IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	
v.	
	Crim. No. CR-08-360 (RMU)
PAUL A. SLOUGH,	
NICHOLAS A. SLATTEN,	**Judge Ricardo M. Urbina**
EVAN S. LIBERTY,	
DUSTIN L. HEARD,	
DONALD W. BALL,	
Defendants.	

MOTION OF DEFENDANTS DUSTIN L. HEARD AND PAUL A. SLOUGH
TO EXCLUDE EVIDENCE OF NICKNAMES

Defendants Dustin L. Heard and Paul A. Slough, through undersigned counsel, move to exclude from evidence at trial any reference to alleged nicknames that the Government has ascribed to Mr. Heard and Mr. Slough. As set forth below, that evidence in not relevant to any issue in this case under Fed. R. Evid. 401 and 402. And even assuming, *arguendo*, that such evidence had some relevance (which we dispute), the evidence should be excluded (1) under Fed. R. Evid. 403 because any marginal probative value would be substantially outweighed by the danger of unfair prejudice, and (2) under Fed. R. Evid. 404(a) because the nickname evidence is simply inadmissible character evidence.

FACTUAL BACKGROUND

In the course of discovery, the Government has provided the Defendants with information that alleges Defendant Heard was sometimes referred to by the nickname "Extreme" and that Defendant Slough was sometimes referred to by the nickname "Savage Viking." We anticipate that the Government may try to introduce evidence of these nicknames through

witnesses at trial. Because evidence of these alleged nicknames has nothing to do with any of the issues that will be presented at trial and will be used only to unfairly prejudice the Defendants through inadmissible and unsubstantiated evidence of character, the Defendants move to preclude the admission of such evidence.

ARGUMENT

A. Legal Principles

Rule 402 provides that in order to be admissible, evidence must be relevant as that term is defined in Rule 401. "If it is relevant, the government must use it for proper purpose, i.e., it must be probative of some material issue other than character under 404(b)" and, "[i]f the evidence is relevant and used for a proper purpose, it must still undergo the rule 403 balancing test to determine if its probative value is substantially outweighed by its prejudicial effect." *United States v. Mathews*, 62 F. Supp. 2d 59, 61 (D.D.C. 1999). Rule 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is ***not*** admissible to prove the character of a person in order to show action in conformity therewith." Fed. R. Evid. 404(b). Rule 403 governs the admissibility not only of 404(b) evidence, but of any evidence sought to be admitted in a criminal trial. *See United States v. Doe*, 903 F.2d 16, 21 n.30 (D.C. Cir. 1990) ("probative value must outweigh the probability of prejudice before even relevant evidence may be admitted," quoting *United States v. Marcey*, 440 F.3d 253, 256 (D.C. Cir. 1971)). Rule 403 provides that "[a]lthough 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, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403.

B. Analysis

We anticipate that in the trial of this matter, the Government will attempt to introduce evidence of nicknames that it claims were ascribed to Defendants Heard and Slough. In particular, the Government claims that Mr. Heard was known to other members of the Raven 23 Team as "Extreme" and that Mr. Slough was known as "Savage Viking." In the context of this case, both alleged nicknames carry pejorative connotations of violent or aggressive character that renders them inadmissible as evidence.

First, these alleged nicknames have no relevance to the issues in this trial. This is not a case in which an alias or nickname may be relevant because it is "necessary to identify the defendant in connection with the acts charged in the indictment." *United States v. Palmer*, Cr. No. 89-0036, 1989 WL 1170001, at *11 (D.D.C. June 8, 1989); *see also United States v. Clark*, 541 F.2d 1016, 1018 (4th Cir. 1976); *United States v. Brodie*, 326 F. Supp 2d 83, 90 (D.D.C. 2004) (citing *Palmer* and *Clark* for the "general rule" that nickname or alias evidence must be "necessary to identify defendant at trial."). There will be no evidence in this case that witnesses commonly referred to Mr. Heard and Mr. Slough by the alleged nicknames or that they knew them only by those names. To the contrary, all of the potential government witnesses knew Mr. Heard and Mr. Slough and referred to them by their proper names.[1] For this reason alone, any reference to the alleged nicknames should be excluded on relevance grounds. *United States v. Lawson*, 535 F.3d 434, 443 (6th Cir. 2008) ("[I]t might be the case that the jury should not have

[1] The government executed a search warrant on the email accounts of several Raven 23 members, including an account with the address "savage.viking@gmail.com" allegedly used by Mr. Slough. However, there is no evidence that any Raven 23 member or anyone else knew Mr. Slough only by his alleged nickname. Moreover, the government has represented in a sealed filing relating to the *Garrity* litigation that it will not be offering into evidence at trial any material secured by or derived from the search warrants of the Raven 23 email accounts. *See* United States' Response Brief to Defendants' Post-Hearing Memorandum (Dkt. 170), at 16.

been permitted to hear that Lawson's nickname is "Psycho" since the nickname was not necessary to identify him or connect him with the acts charged"); *United States v. Yuot*, Cr. No. 07-4091, 2008 WL 2857144, at *5 (N.D. Iowa July 23, 2008) ("[T]he court concludes that evidence of the nickname or alias 'Lord' should be excluded until or unless the prosecution alerts the court . . . that a witness did, indeed, know Yuot exclusively by that nickname or alias").

Furthermore, the nicknames themselves – "Extreme" and "Savage Viking" – in the context of the charges in this case, improperly imply that the Defendants are of a violent or aggressive character, which is precisely the type of evidence that is not admissible under Rule 404b. For that reason as well, the nickname evidence should be excluded.

Finally, even if the Court were to find that these nicknames have marginal relevance to any issue in the case (which we dispute), Rule 403 renders the nicknames inadmissible in any event. In *United States v. Farmer*, 583 F.3d 131 (2d Cir. 2009), where the government introduced evidence in a murder trial that the defendant was known by the nickname "Murder," the Second Circuit reversed the defendant's conviction, stating:

> When a defendant charged with a crime of violence is identified before a jury by a nickname that bespeaks guilt, violence, or depravity, the potential for prejudice is obvious. Before receiving such evidence over a defendant's objection, a trial court should consider seriously whether the probative value is substantially outweighed by any danger of unfair prejudice, Fed.R.Evid. 403, and whether introduction of the nickname is truly needed to identify the defendant, connect him with the crime, or prove some other matter of significance. Even so, a potentially prejudicial nickname should not be used in a manner beyond the scope of its proper admission that invites unfair prejudice. Federal Rule of Evidence 404(a) provides (with exceptions not applicable here) that "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion." It is the ethical obligation of the prosecutor, and the legal obligation of the court, to ensure that this rule is observed.

Id. at 135.

Similarly, the danger of unfair prejudice to Mr. Heard and Mr. Slough that would result from the admission of unsubstantiated bad character evidence in the form of the nicknames is real and substantial, especially in the context of the charges in this case. A jury who hears evidence of these nicknames is very likely to unfairly and improperly infer that the nicknames reflect violent or belligerent character traits on the part of these Defendants that makes them more likely to have committed the crimes with which they are charged. The actual probative value of the nickname evidence would be negligible (at best), and it would be substantially outweighed by the danger of this very significant prejudicial effect.

CONCLUSION

For the foregoing reasons, the Court should issue the attached order preventing the government from introducing at trial any evidence relating to the nicknames of Mr. Heard and Mr. Slough.

Dated: December 16, 2009

Respectfully submitted,

/s/ David Schertler

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of December 2009, I caused the foregoing Motion to Exclude Evidence of the Nicknames of Defendants Heard and Slough to be filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to

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