictment was returned by a legally constituted and unbiased grand jury and identifies the relevant elements of the offenses charged in order to provide the defendant notice of the issues he must defend against. The Court finds the indictment valid on its face, and, therefore, the question of the significance of these charges will be determined at trial.

#### **IV. CONCLUSION**

For the above reasons the Court will grant in part and deny in part the Government's motion *in limine* under Rule 609 to admit certain impeachment evidence. Doc. No. 175. Likewise, the Court will grant in part and deny in part the Government's motion *in limine* under Rule 404(b) to admit certain evidence of the Defendant's prior bad acts. Doc. Nos. 176 & 192. Finally, the Court will deny the Defendant's motion to strike from the superseding indictment allegations regarding the Feasterville-Trevoise incident. Doc. No. 200.

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An appropriate Order reflecting the above will follow.

BY THE COURT:

S/Gene E.K. Pratter  
GENE E.K. PRATTER  
United States District Judge

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

<b>UNITED STATES OF AMERICA</b>	:	<b>CRIMINAL ACTION</b>
	:	
v.	:	
	:	
<b>MICHAEL KATZIN</b>	:	<b>NO. 11-226-2</b>
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**ORDER**

And now, this 22<sup>nd</sup> day of December, 2015, upon consideration of the United States of America’s Motion *in Limine* to Admit Evidence Under Federal Rule of Evidence 609(a)(1) and (a)(2) (Doc. No. 175), along with the Defendant’s response thereto (Doc. No. 181); the United States of America’s Motion *in Limine* to Admit Other Acts Evidence Pursuant to Federal Rule of Evidence 404(b) (Doc. No. 176), along with the Defendant’s response thereto (Doc No. 182); the United States of America’s Amended Motion *in Limine* to Admit Other Acts Evidence Pursuant to Federal Rule of Evidence 404(b) (Doc. No. 192), and the Defendant’s response thereto (Doc. No. 210); the United States of America’s Supplemental Memorandum of Law in Support of its Amended Motion *in Limine* to Admit Other Acts Evidence Pursuant to Federal Rule of Evidence 404(b) (Doc. No. 220); the Defendant’s Motion to Strike Allegations Regarding An Alleged Attempted Burglary of a Rite Aid Pharmacy in Feasterville-Trevoze, PA From Superseding Indictment (Doc. No. 200), the United States of America’s response thereto (Doc. No. 209), and the Defendant’s reply in further support of the motion (Doc. No. 212-1), as well as Oral Argument on the above listed Motions which occurred on December 14, 2015, it is hereby **ORDERED** that:

1. The United States of America’s Motion *in Limine* to Admit Evidence Under Federal Rule of Evidence 609(a)(1) and (a)(2) (Doc. No. 175) is **GRANTED** as to evidence of

the Defendant's January 31, 2008 Forgery Conviction and evidence of the Defendant's April 14, 2010 False Identification to a Law Enforcement Officer Conviction and **DENIED** as to evidence of the Defendant's March 5, 2004 arrest for Possession of Burglary Tools;

2. The United States of America's Motion *in Limine* to Admit Other Acts Evidence Pursuant to Federal Rule of Evidence 404(b) (Doc. No. 176) is **GRANTED**;

3. The United States of America's Amended Motion *in Limine* to Admit Other Acts Evidence Pursuant to Federal Rule of Evidence 404(b) is **GRANTED** as to evidence regarding the Feasterville-Trevose, Pennsylvania incident and **DENIED** as to the Tabernacle, New Jersey incident;

4. The Defendant's Motion to Strike Allegations Regarding An Alleged Attempted Burglary of a Rite Aid Pharmacy in Feasterville-Trevose, PA From Superseding Indictment (Doc. No. 200) is **DENIED**.

BY THE COURT:

S/Gene E.K. Pratter  
GENE E.K. PRATTER  
United States District Judge