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Federal Rules of Evidence—Rule 404(b) Limits the Admission of Other Crimes Evidence, Under an Inclusionary Approach, to Cases Where It Is Relevant to an Issue in Dispute

*United States v. Manafzadeh**

I. Introduction

Federal Rule of Evidence 404(b) states:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted 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.¹

Rule 404(b) has been subjected to various interpretations since it became effective in 1975. In *United States v. Manafzadeh*,² the United States Court of Appeals for the Second Circuit contributed to the diverse field of opinions by holding that other acts evidence is admissible under rule 404(b) only when relevant to an actual issue in dispute.³

In arriving at its decision, the court was required to pass upon two issues: (1) what approach to admitting other crimes evidence is contemplated in the rule; and (2) when interpreting rule 404(b), what standard of relevance is applicable to other crimes evidence. As to the first issue, the court found that rule 404(b) contemplates an inclusionary approach.⁴ This approach encourages the admission of other crimes evidence where the evidence is used for any purpose other than to show the propensity of the defendant to commit bad acts. It rejected the exclusionary approach which, on the other hand, tends to restrict the admission of such evidence. Under the exclusionary approach, similar acts evidence is inadmissible unless it falls within an exception to the rule of exclusion such as those exceptions listed in the second sentence of rule 404(b).⁵

Regarding the second issue, that of the proper standard of relevance, the court restricted the use of other crimes evidence to that "relevant to an issue in dispute"⁶ as opposed to the broader definition requiring that evidence be "relevant to establish any fact consequential to the determination of the action."⁷ In restricting the definition of relevance, the court failed to admit

* 592 F.2d 81 (2d Cir. 1979).

1 For a discussion of some of the early interpretations of this rule, see *Rule 404(b) Other Crimes Evidence: The Need for a Two-Step Analysis*, 71 Nw. U.L. Rev. 634 (1976) [hereinafter cited as *Two-Step Analysis*].

2 592 F.2d 81 (2d Cir. 1979).

3 *Id.* at 86.

4 *Id.*

5 For a comprehensive discussion of the history and development in common law of the rule on the admissibility of similar acts evidence, see Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988 (1938).

6 592 F.2d at 87.

7 See text accompanying note 60 *infra*.

evidence, relevant under a broader standard, which served a purpose other than to show the defendant's bad character. Thus, in taking an inclusionary approach but limiting it under a narrow standard of relevance, the court failed to emphasize the admissibility of other crimes evidence which rule 404(b) is intended to promote.⁸

II. Statement of the Case

Ekram Manafzadeh was tried and convicted in the United States District Court for the Southern District of New York for causing to be transported in interstate commerce falsely made checks in violation of 18 U.S.C. sections 2314 and 2.⁹ The case arose out of a series of transactions involving the deposit of fraudulent checks into the Chase Manhattan Bank.

In September 1976, Hossein Mohammad Kia, an Iranian citizen, checked into a hotel in Washington, D.C., where the defendant, Manafzadeh, was then registered. On September 28, 1976, Kia, using false credentials, opened a bank account under the name of Mehdi H. Barkhordar at Chase Manhattan Bank in New York with an initial deposit of \$2,000.

On October 12, 1976, Kia deposited six checks into the Barkhordar account, three drawn on a nonexistent account at the First National Bank of Miami and three bearing unauthorized signatures for an account at the First National Bank of Chicago. After deposit, the checks totalling \$5,700,000 were transmitted through interstate commerce to their respective drawee banks, where payment was refused.¹⁰

Six days after the deposit, Kia returned to the bank and had five checks totalling \$2,717,500 drawn and certified on that account.¹¹ Four of these checks were deposited into three accounts belonging to Aminco Trading Company, a business wholly owned by Manafzadeh. The fifth check was wired by Kia through Western Union to Las Vegas where a portion was retained by Kia and the remainder returned to New York and deposited in an Aminco bank account. At trial, Kia testified that the certified checks were deposited into the Aminco accounts as payment for Iranian bonds and other valuable papers which had been purchased from the trading company.

When the Chase Manhattan Bank discovered its mistaken certification of the checks, it traced them to the Aminco bank accounts and froze those assets.

8 See note 22 *infra* and accompanying text.

9 18 U.S.C. § 2314 (1976) provides in relevant part:

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited . . . [s]hall be fined not more than \$10,000, or imprisoned not more than ten years or both.

10 18 U.S.C. § 2 (1976) provides:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

11 It was the creation and deposit of these fraudulent checks which constituted the crime for which Manafzadeh was charged.

12 For reasons not made clear at trial, these five checks were validly certified despite the fact that there were insufficient funds in the Barkhordar account to cover the checks. It was suggested that either a Chase employee erred or deliberately caused the checks to be certified as part of a plot to defraud Chase. It was clear, however, that in all respects the checks were valid. Brief for Appellant at 4-5.

Following negotiations with Manafzadeh, \$1,902,500 was returned to Chase Manhattan, and the remainder was retained by Manafzadeh as payment for the Iranian bonds he claimed to have sold to Kia.

At trial, the Government argued that Manafzadeh was the "brain" behind this scheme and attempted to connect him to the negotiation of the six fraudulent checks through a combination of facts and inferences. The Government presented circumstantial evidence showing that Manafzadeh was registered at the same hotel as Kia immediately prior to the creation and deposit of the six fraudulent checks, that such checks were imprinted by a Hall-Welter Speedwrite checkwriter of the series which Aminco Trading Company owned, and that Manafzadeh's fingerprint was found on one of the fraudulent checks. Additionally, the Government questioned Manafzadeh at length regarding his receipt of the five certified checks, suggesting that Manafzadeh knew these checks were invalid and therefore knew that they were not payment for Iranian bonds as claimed.

Manafzadeh alleged that he was in no way involved with the negotiation and deposit of the six fraudulent checks into the Chase Manhattan Bank. Furthermore, he claimed that he accepted the five certified checks drawn on the fraudulent Barkhordar account as payment for the legitimate sale of bonds to Kia. Kia supported this contention with his own testimony alleging that Manafzadeh was in no way involved with the scheme.

The crucial point upon which the trial turned was the admission of similar acts evidence as part of the Government's case-in-chief to show that Manafzadeh possessed the criminal intent to participate in the fraud. The evidence offered by the Government surrounded the testimony of one Matovossian who revealed that Manafzadeh had twice approached him subsequent to the events leading to the instant case and asked him to participate in certain fraudulent activities.¹²

Defense counsel objected to the admission of such testimony to show criminal intent, offering a number of times to concede the issue of intent if the jury found that Manafzadeh had participated in the creation or deposit of the fraudulent checks as charged. The defense claimed that with such a stipulation intent was not at issue and thus irrelevant.

The trial judge, nevertheless, permitted the admission of the testimony, with an instruction to the jury to consider it only in deciding the question of intent on the crime charged in the indictment. The jury found the defendant guilty and from the conviction, this appeal was taken.¹³

The Second Circuit recognized rule 404(b) as a rule of inclusion which en-

¹² The witness testified that the defendant first tried to recruit him to deposit \$10,000 in a bank and withdraw some \$3,000,000 a few days later. The witness also revealed that the defendant recruited him to purchase some jewelry using certified checks bearing a counterfeit bank certification. These checks were given to Matavossian by Manafzadeh and subsequently turned over to the police.

¹³ On appeal, the defendant-appellant raised five issues, the primary one being the Government's use of other crimes evidence. The majority disposed of two of the remaining four issues finding no merit in the defendant's claims that no probable cause existed to support the February arrest and search warrants and that the court erred in refusing to require the Government to make an offer of proof regarding a prior conviction of the defendant in a foreign country. Additionally, no grounds were found to justify reversal under either of the remaining two issues concerning testimony as to defendant's exercise of his right to counsel at the time of initial questioning and the probable cause to issue the May arrest and search warrants. For purposes of this comment, only the primary issue of the case, the admission of other acts evidence, will be addressed.

couraged the admission of other acts evidence.¹⁴ The court, however, went on to hold that other crimes evidence was properly admitted only when relevant to an actual issue in the case, and then, only if its probative value on that issue outweighed its prejudice to the defendant.¹⁵

In applying this analysis to Manafzadeh, the court found that the similar acts evidence was inadmissible to show criminal intent. Its reasoning was simply that intent was never in issue. Manafzadeh claimed that he had not participated in the negotiation of the checks. In addition, he agreed to concede intent if his participation was evident to the jury beyond a reasonable doubt. Denying participation made the sole issue whether or not Manafzadeh had anything to do with the creation or deposit of the six fraudulent checks alleged in the indictment or the use of those checks to defraud the bank.

The court also found that the receipt of the certified checks drawn from the fraudulent Barkhordar account was irrelevant.¹⁶ The court reasoned that Manafzadeh's knowledge that he was receiving proceeds fraudulently obtained from the Chase Manhattan Bank was not an element of the offense in the indictment and was not relevant to the charge against him. The specific charge against Manafzadeh was that at a much earlier point, he had violated 18 U.S.C. section 2314¹⁷ by causing the forged Miami and Chicago checks to be created and placed in interstate commerce.¹⁸ Thus, Manafzadeh's subsequent contact with the proceeds of the crime was irrelevant, according to the court, to the only issue truly in dispute—Manafzadeh's participation in the creation or deposit of the six fraudulent checks alleged in the indictment. Because the court did not find the evidence relevant, it did not have to address the question of its prejudicial impact.

III. Alternative Approaches to Rule 404(b) Available to the *Manafzadeh* Court

The ambiguity of rule 404(b) has resulted in a wide variety of interpretations by the courts attempting to apply it. The second sentence of the rule states: "[other crimes evidence] may, however, be admissible for other purposes [than merely showing the defendant's propensity to act in a criminal manner] such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."¹⁹ One method by which courts have interpreted this rule has been termed the inclusionary approach. The inclusionary approach stresses the admissibility of other crimes evidence where it serves a purpose other than to show the defendant's criminal character. Thus, in interpreting this rule, a court using an inclusionary approach might ask, "Is this evidence relevant for a purpose other than to show the defendant's propensity to commit criminal acts?"²⁰ In contrast to the inclu-

14 592 F.2d at 86.

15 *Id.*

16 *Id.* at 88.

17 See note 9 *supra*.

18 592 F.2d at 88.

19 FED. R. EVID. 404(b).

20 See Stone, *supra* note 5, at 1005. See also *Two-Step Analysis*, *supra* note 1, at 636.

sionary approach, other courts have adopted what has been termed the exclusionary approach when dealing with rule 404(b). Under the exclusionary approach, other crimes evidence is excluded unless it falls within a particular exception such as one of those listed in rule 404(b). Thus, a court using an exclusionary approach might ask, "Does this evidence fall within any exception to the rule of exclusion?"²¹ The inability of courts to agree on the meaning of rule 404(b) has also led to a number of interpretations using a modified version of one of these two approaches. Although a sampling of cases does not significantly clear the confusion which case law has established, it does shed some light on the variety of approaches which were available to the Second Circuit in *Manafzadeh*.

A. The Inclusionary Approach

The inclusionary approach to analyzing other crimes evidence stresses the admissibility of evidence when it serves a purpose other than to show the defendant's propensity to commit criminal acts. The legislative history of rule 404(b) suggests that Congress intended the rule to be one of inclusion.²² A statement of the proper application of rule 404(b) was made by the Third Circuit in *United States v. Long*.²³ The *Long* court held that it would accept evidence where relevant for any purpose other than to show the defendant's propensity to commit a crime.²⁴ The court referred to congressional reports on rule 404(b) citing the intent of Congress to place greater emphasis on admissibility. It noted that where a purpose was found for admission, only rule 403 prejudice considerations barred its admission.

A similar analysis recognizing that rule 404(b) was designed to encourage admission of relevant other acts evidence was made in *United States v. Beechum*.²⁵ In *Beechum*, the Fifth Circuit, sitting *en banc*, applied a two-step inclusionary approach in analyzing other acts evidence: first, the court must determine if the other acts evidence is relevant other than to show a propensity for the defendant to commit bad acts; and second, the court must weigh the probative value of the evidence against its danger of undue prejudice.²⁶

²¹ Stone, *supra* note 5, at 1005.

²² See H.R. REP. NO. 650, 93d Cong., 1st Sess. 7 (1973), reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7075, 7081, which provides:

The second sentence of Rule 404(b) as submitted to this Congress began with the words "This subdivision does not exclude the evidence when offered." The Committee amended this language to read "It may, however, be admissible," the words used in the 1971 Advisory Committee draft, on the ground that this formulation properly placed greater emphasis on admissibility than did the final Court version.

See also S. REP. NO. 1277, 93d Cong., 2d Sess. 25 (1974), reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7051, 7071, stating: "[I]t is anticipated that with respect to permissible uses for such evidence, the trial judge may exclude it only on the basis of those considerations set forth in Rule 403, i.e., prejudice, confusion or waste of time."

²³ 574 F.2d 761 (3d Cir.), cert. denied, 439 U.S. 985 (1978). The case involved a conspiracy on garbage collection contracts in which the defendant objected to the admission into evidence of other pay-off schemes involving the defendant. The court found the evidence to be relevant under rule 404(b) and not overprejudicial under rule 403. A concurring opinion sought to limit the court's expansive scope of the concept of relevance under rule 401.

²⁴ *Id.* at 765.

²⁵ 582 F.2d 898 (5th Cir. 1978), cert. denied, 440 U.S. 920 (1979). See generally *Two-Step Analysis*, *supra* note 1, for a discussion of *Beechum*.

²⁶ 582 F.2d at 911.

The two-step approach applied in *Long* and delineated in *Beechum* emphasizes the admissibility of other acts evidence in its first step. A growing number of courts have favored the adoption of this approach.²⁷

The two-step approach applying a broad standard of relevance in the first step is to be distinguished, however, from a two-step approach applying a narrow standard of relevance in the initial step. In both *Long* and *Beechum*, the courts referred to rule 401²⁸ and its broad scope as the proper standard of relevance to be applied in analyzing similar acts evidence. However, in *Manafzadeh*, a narrow standard of relevance was applied and evidence that served a purpose other than to show the defendant's criminal character was excluded. The *Manafzadeh*-type application of the two-step approach frustrates the intent of rule 404(b) because it fails to emphasize admissibility.²⁹

The issue of relevance was discussed in the Seventh Circuit's analysis of other crimes evidence in *United States v. Fairchild*.³⁰ In *Fairchild*, the defendant objected to the admission of evidence that he possessed a large number of counterfeit bills shortly following the events which constituted the counterfeiting crime for which he was charged. In an opinion written by then Judge Stevens, the court held that other acts evidence is admissible when it "has a tendency to make the existence of an element of the crime charged more probable than it would be without such evidence."³¹ This was arguably the proper application of the relevance standard under rules 404(b) and 401. The court, however, did not totally settle the relevance problem. Like *Manafzadeh*'s "issue in dispute" limitation, the court in *Fairchild* stated that evidence tending to establish an "element of the crime" is relevant. Under a broad standard of relevance, evidence tending to establish "any fact of consequence to the determination of the action"³² would be relevant and admissible under the first step of the two-step approach. Although the distinction is subtle, cases such as *Manafzadeh* exemplify how a narrow standard of relevance under an otherwise inclusionary approach may bar the admission of relevant other acts evidence.³³

The majority of circuits have at least recognized the inclusionary approach within rule 404(b).³⁴ A preference, however, for any one approach is not clearly delineated by the cases.

B. The Exclusionary Approach

In contrast to the inclusionary approach, which stresses the admissibility of other crimes evidence, the exclusionary approach excludes the use of other

27 4 FED. R. EVID. NEWS 79-65 (J. Schmertz ed. 1979).

28 See text accompanying note 60 *infra*.

29 See note 22 *supra* and accompanying text.

30 526 F.2d 185 (7th Cir. 1975), *cert. denied*, 425 U.S. 942 (1976).

31 *Id.* at 189.

32 This is properly in line with the definition of relevance stated in Federal Rule 401. See text accompanying note 60 *infra*.

33 For future developments within the Seventh Circuit, see *United States v. McPartlin*, 595 F.2d 1321 (7th Cir.), *cert. denied*, 48 U.S.L.W. 3218 (1979) (otherwise inclusionary approach was limited to evidence relevant to prove an element of the crime).

34 For cases in other circuits using an inclusionary analysis, see *United States v. Wright*, 573 F.2d 681 (1st Cir.), *cert. denied*, 436 U.S. 499 (1978); *United States v. James*, 555 F.2d 992 (D.C. Cir. 1977); *United States v. Czarnecki*, 552 F.2d 698 (6th Cir.), *cert. denied*, 431 U.S. 939 (1977); *United States v. Riggins*, 539 F.2d 682 (9th Cir. 1976), *cert. denied*, 429 U.S. 1045 (1977).

crimes evidence unless it falls within a particular exception to the general rule of exclusion. Despite the fact that Congress expressed its intent to make rule 404(b) an inclusionary rule,³⁵ some jurisdictions continue to exclude other acts evidence unless an exception is shown.³⁶

The Sixth Circuit recently interpreted rule 404(b) in *United States v. Phillips*.³⁷ In *Phillips*, evidence of other robberies was admitted in a trial for bank robbery to show a plan or pattern common to the defendant. The court held that the evidence was inadmissible under the common plan or scheme exception where no distinctive pattern was shown. In commenting on rule 404(b) the court stated: "The draftsmen narrowed the scope of the Rule by listing 'exceptions' to the Rule's general exclusion of evidence of other crimes or wrongs"³⁸ The Sixth Circuit is one of several circuits in which the exclusionary approach has been implemented.³⁹

C. Other Approaches

In lieu of using an exclusionary or inclusionary approach, courts have created additional theories to limit the introduction of other crimes evidence under rule 404(b). In many cases, the courts have placed particularized limitations on the scope of relevance.⁴⁰ In doing so, they require that the evidence proffered meet more exacting standards of reliability and proof under rule 404(b) before ever reaching the issue of whether the evidence falls within an exception to the rule of exclusion or serves a purpose other than to show the defendant's propensity to act in a criminal manner.

In *United States v. Silva*,⁴¹ the Fifth Circuit stated that a trial court must be satisfied that four prerequisites have been met before it can consider whether other acts evidence falls within an exception to the general rule of exclusion. These prerequisites require that: (1) there is plain, clear and convincing evidence of a similar offense; (2) the offense is not too remote in time; (3) the element of the prior crime for which there is a recognized exception is a material issue in the case; and (4) there is a substantial need for the probative value of the evidence.⁴² Thus, a court that imposes more exacting standards of

35 See note 22 *supra* and accompanying text.

36 Judge Weinstein states that a majority of jurisdictions hold steadfastly to the exclusionary rule. 2 J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE* ¶ 404 [08], at 404-42 (1977).

37 599 F.2d 134 (6th Cir. 1979).

38 *Id.* at 136. *Cf.* *United States v. Czarnecki*, 552 F.2d 698 (6th Cir.), *cert. denied*, 431 U.S. 939 (1977) (inclusionary approach). The *Phillips* case is noted here for its dicta citing rule 404(b) as a rule of exclusion despite the fact that its legislative history fails to support the court's interpretation. Under an inclusionary analysis it is likely that *Phillips* would have been decided the same way.

39 For cases in other circuits using an exclusionary approach, see *United States v. Jackson*, 588 F.2d 1046 (5th Cir.), *cert. denied*, 99 S. Ct. 2882 (1979); *United States v. Westbo*, 576 F.2d 285 (10th Cir. 1978); *United States v. Jamar*, 561 F.2d 1103 (4th Cir. 1977).

40 See text accompanying notes 25-33 *supra*. The two-step approach with a narrow standard of relevance is an example of a court placing a particularized limitation on relevance. In *Manafzadeh* the limitation was "relevant to an issue in dispute."

41 580 F.2d 144 (5th Cir. 1978).

42 *Id.* at 148. Note that if the evidence meets these four criteria then it likely is relevant for purposes of rule 404(b). The only inquiry that a court would subsequently make would be to weigh the probative value of the evidence against its prejudicial impact. See also *United States v. Goehring*, 585 F.2d 371 (8th Cir. 1978) (in which the court imposed an additional requirement on rule 404(b) that such evidence be clear and convincing that the defendant committed the crime).

reliability and proof is likely to exclude other crimes evidence prior to considering its admissibility under rule 404(b).

IV. The Qualified Inclusionary Approach of *Manafzadeh*

A. Background: "Stemming the Tide" Under Rule 404(b)

The Second Circuit had the opportunity to construe rule 404(b) prior to *Manafzadeh* in a series of prosecutions by the Federal Government against U.S. Department of Agriculture meat inspectors accused of taking bribes in the course of their work.⁴³ These cases and *Manafzadeh* had two important factors in common. First, in each, other acts evidence was a vital part of the prosecutor's case which was based largely on circumstantial evidence. Without the admission of similar acts evidence, each prosecution's case was significantly weaker. Second, in all the cases, each defendant denied participation in the act for which he was charged, and thus removed the issue of intent from the case.⁴⁴ In each case, evidence of bribes other than those for which the defendant was charged was admitted. A precise analysis of these cases reveals two variations in the Second Circuit's approach to other crimes evidence.

In *United States v. Benedetto*,⁴⁵ the court, in seeking to find a relevant purpose for the admission of other crimes evidence, was forced to rule out intent as grounds for admission because intent was not in issue. The court found, however, that the evidence was admissible to impeach a statement by the defendant that he had never taken any bribes. In a companion case, *United States v. Gubelman*,⁴⁶ the court found that the defendant had raised the question of identity and thus permitted other crimes evidence to enter where relevant to the issue of identity. In both of these cases the court, using the two-step inclusionary approach, emphasized the admissibility of other crimes evidence.⁴⁷

The court seemed to make a subtle, yet significant, change in its other acts analysis in *United States v. O'Connor*.⁴⁸ In *O'Connor*, the defendant denied participation in the bribery scheme. There was direct testimony, however, by managers of two meat packing companies that O'Connor accepted bribes in exchange for relaxed enforcement of meat inspection standards. The prosecution argued that similar acts testimony by managers of other companies not mentioned in the indictment was relevant to show (1) a common scheme and pattern, (2) a unique scheme and pattern, (3) identity, and (4) to corroborate

43 See 2 J. WEINSTEIN & M. BERGER, *supra* note 36, ¶ 404[08], at 39 (Supp. 1978).

44 The *Manafzadeh* court, quoting from these bribery cases stated: "Knowledge and intent, while technically at issue, were not really in dispute. . . ." 592 F.2d at 87. This does not mean that intent was not recognized as an element of the crime; the fact that it was conceded if participation in the crime were shown removed it "technically" from issue.

45 571 F.2d 1246 (2d Cir. 1978).

46 571 F.2d 1252 (2d Cir.), *cert. denied*, 436 U.S. 948 (1978).

47 The court stated its two-step approach in *Gubelman* as follows:

[A]nalysis of other crimes evidence falls into two parts: First, is the evidence relevant to some issue at trial other than "to prove the character of a person in order to show that he acted in conformity therewith," as required by Fed.R.Evid. 404(b); and second, even if relevant, should the evidence nonetheless be excluded because "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . .," as mandated by Fed.R.Evid. 403.

571 F.2d at 1254.

48 580 F.2d 38 (2d Cir. 1978).

the testimony of the meat producers referred to in the indictment.⁴⁹ At trial the evidence was admitted only on the first of these grounds.

On appeal, the Second Circuit ruled out the common scheme exception as grounds for admission. Under the court's analysis, the facts of *O'Connor* did not fit within the exception. Additionally, the court refrained from addressing the propriety of the three remaining contentions ruled out and objected to at trial.⁵⁰ Further still, the court failed to address any other purposes for which the evidence may have been properly admitted, such as impeachment—an issue addressed in both *Benedetto* and *Gubelman* and arguable in this case. Though the *O'Connor* court recognized the inclusionary approach, it seemed content to rule out the one justification for which the evidence was admitted and ignore any other purposes for admission which may have existed.

In addition to its subtle shift in approaches, the court seemed to narrow the standard of relevance within its analysis. In *O'Connor* the court said: "[The other crimes evidence] was not relevant to a *significant issue that was truly in dispute* and was therefore inadmissible under Rule 404(b)."⁵¹ Federal Rule 404(b) is much broader in its scope than *O'Connor* recognized, for the rule requires only that the evidence be for "other purposes, such as proof of motive, opportunity" Although the court had stated the "issue in dispute" limitation before *O'Connor*,⁵² this was the first time in which the court failed to find some other purpose upon which to admit the evidence.⁵³

O'Connor was the first indication of a subtle change in the Second Circuit's interpretation of rule 404(b). In *United States v. Halper*,⁵⁴ the Second Circuit, addressing the issue of admissibility of similar acts evidence, stated:

More recently, this Court has attempted if not to "stem the tide" at least to define its limits. We need not state in detail the law as it now stands. Suffice it to say that, although this Court continues to adhere to the "inclusionary" view of the rule regarding other crimes and similar acts evidence, it is by no means our view that such evidence is either presumed relevant or automatically admissible. *Its relevance to an issue truly in dispute must be demonstrated.*⁵⁵

49 *Id.* at 41.

50 The Second Circuit stated that after-the-fact justification would seemingly render meaningless the trial judge's limiting instruction if admissibility were upheld on grounds other than those adopted by the trial judge. This was contra, however, to *Benedetto* in which the court found after-the-fact justification proper when no limiting instructions were given. *See id.* at 42 n.9.

51 *Id.* at 43 (emphasis added).

52 *See United States v. Gubelman*, 571 F.2d at 1254; *United States v. Benedetto*, 571 F.2d at 1248.

53 In *Benedetto* and *Gubelman* the Second Circuit found that the other crimes evidence was not relevant to those issues upon which the Government sought to admit it, but the court did seek and recognize other issues so as to make the evidence relevant under a seemingly narrow standard. In *O'Connor*, however, the court refrained from investigating other possible grounds upon which the evidence was admissible; thus for the first time, other crimes evidence was found irrelevant under the narrow standard. *Manafzadeh* was another situation in which a narrow standard was used. Contrast, however, *United States v. Williams*, 577 F.2d 188 (2d Cir.), *cert. denied*, 439 U.S. 868 (1978), discussed in text accompanying notes 63-70 *infra*, a pre-*O'Connor* case, in which the court did apply a broad standard of relevance using other crimes evidence to corroborate a witness' testimony even though such evidence was not directly relevant to an "issue in dispute."

54 590 F.2d 422 (2d Cir. 1978). In *Halper*, the defendant was charged with making false claims as to defraud the U.S. Department of Health, Education, and Welfare's Medicaid Program and with income tax evasion. The defendant's principal argument on appeal was that the trial court improperly joined the charge of Medicaid fraud with the income tax evasion charge. The court agreed and reversed on those grounds but not before addressing the question as to the admission of evidence of Medicaid fraud into the income tax evasion case and vice versa. On this issue, the court held, for purposes of the separate trials it was ordering, that one crime's evidence was not admissible in the case involving the other crime.

55 *Id.* at 432 (citations omitted; emphasis added).

It was in an atmosphere of change absent any concrete doctrine that *United States v. Manafzadeh* came before the Second Circuit Court of Appeals.

B. *The Court's Shift in Its Inclusionary Approach*

In *Manafzadeh*, the court strayed from the inclusionary approach and broad standard of relevance promulgated by the Federal Rules of Evidence. Although the Second Circuit followed an inclusionary approach, the court immediately limited admissibility of other crimes evidence to cases where it was "relevant to an *actual issue*."⁵⁶ Because the evidence had been admitted to show criminal intent, both the majority and dissent spent a significant amount of time arguing whether or not intent was actually "at issue."

Federal Rule 404(b) is clearly aimed at admitting evidence of similar acts or other crimes wherever such evidence serves a relevant purpose other than to prove the character of the defendant to show he acted in conformity with such character. Both the House and Senate Reports discussing rule 404(b) reflect an intention to emphasize the admissibility of the evidence.⁵⁷ Nowhere does 404(b) limit admissibility to "issues in dispute." Under the Federal Rules, the only limitations which may be implied upon rule 404(b) are those of relevance (rule 402)⁵⁸ and prejudicial consideration (rule 403).⁵⁹

The majority erred in *Manafzadeh* when it equated the requirement that evidence be admitted to prove an "issue in dispute" with the rules' requirement to admit evidence which is "relevant." The concept of relevance is more encompassing than the majority recognized. As stated in Federal Rule 401: " 'Relevant Evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."⁶⁰

Because the prosecution's case was based on circumstantial evidence, any fact tending to link Manafzadeh to the negotiation of the fraudulent checks was consequential to the determination of the action. The dissent argued that the evidence of "other schemes in which certified checks, apparently good on their face, were used as tools of fraud, tended to discredit [Manafzadeh's] claim of innocent reliance on the stamp of certification and consequently suggest his awareness of the underlying fraud."⁶¹ The majority held that knowledge that the proceeds had been fraudulently obtained was not a relevant issue. Thus, other acts evidence was not admissible to show Manafzadeh's state of mind at the time he received the proceeds.⁶² The majority's preoccupation with admit-

56 592 F.2d at 87 (emphasis added).

57 See note 22 *supra* and accompanying text.

58 FED. R. EVID. 402 provides: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible." Indeed, rule 404(b) has been described as a "particularized exception to rule 402 that all relevant evidence is admissible." *Two-Step Analysis*, *supra* note 1, at 635.

59 FED. R. EVID. 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." See text accompanying notes 74-77 *infra* for discussion of prejudicial considerations.

60 FED. R. EVID. 401.

61 592 F.2d at 92 (Lumbard, J., dissenting).

62 *Id.* at 88 (majority).

ting the similar acts evidence to determine an issue in dispute ignored the broader and proper application of rule 404(b) whereby the court should have admitted any evidence which was more likely to show the existence of a consequential fact.

A comparison between *Manafzadeh* and an earlier case, *United States v. Williams*,⁶³ shows the subtle, yet significant shift of the Second Circuit in its analysis of other crimes evidence.

In *Williams*, the defendant like Manafzadeh, was the alleged "planner" of the charged crime, in this case bank larceny. The charge arose out of a bank robbery in which a bank teller, Simmons, was involved. As in *Manafzadeh*, there was no direct evidence to show that Williams participated in the crime for which he was charged. Simmons, however, testified that Williams had been present at a meeting planning the robbery. Williams denied both his presence at the meeting and his participation in the robbery, thus taking the issue of intent out of the case. In *Williams*, however, evidence of prior convictions was admitted at trial for the same purpose as in *Manafzadeh*, to show intent. In *Williams*, it was also admitted to corroborate Simmons' testimony concerning the defendant's alleged participation in the robbery.

The Second Circuit's analysis in *Williams* differed significantly from that in *Manafzadeh*. In *Williams*, the defendant denied his participation in every part of the scheme. Yet, unlike *Manafzadeh*, the court allowed the evidence of prior convictions in because the defense had failed to "affirmatively take the issue of intent out of the case."⁶⁴

In holding that the prior conviction was admissible to corroborate Simmons' testimony, the court noted that evidence was admissible, if relevant, "except where offered solely to prove criminal character."⁶⁵ Although corroboration is not among the express exceptions set out in rule 404(b), the list is not intended to be exhaustive. The *Williams* court sought and found a relevant purpose for the admission of the testimony.

In contrast, however, the *Manafzadeh* court, after recognizing its inclusionary approach, emphasized the factors making evidence inadmissible: "Other crime evidence *may not* be received *unless* it is relevant . . . and *unless* its probative value on [an] issue is not outweighed by its unfair prejudice" ⁶⁶ Furthermore, it stated, "There is no presumption that such other crimes evidence is relevant."⁶⁷ Whereas the court in *Williams* analyzed its case giving positive comments to admit the evidence, the majority in *Manafzadeh* emphasized those reasons why *not* to admit it. The majority approach was more of an exclusionary one, although characterized by the court as inclusionary.

Besides the contrasting approaches of the two cases, *Manafzadeh* and *Williams* also show the Second Circuit's shift to a narrower standard of relevance. In *Williams*, the defendant claimed that other crimes evidence was inadmissible under the rubric of corroboration because it failed to prove a con-

63 577 F.2d 188 (2d Cir.), cert. denied, 439 U.S. 868 (1978).

64 Id. at 191.

65 Id. at 192.

66 592 F.2d at 86 (emphasis added).

67 Id.

sequential fact.⁶⁸ The court, however, held that the evidence bolstered Simmons' testimony and "thereby tended through a series of direct inferences to prove appellant's participation in the conspiracy—the ultimate fact to be proved by the Government."⁶⁹ This was a proper application of rule 404(b) in regard to relevance and yet this was the exact reasoning in *Manafzadeh* which the majority rejected. Clearly then, after *Williams*, the court narrowed the scope of relevant evidence and shifted from a positive inclusionary analysis to a more negative exclusionary approach in *Manafzadeh*.⁷⁰

V. A Suggested Analysis

Had the majority approached the question of admissibility using an inclusionary approach and applying a broad standard of relevance, they would not necessarily have found the similar acts evidence admissible. The majority did not address the question of Manafzadeh's receipt of the proceeds of the crime because they held that it was not relevant to the charge against him. Because the question of Manafzadeh's receipt of the proceeds was found irrelevant, the similar acts evidence was not admissible to discredit Manafzadeh's claim that he innocently relied on the stamp certification of the checks constituting the proceeds of the crime.

Yet, as the dissent pointed out, Manafzadeh's possession of the proceeds of the fraud, though subject to an innocent interpretation, was the strongest evidence linking him to the crime.⁷¹ The majority divided the facts into two segments: first, the deposit of the six fraudulent checks constituting the crime; and second, the withdrawal and distribution of the five certified checks (the proceeds) among the participants. The dissent argued, however, that "the record discloses a sophisticated scheme to defraud which was constructed to place the recipient of the fraudulently obtained funds in a position where he could claim lack of knowledge."⁷² If the majority were to take an inclusionary approach stressing admissibility, then they should have examined the entire scheme to determine if the similar acts evidence was relevant for any purpose other than to show the defendant's propensity.

The dissent found the evidence admissible "to establish a proposition [that Manafzadeh was aware of the improper certification of the checks] . . . which through a series of inferences [tended] to establish the probability of a consequential fact [that one who possesses proceeds of a crime, without explanation, has likely participated in the crime itself]."⁷³ There are two critical

68 577 F.2d at 192.

69 *Id.*

70 Summarizing the cases then, in *Benedetto*, *Gubelman* and *Williams* the Second Circuit sought and found a purpose for the admission of other acts evidence though such evidence was admitted on somewhat strained grounds. In *O'Connor*, there were likewise no clear-cut grounds for admitting the evidence, yet the court refrained from addressing any other arguable purposes for admitting the evidence as it had done before. *O'Connor* and *Halper* both reflect a shift in the court's attitude or approach to the question of admissibility, suggesting that the court was no longer willing to be as lenient as before. Finally, in *Manafzadeh*, the court again had a reason to admit the other acts evidence, but the court never recognized it because it was found irrelevant under a narrow definition of relevance.

71 592 F.2d at 91 (Lumbard, J., dissenting).

72 *Id.* at 92.

73 *Id.* quoting 2 J. WEINSTEIN & M. BURGER, *supra* note 36, ¶ 404[08], at 404-43 to 44 (1977).

problems with the dissent's reasoning, however, either of which would bar the admission of similar acts evidence to show the defendant's knowledge of the proceeds of the fraudulent transaction. First, the dissent argued that the similar acts evidence would have discredited Manafzadeh's claim that he had every right to rely on the certification of the checks in his alleged bond sale. The similar acts evidence would have aided in establishing that the certified checks which Manafzadeh had received were not valid. It was an established fact, however, that this certification was valid, that the bank erred, and that Manafzadeh himself did not falsely certify the checks. Thus, the similar acts evidence could not have been admitted to establish a proposition which directly contradicted an established fact in the case.

A second problem with the admission of the similar acts evidence was that the inference it sought to establish, that is, because Manafzadeh knew the certified checks were proceeds of a crime then he likely participated in the crime, is not necessarily a natural inference. Even if it had been proven that Manafzadeh was aware that the certified checks were proceeds of the crime, such knowledge would not have directly implied his participation in the crime. Such an implication would equate guilty knowledge with guilty act. Clearly, there are problems with this analysis, and a court properly exercising its discretion could have found that the proposition established by the evidence was based on unsound, illogical, inferential reasoning and did not make the existence of a consequential fact more probable than not.

Even if it were established that the evidence was admissible for some purpose other than to show the defendant's propensity to commit a crime, a proper analysis under rule 404(b) would require the court to weigh the probative value of the evidence against its prejudicial impact according to rule 403.⁷⁴ This is the second step in the two-step analysis of rule 404(b).⁷⁵ Because of unsound reasoning or problems with establishing a proposition in contradiction to established facts, the majority, using an inclusionary approach, would likely have found similar acts evidence prejudicial and excluded it under rule 403.

The majority in *Manafzadeh* was attempting to define the limits of rule 404(b), or at least "stem the tide" of admissibility under such rule. Yet, in narrowing the scope of relevant evidence and taking a less-than-inclusionary approach, the court was ignoring both the spirit and text of Federal Rule of Evidence 404(b).

VI. Reconciliation of the Inclusionary Approach with Control over the Evidence

The Second Circuit in *Manafzadeh* was reluctant to take a purely inclusionary approach to the admission of other crimes evidence. The reason courts do not implement the liberal approach of rule 404(b) is the fear that loss of control over the admission of other crimes evidence will occur when a broad stan-

⁷⁴ For a discussion of the considerations in weighing the probative value of similar acts evidence with its prejudicial impact, see Comment, *Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 YALE L.J. 763 (1961).

⁷⁵ See text accompanying notes 15, 25-34 *supra*, for a discussion of the two-step analysis and how courts have applied it. See also *Two-Step Analysis*, *supra* note 1.

dard of relevance is applied. Because of this fear, there is the concern that the overzealous prosecutor will seek to admit all other crimes evidence, thereby threatening the defendant's right to be protected from evidence which is unduly prejudicial. This concern was vigorously expressed in *United States v. Coades*⁷⁶ where the court stated:

The government's contention that the evidence was relevant to establish the existence of an intent to rob was frivolous. . . . Whatever slight probative value evidence of the prior conviction may have had was patently outweighed by the danger of unfair prejudice. . . . The misuse of evidence of prior misconduct in this case is a deplorable example of prosecutorial overzealousness. Such incidents have occurred with sufficient frequency in recent trials to be a source of growing concern.⁷⁷

The fear of undue prejudice and prosecutorial overzealousness has created an atmosphere in which courts are reluctant to admit other crimes evidence. As a result, the courts have developed narrow definitions of relevance to halt the flow of evidence under the first step of the inclusionary analysis.

The courts must recognize that the test to admit other acts evidence is a two-prong test. Not only must the evidence be relevant, but its probative value must outweigh its prejudicial effect. In the application of the second prong of this test, a court can maintain the control it seeks over the admission of other crimes evidences without restricting the definition of relevance. In *Manafzadeh*, the fact that the other acts evidence was not directly relevant to an issue in dispute did not make it irrelevant for any purpose other than to show the defendant's bad character. However, its lack of relevance to "an issue in dispute" was a crucial factor in determining the probative value of the evidence and weighing it against its prejudicial effect.

This distinction holds true in other cases where courts have placed additional limits on the introduction of similar acts evidence.⁷⁸ The degree to which evidence is plain, clear, and convincing or relevant in proving an element of the crime is important in determining the probative value of other acts evidence. Because such evidence does not meet more exacting standards of reliability and proof, however, it is not automatically irrelevant to the case.

The importance of distinguishing the stage at which to consider the limitations which the courts have placed on similar acts evidence can best be shown by looking at the balanced interests in a criminal prosecution. In every trial, evidence is admitted only after balancing the defendant's interest in receiving a fair trial with the societal interest in reprimanding those who have acted outside the laws. The courts have limited the scope of relevance to ensure the protection of the defendant's right to a fair trial. In doing so, however, they have impaired the societal interest because prosecutions are needlessly obstructed where relevant evidence is excluded under the narrow standard.

Consideration of the limiting factors such as relevance to an issue in dispute is more appropriate under the second prong of the test for admission.

⁷⁶ 549 F.2d 1303 (9th Cir. 1977).

⁷⁷ *Id.* at 1306.

⁷⁸ For a discussion of additional theories that limit the introduction of other crimes evidence under rule 404(b), see text accompanying note 40 *supra*.

At this stage, the court can still protect the defendant's interest in a fair trial without undue prejudice, and society's interests can be better protected also. Currently if one factor, such as relevance to an issue in dispute, is not present, the evidence is excluded. Were this factor considered during the second prong of the test, relevance to an issue in dispute would be only one of a number of considerations affecting the probative value of the evidence. Other factors such as the amount of evidence, its reliability, its similarity to the crime charged and its effect upon the jury would also be considered in balancing its probative value against its prejudicial effect. In weighing several factors, as opposed to one, the court can balance the competing interests of the defendant and of society with greater flexibility.

The court in *Manafzadeh* never recognized this analysis because it disposed of the case through its narrow definition of relevance. Had it applied the inclusionary approach of rule 404(b), it could have addressed its concern over the loss of control over other acts evidence and noted that limiting factors such as an "issue in dispute" are better considered in weighing the probative value of evidence against its prejudicial effect. Should a liberal definition of relevance be judicially prescribed by the Supreme Court of the United States or be explicitly defined by Congress and the drafters of the rule, then the courts should prepare to shift their scrutiny of other acts evidence to determining the probative value of such evidence and weighing it against its prejudicial impact. In doing so, control over the evidence and the inclusionary approach of rule 404(b) can be reconciled.

VII. Conclusion

In *United States v. Manafzadeh*, the Second Circuit interpreted Federal Rule of Evidence 404(b) to limit the admission of similar acts or other crimes evidence to cases where it was relevant to an issue truly in dispute. In doing so, the court narrowed the scope of relevance envisioned by the drafters of the Federal Rules and impeded the admission of evidence which, when relevant for other purposes, was admissible under a pure inclusionary approach.

The failure of its drafters to state explicitly within the text of the rule the analysis which it expected the courts to employ has resulted in conflicting interpretations of rule 404(b), not only between the circuits, but within a number of them. Although rule 404(b) is intended to emphasize the admissibility of other acts evidence, its ambiguity has led a number of courts to limit the inclusionary approach, as did the Second Circuit in *Manafzadeh*. Some courts, however, have gone further, taking an exclusionary approach to admitting such evidence. A close analysis of *Manafzadeh* reveals that the court could have maintained control over the admission of other acts evidence without limiting the scope of relevance or sacrificing an inclusionary approach. This could have been accomplished by carefully scrutinizing the probative value of the evidence when weighing it against prejudicial considerations during the second step of its inclusionary analysis.

Manafzadeh illustrates the need for clarification of Federal Rule 404(b).⁷⁹ Until a clear pronouncement is made by the Supreme Court or an amendment to the rule is drafted and passed by Congress, the uniformity of law which the Federal Rules of Evidence seek to establish⁸⁰ will continue to be frustrated.

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79 One suggested phrasing of the rule which eliminates much of its ambiguity is as follows:
Evidence of other crimes, wrongs, or acts is inadmissible only if its sole purpose is to show the character of a person in order to prove that he acted in conformity therewith. When offered for other purposes, this evidence is admissible under this subsection and may be excluded only on the basis of the considerations expressed in Rule 403.

Two-Step Analysis, *supra* note 1, at 644.

80 See generally S. REP. NO. 1277, 93d Cong., 2d Sess. 8 (1974), reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7051, 7054.