4.29 Defendant's Prior Bad Acts or Crimes (F.R.E. 404(b))

You have heard testimony that the defendant *(summarize the other act evidence)***.**

This evidence of other act*(s)* **was admitted only for** *(a)* **limited purpose***(s)***. You may consider this evidence only for the purpose of deciding whether the defendant** *(describe the precise purpose or purposes for which the other act evidence was admitted: for example (Pick those of the following, or other reasons, that apply)),*

had the state of mind, knowledge, or intent necessary to commit the crime charged in the indictment;

or

had a motive or the opportunity to commit the acts charged in the indictment;

or

was preparing or planning to commit the acts charged in the indictment;

or

acted with a method of operation as evidenced by a unique pattern (describe);

or

did not commit the acts for which the defendant is on trial by

accident or mistake.;

or

is the person who committed the crime charged in the indictment.

You may consider this evidence to help you decide (describe how the evidence will be used to prove identity – e.g., whether the evidence that the defendant committed the burglary in which the gun that is the subject of this trial was stolen makes it more likely that the defendant was the person who placed the gun in the trunk of the car).

Do not consider this evidence for any other purpose.

Of course, it is for you to determine whether you believe this evidence and, if you do believe it, whether you accept it for the purpose offered. You may give it such weight as you feel it deserves, but only for the limited purpose that I described to you.

The defendant is not on trial for committing these other acts. You may not consider the evidence of these other acts as a substitute for proof that the defendant committed the crime*(s)* charged. You may not consider this evidence as proof that the defendant has a bad character or any propensity to commit crimes. Specifically, you may not use this evidence to conclude that because the defendant may have committed the other act*(s)*, *(he)(she)* must also have committed the act*(s)* charged in the indictment.

Remember that the defendant is on trial here only for *(state the charges briefly)***, not for these other acts. Do not return a guilty verdict unless the government proves the crime***(s)* **charged in the indictment beyond a reasonable doubt.**

Comment

See Sixth Circuit § 7.13. *See United States v. Lee*, 612 F.3d 170 (3d Cir. 2010) (commenting that trial court's instruction based on Model Instruction 4.29 was not error).

This instruction should be given if evidence of defendant's other crimes or acts has been admitted under Federal Rules of Evidence Rule 404(b). Rule 404(b) provides:

(1) Prohibited Uses. 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.

(2) Permitted Uses. Notice in a Criminal Case. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:

(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

(B) do so before trial--or during trial if the court, for good cause, excuses lack of pretrial notice.[11]

Evidence admitted under Rule 404(b) is allowed for a limited purpose, and the court should instruct the jury accordingly. *See United States v. Caldwell*, 760 F.3d 267 (3d Cir. 2014); *United States v. Givan*, 320 F.3d 452, 460-61 (3d Cir. 2003); *United States v. Scarfo*, 850 F.2d 1015 (3d Cir. 1988); *United States v. Morena*, 547 F.3d 191 (3d Cir. 2008) (reversing conviction where government exceeded limited purpose for which other act evidence was admissible by repeatedly injecting prejudicial references to defendant's drug use and collateral drug transactions in firearms case). *See also Graham, Handbook of*

[11] Before the Federal Rules of Evidence were restyled, Rule 404(b) provided:

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

Federal Evidence, § 404.5 at 364 (5th ed. 2001).

Admissibility of other act evidence. In *United States v. Caldwell*, 760 F.3d 267, 277-78 (3d Cir. 2014), the court emphasized that the trial court must analyze the admissibility of other act evidence carefully and summarized the steps necessary to admit evidence under Rule 404(b). When other act evidence is offered, the court must determine that the other act 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 unfair prejudice; and (4) accompanied by a limiting instruction, if requested.

Caldwell, 760 F.3d 267, 277-78. *See also United States v. Scarfo*, 241 F.4th 136 (3d Cir. 2022); *United States v. Repak,* 852 F.3d 230 (3d Cir. 2017) (outlining steps for assessing admission of other act evidence); *United States v. Scarfo*, 850 F.2d 1015 (3d Cir. 1988); *United States v. Johnson*, 2021 WL 5412591 (3d Cir. 2021) (non-precedential).

The Third Circuit has said that the law "favor[s] the admission of such evidence, 'if relevant for any other purpose than to show a mere propensity or disposition on the part of the defendant to commit the crime.'" *United States v. Long*, 574 F.2d 761, 766 (3d Cir. 1978). *See also United States v. Daraio*, 445 F.3d 253, 263 (3d Cir. 2006) (stating that admission of 404(b) evidence is favored); *United States v. Johnson*, 199 F.3d 123, 128 (3d Cir. 1999) (noting that rules favor admission). The Third Circuit has also stated that Rule 404(b) is a rule of inclusion rather than exclusion. *See, e.g., United States v. Jemal*, 26 F.3d 1267, 1272 (3d Cir. 1994); *Scarfo*, 850 F.2d at 1019. However, it is clear that other act evidence is not presumptively admissible. *United States v. Caldwell*, 760 F.3d 267, 276 (3d Cir. 2014). Also, as the court explained in *Caldwell*, the statements that Rule 404(b) is inclusive rather than exclusive mean only that the rule's list of purposes for which other act evidence may be admitted is not exclusive - that is, the uses of other act evidence are not limited to those specified in Rule 404(b). *See Caldwell*, 760 F.3d at 276; *see also Jemal*, 26 F.3d at 1272; *Scarfo*, 850 F.2d at 1019.

The proponent of evidence of prior acts "must clearly articulate how that evidence fits into a chain of logical inferences, no link of which may be the inference that the defendant has the propensity to commit the crime charged." *United States v. Morley*, 199 F.3d 129, 133 (3d Cir. 1999). *See also United States v. Caldwell*, 760 F.3d 267, 277-78 (3d Cir. 2014); *United States v. Himelwright*, 42 F.3d 777, 782 (3d Cir. 1994).

The district court should also articulate its reasoning; the court should explain the permissible inference, unless the purpose of the evidence is

"plainly obvious," and balance the probative value of the evidence against any prejudicial impact. *Daraio*, 445 F.3d at 263. *See also Scarfo*, 850 F.2d at 1019 (noting that one factor under Rule 403 balance is government's genuine need for the evidence which the court must balance against the risk that the other act evidence will influence the jury to convict on improper grounds). If the trial court does not explain its grounds for ruling on an objection under Rules 404(b) and 403, the Third Circuit will not defer to the ruling unless the reasons are apparent from the record. *See Becker*, 207 F.3d at 181.

The government sometimes argues that evidence should be admitted over an objection under Rule 404(b) because it is intrinsic to the charged offense. In *United States v. Green,* 617 F.3d 233 (3d Cir. 2010), the Third Circuit considered this argument. In *Green*, the court discussed whether evidence that the defendant had threatened to kill an undercover officer was properly admitted as intrinsic evidence of the charged offense in the defendant's trial for attempted narcotics possession. The court noted that labeling evidence as intrinsic serves only to deprive the defendant of the procedural protections that accompany admission under Rule 404(b): notice from the prosecution and a limiting instruction from the court. In determining whether the evidence was intrinsic to the charged offense, the Third Circuit rejected as unhelpful the "inextricably intertwined" test used in some other circuits. Instead, the court adopted a limited definition of intrinsic evidence, applying it to only two categories of evidence: 1) evidence that directly proves the charged offense and thus does not fall in the realm of "other crimes, wrongs, or acts" governed by Rule 404(b); and 2) uncharged acts performed contemporaneously with the charged crime provided the uncharged act facilitates the commission of the charged crime. The court held that the threat evidence in *Green* was not intrinsic to the charged offense but was properly admissible as proof of motive under Rule 404(b) or as proof of bias. *See also United States v. Savage*, 85 F.4th 102 (3d Cir. 2023) (concluding evidence was intrinsic); *United States v. Bailey*, 840 F.3d 99 (3d Cir. 2016) (concluding that other act evidence was not intrinsic).

Under Rule 404(b), the court may admit proof of conduct that allegedly occurred either before or after the charged offense; other act evidence is not limited to prior, as distinct from subsequent, conduct. *See United States v. Bergrin*, 682 F.3d 261, 281 n.25 (3d Cir. 2012).

In ruling on the admissibility of evidence under Rule 404(b), the court should not assess the credibility or weight of the other act evidence but should only determine whether the jury could reasonably find the necessary facts by a preponderance of the evidence. *See United States v. Savage*, 85 F.4th 102 (3d Cir. 2023); *United States v. Bergrin*, 682 F.3d 261, 278-79 (3d Cir. 2012).

The trial court's ruling under Rule 404(b) will be reviewed for abuse of discretion. *See United States v. Savage*, 85 F.4th 102 (3d Cir. 2023); *United States*

v. Bailey, 840 F.3d 99 (3d Cir. 2016); *United States v. Balter*, 91 F.3d 427, 437 (3d Cir. 1996). If the record does not provide a basis for reviewing the trial court's exercise of discretion, the court "may undertake to examine the record and perform the required balancing [itself]." *Becker v. ARCO Chemical Co.*, 207 F.3d 176, 181 (3d Cir. 2000). However, improper use of other act evidence may be reversible error. *See, e.g., United States v. Brown*, 765 F.3d 278 (3d Cir. 2014) (holding that trial court committed harmful error by admitting other act evidence); *United States v. Davis*, 726 F.3d 434, 440-46 (3d Cir. 2013) (holding that defendant's prior possession convictions were not properly admitted as other act evidence to prove intent or knowledge and vacating conviction); *United States v. Smith*, 725 F.3d 340, 344-49 (3d Cir. 2013) (reversing conviction because court improperly admitted other act evidence); *United States v. Morena*, 547 F.3d 191 (3d Cir. 2008) (reversing conviction where government exceeded limited purpose for which other act evidence was admissible by repeatedly injecting prejudicial references to defendant's drug use and collateral drug transactions in firearms case). *See also United States v. Steiner*, 2017 847 F.3d 103 (3d Cir. 2017) (holding that trial court committed error by admitting evidence of defendant's prior arrest, but concluding error was harmless).

In some instances, the use of other act evidence is governed by different rules. *See, e.g., United States v. Gilmore*, 553 F.3d 266, 271 (3d Cir. 2009) (approving use of prior drug convictions to impeach defendant by contradicting his testimony that he had never sold drugs and noting that admission of the evidence is governed by Rules 607 and 403); *see also* F.R.E. 413 and 414 (allowing other act evidence to be admitted without restriction in sexual assault and child molestation cases). The court has also stated that "the Government has broad latitude to use 'other acts' evidence to prove a conspiracy." *United States v. Cross*, 308 F.3d 308, 324 (3d Cir. 2002).

The instruction. The instruction should not merely include a laundry list of permitted uses of other act evidence. Rather, it should specifically state the limited purpose for which the other act evidence is admitted. *Graham, Handbook of Federal Evidence*, § 404.5 n.56 (5th ed. 2001). *See also United States v. Davis*, 726 F.3d 434, 440-46 (3d Cir. 2013) (criticizing instruction that included list of uses as not providing sufficient guidance to jury); *United States v. Lee*, 612 F.3d 170 (3d Cir. 2010) (Rendell, J. dissenting) (criticizing trial court for failing to specify limited purpose).

The instruction is most helpful if it explains to the jury the precise role of the other act evidence. In *Scarfo*, the Third Circuit approved the trial court's instructions.

> The trial judge charged the jury: "Mr. Scarfo is not on trial here for any murders, for any gambling or any other kind of illegal activities . . . . [T]hose kinds of offenses would be dealt with in other tribunals than this . . . . I think you

> can understand that it would be utterly improper for you to take them into account in this case in the sense of saying to yourselves: 'Well, maybe he didn't do this extortion; but he did a lot of other stuff. So it doesn't much matter whether they prove this case. I am going to find him guilty anyway.' That obviously would be totally improper."
>
> In instructing on the proper use of other crimes evidence, the judge explained that the testimony could be used to assess the nature of the relationship among Caramandi, DelGiorno, and defendant.
>
> > It is a position of the Government that Caramandi and DelGiorno were subordinates within this carefully organized and structured organization; that they did Mr. Scarfo's bidding; [that] they never would dream of doing anything this large without his approval; and that the tapes and other evidence in the case corroborate their testimony to the effect that he was involved and did approve.
>
> The judge also told the jurors that they could use the evidence to decide whether defendant adopted a standardized scheme or mode of operation, to determine whether he had knowledge of or an intent to participate in the conspiracy, as well as to evaluate the witnesses' motives for cooperating with the government. Finally, the judge stated that the government had the right to reveal the witnesses' unsavory criminal records 'so as not to be accused of trying to hoodwink the jury by pretending that people like Caramandi and DelGiorno were Boy Scouts.'
>
> These clear, frank, and comprehensive instructions did all that was possible under the circumstances to place the other crimes evidence in proper perspective.

850 F.2d at 1020-21. For other Third Circuit decisions approving instructions on other act evidence, *see*; *United States v. Cruz*, 326 F.3d 392 (3d Cir. 2003); *United States v. Givan*, 320 F.3d 452, 460-61 (3d Cir. 2003)*; United States v. Butch*, 256 F.3d 171 (3d Cir. 2001); *United States v. Palma-Ruedas,* 121 F.3d 841, 852 n.11 (3d Cir. 1997); *United States v. Ferguson*, 2010 WL 3638928 (3d Cir. 2010) (non-precedential); *United States v. Major,* 293 F. App'x. 160, 2008 WL 4229933 (3d Cir. 2008) (non-precedential) (approving admission of other act evidence to prove intent and approving instruction). *See also United States v. Scarfo*, 241 F.4th 136 (3d Cir. 2022) (assuming effectiveness of limiting instructions). *But see United States v. Morena*, 547 F.3d 191 (3d Cir. 2008) (concluding that court's instruction was not adequate and reversing conviction).

Other act evidence admitted under Rule 413 or 414. This instruction should not be given when the other act evidence was admitted under Rule 413 or 414 of the Federal Rules of Evidence. Those rules allow the prosecution to introduce evidence of similar acts in prosecutions for sexual assault or child molestation. The evidence of prior

conduct admitted under those rules "may be considered on any matter to which it is relevant." As a result, no limiting instruction should be given.

(Revised 4/2024)

4.30 Consciousness of Guilt (Flight, Concealment, Use of an Alias, etc.)

You have heard testimony that after the crime was supposed to have been committed, *(name of defendant) (describe the conduct proven; e.g., shaved his beard and cut his hair, went to Los Angeles)***.**

If you believe that *(name of defendant) (describe the conduct proven*)**, then you may consider this conduct, along with all the other evidence, in deciding whether the government has proved beyond a reasonable doubt that** *(he)(she)* **committed the crime charged. This conduct may indicate that** *(he)(she)* **thought** *(he)(she)* **was guilty of the crime charged and was trying to avoid punishment. On the other hand, sometimes an innocent person may** *(describe the conduct proven*) **for some other reason. Whether or not this evidence causes you to find that the defendant was conscious of** *(his)(her)* **guilt of the crime charged, and whether that indicates that** *(he)(she)* **committed the crime charged, is entirely up to you as the sole judges of the facts.**

Comment

See Sixth Circuit § 7.14. For variations, *see* O'Malley et al., supra, § 14.08; Sand et al., supra, 6-9 and 6-10; First Circuit § 2.09; Eight Circuit § 4.09; and Seventh Circuit § 3.20 and Ninth Circuit § 4 (recommending that no instruction be given).

Certain types of behavior by a defendant may suggest consciousness of guilt and therefore be admissible as evidence that the defendant acted out of awareness of guilt of the charged offense, which in turn may be used by the jury as evidence of guilt. This category includes evidence of the defendant's flight or concealment, use of an alias, concealment or destruction of evidence, making false exculpatory statements, and threatening or tampering with a witness or juror. This instruction explains to the jury the inference to be drawn from the admitted evidence. The instruction should be tailored to the evidence admitted in the trial. *See United States v. Moorefield*, 683 F. App'x. 99 (3d Cir. 2017) (non-precedential) (approving

instruction as fair and balanced in case where defendant had fled police). *See also United States v. Howard*, 729 F. App'x. 181 (3d Cir. 2018) (non-precedential) (holding that giving instruction informing jury that circumstantial evidence that the defendant destroyed evidence could be taken as evidence of consciousness of guilt was not abuse of discretion)

The court should generally apply Rule 403 of the Federal Rules of Evidence to this evidence, asking whether the evidence generates a risk of unfair prejudice that substantially outweighs the fair probative value. In addition, the admissibility of these types of evidence will sometimes need to be evaluated under Rule 404(b) of the Federal Rules of Evidence, which allows introduction of other act or crime evidence if it is probative for a purpose other than proof of character.

> The law views evidence of flight as an admission by conduct reflecting consciousness of guilt. *See United States v. Miles*, 468 F.2d 482 (3d Cir. 1972). In *United States v. Scarfo*, 711 F. Supp. 1315, 1321 (E.D. Pa. 1989), the court noted that the probative value of flight evidence depends upon whether there is sufficient evidence to establish the following four inferences: (1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to the actual guilt of the crime charged. (citations omitted).

See also United States v. Green, 25 F.3d 206 (3d Cir. 1994) (evidence of defendant's flight was properly admitted to show consciousness of guilt when defendant fled upon spotting federal authorities); *United States v. Pungitore*, 910 F.2d 1084, 1151 (3d Cir. 1990) (evidence of defendant's flight admissible to prove his consciousness of guilt in RICO trial); *United States v. Levy*, 865 F.2d 551, 558 (3d Cir. 1989) (evidence of use of false identity admissible in drug case).

In *United States v. Miles*, 468 F.2d 482 (3d Cir. 1972), having admitted evidence of the defendant's flight, the trial court instructed the jury as follows:

> The flight or concealment of a person immediately after the commission of a crime, or after he is accused of a crime that has been committed, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by the jury in the light of all other proved facts in deciding the question of his guilt or innocence. Whether or not evidence of flights or concealment shows a consciousness of guilt, and the significance if any to be attached to such a circumstance, are matters for determination by you, the jury.
>
> In thus instructing you upon the subject of flight or concealment, let it be understood that I do not declare to you, or even remotely suggest, that the Defendant did either so take flight or so conceal himself immediately after the commission of the offenses defined in Count I and Count II of the indictment, or either of such counts, or at any other time. Whether he did so take flight or so conceal himself, you will determine from all of the evidence in the case. And, unless you find that he did so take flight or

conceal himself, you will entirely disregard my instruction just imparted to you upon those questions. (emphasis added).

The Third Circuit concluded that there was sufficient evidence to justify the trial court's instruction to the jury on the issue of flight and that the instruction was proper and protected the rights of the defendant. *United States v. Miles*, 468 F.2d 482, 489-90 (3d Cir. 1972) (citation omitted). *See also United States v. Terry*, 518 F. App'x. 125, 2013 WL 2166117 (3d Cir. 2013) (non-precedential) (holding that instruction was warranted even though officer tackled defendant as he started to flee).

In *United States v. Katzin*, 94 F. App'x. 134, 138 (3d Cir. 2004), a non-precedential decision, the Third Circuit affirmed the admissibility of flight evidence to prove consciousness of guilt when the trial court properly instructed the jury on how to weigh such evidence and approved the trial court's instruction on the evidence, stating:

We have consistently held that "evidence of a defendant's flight after a crime has been committed is admissible to prove the defendant's consciousness of guilt." We hold such evidence admissible as circumstantial evidence of guilt to be considered with the other facts of the case. In fact, the District Court charged the jury to consider the evidence only for proper purposes. ("Whether or not evidence of flight or concealment shows a consciousness of guilt, and the significance, if any, to be attached to such a circumstance are matters for determination by you, the jury."). Evidence of flight is not considered inadmissible under Fed.R.Evid. 404(b). We find no error here.

An instruction addressing this evidence may not be required. *See United States v. Rothberg*, 896 F. Supp. 450, 456 (E.D. Pa. 1995) (no instruction given addressing evidence of use of alias admissible as consciousness of guilt).

(Revised 2018)

4.31 Consciousness of Guilt (False Exculpatory Statements)

You have heard testimony that *(name of defendant)* **made certain statements outside the courtroom to law enforcement authorities in which** *(he)(she)* **claimed that** *(his)(her)* **conduct was consistent with innocence and not with guilt. The government claims that these statements are false.**

If you find that *(name of defendant)* **made a false statement in order to direct the attention of the law enforcement officers away from** *(himself)(herself)***, you may, but are not required to conclude that** *(name of defendant)* **believed that** *(he)(she)* **was guilty. It is reasonable to infer that an innocent person does not usually find it necessary to invent or fabricate an explanation or statement tending to establish** *(his)(her)* **innocence. You may not, however, conclude on the basis of this alone, that** *(name of defendant)* **is, in fact, guilty of the crime for which** *(he)(she)* **is charged.**

You must decide whether or not the evidence as to *(name of defendant)* **shows that** *(he)(she)* **believed that** *(he)(she)* **was guilty, and the significance, if any, to be attached to this evidence. In your evaluation, you may consider that there may be reasons - fully consistent with innocence - that could cause a person to give a false statement that** *(he)(she)* **did not commit a crime. Fear of law enforcement, reluctance to become involved, or simple mistake may cause an innocent person to give such a statement or explanation.**

Comment

See Sand et al., supra, 6-11; O'Malley et al., supra, § 14.06.

In most cases, this issue is best left to the arguments of the parties. Indeed, some circuits recommend that no instruction be given. *See, e.g.,* Seventh Circuit § 3.22; Eighth Circuit § 4.15. The Third Circuit appears to have considered questions concerning false exculpatory statements only rarely. In *Government of the Virgin Islands v. Lovell*, 378 F.2d 799, 806 (3d Cir. 1967), the court cited Wigmore for the settled proposition that false exculpatory statements may be admitted as circumstantial evidence of the defendant's "consciousness that his case is a weak or unfounded one." The court noted with approval that the trial court's instruction came directly from Mathes & Devitt, Federal Jury Practice and Instructions § 8.14 at 99-100 (1965 ed.). *Id.* at 807. The Court further commented that other circuit courts had approved similar instructions. *Id.* at 807 n.9. In *United States v. Battles*, 514 F. App'x. 242, 2013 WL 718750 (3d Cir. 2013), a non-precedential decision, the Third Circuit held that the instruction given, which largely tracked this instruction, was not plain error and was sufficiently supported by the evidence in the case. *See also United States v. MacInnes*, --- F.Supp.2d ----, 2014 WL 2439336 (E.D. Pa. 2014) (discussing propriety of giving false exculpatory statements instruction).

In *United States v. Chaney*, 446 F.2d 571, 576 (3d Cir. 1971), the defendant conceded that "exculpatory statements made upon interrogation with intent to divert suspicion or mislead the police, when shown to be false, are circumstantial evidence of guilty consciousness and have independent probative value," but argued that the prosecutor had improperly commented on his failure to testify. Concluding that the comments did not constitute plain error, the court noted that the trial court had clarified the prosecutor's meaning by instructing the jury as follows:

> The government also asks me to point out to you the government's contention that, in addition to the other evidence that they argue with respect to Chaney, it is their contention that his statements . . . were false and that is indicative of guilt.

Id. at 576.

The instruction states that the false statements were made outside the courtroom. This language is particularly important if the defendant testifies at trial, as the instruction would not be appropriate to cast doubt on the defendant's testimony at trial. *United States v. Clark*, 45 F.3d 1247, 1251 (8th Cir. 1995).

(Revised 2014)