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Lost In a Maze of Character Evidence: How the Federal Courts Lack a Cohesive Approach to Applying Federal Rule of Evidence 404(b) in Drug Distribution Cases

Brian Byrne¹

I. Introduction

The admission of a criminal defendant's prior bad acts can be a powerful tool for attaining a conviction. The federal courts are currently divided as to whether the defendant's prior drug use is admissible under Rule 404(b) of the Federal Rules of Evidence when the defendant is charged with distributing a controlled dangerous substance.

Part I of this Comment will briefly explore the historical roots of Rule 404(b). Part II will examine the permissible purposes for admitting prior bad acts under Rule 404(b). Part III will discuss the circuit split that has developed as to whether the defendant's prior drug use can be admissible under one of the exceptions to Rule 404(b) in a prosecution for possession with intent to distribute. Part IV examines a new standard for analyzing prior drug offenses under Rule 404(b) and argues that courts should move away from a mechanical framework of applying Rule 404(b). Part V will briefly summarize this Comment.

A. *History of Excluding Prior Bad Acts*

The general rule in American law is that propensity proof

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should be excluded.² Rule 404(b) codified this principle in the Federal Rule of Evidence.³ Rule 404(b)(1) states in relevant part that “[e]vidence 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.”⁴ However, evidence of character may be admissible to prove the defendant’s “motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or lack of accident.”⁵ Rule 404(b) establishes a general rule that an individual’s character cannot be established through evidence of his prior acts, unless those prior acts relate to a permissible purpose.

The United States Supreme Court has delineated a four-step framework for the admission of 404(b) evidence.⁶ First, the evidence must be offered for a non-propensity purpose.⁷ Second, the evidence must be relevant pursuant to Rule 402.⁸ Third, the trial court must weigh the probative value of the evidence against the danger of unfair prejudice pursuant to Rule 403.⁹ Fourth, the trial court must instruct the jury that the evidence can only be considered for the specific purpose for which it was admitted.¹⁰ This framework merely ensures that evidence is probative to something other than propensity, and that the evidence is not outweighed by the danger of unfair prejudice.¹¹

While Rule 404(b) was uncontroversial when Congress passed the Federal Rules of Evidence in 1975, its proper application has engendered a significant amount of controversy.¹² Identifying whether the prior conviction is

2. *See generally* *People v. Molineux*, 61 N.E. 286 (N.Y. 1901).

3. *See* FED. R. EVID. 404(b)(1).

4. *Id.*

5. FED. R. EVID. 404(b)(2).

6. *See Huddleston v. United States*, 485 U.S. 681, 685 (1988) (finding that evidence of the prior act should be admitted if there is “sufficient evidence to support a finding by the jury that the defendant committed the similar act.”).

7. *Id.* at 691.

8. *Id.*

9. *Id.*

10. *Id.* at 691-92.

11. *See United States v. Davis*, 726 F.3d 434, 441 (3d Cir. 2013). *See also* FED. R. EVID. 403 (allowing the exclusion of evidence if the probative value is substantially outweighed by the danger for unfair prejudice).

12. *See* FED. R. EVID. 404(b) advisory committee’s note (finding that “Rule

relevant to some issue other than the defendant's propensity has proven difficult at the trial and appellate levels.¹³

B. *Propensity Proof is Relevant*

Rule 404(b)(2) establishes that a defendant's prior bad acts must be relevant to something other than proving character. Rule 401 defines relevant evidence as having "any tendency to make a fact more or less probable than it would be without the evidence; and the fact is of consequence to the determination of the action."¹⁴ In essence, Rule 401 requires the evidence to be material and probative. First, the evidence is material if it goes to the "determination of the action." Second, the evidence is probative if it makes a "fact more or less probable without the evidence." However, relevance is a necessary, not a sufficient condition of admissibility.¹⁵

Rule 404(b) is designed to protect the defendant from being found guilty based on the inference of bad character. There is a fear that the defendant's prior bad acts will weigh too heavily "with the jury . . . and deny him [the defendant] a fair opportunity to defend against a particular charge."¹⁶ While evidence of an individual's character may be relevant, there is also the risk that the evidence will be unfairly prejudicial.¹⁷

The party seeking admission of a prior bad must show that

404(b) has emerged as one of the most cited Rules in the Rules of Evidence."). See also Thomas J. Reed, *Admitting the Accused's Criminal History: The Trouble with Rule 404(b)*, 78 TEMP. L. REV. 201, 209 (2001) (noting that Rule 404(b) was one of the least controversial rules during the passage of the Federal Rules of Evidence).

13. See Reed, *supra* note 11.

14. FED. R. EVID. 401.

15. See FED. R. EVID. 403.

16. *Michelson v. United States*, 335 U.S. 469, 476 (1948) (alterations added).

17. See *Old Chief v. United States*, 519 U.S. 172, 181 (1997) (finding that while propensity proof is relevant "the risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment—creates a prejudicial effect that outweighs ordinary relevance." (quoting *United States v. Moccia*, 681 F.2d 61, 63 (1st Cir. 1982) (Breyer, J.) (alterations in original)). See also David Culberg, *The Accused's Bad Character: Theory and Practice*, 84 NOTRE DAME L. REV. 1343, 1351 (2009) (noting that it is obvious that propensity proof is relevant).

it is admissible for a non-propensity purpose.¹⁸ Rule 404(b) is designed to prevent the prosecution from being able to infer to the jury that the defendant is a person of bad character. However, even when admitted for a non-propensity purpose under Rule 404(b), it is highly debatable whether the current rule eliminates the risk that the jury will take the evidence as propensity proof. For instance, Rule 404(b) could allow a prior act to be admitted to show the defendant's motive to commit the crime if it was not propensity proof. However, in reality, the jury is still being informed of the defendant's prior act and could use the evidence as propensity proof.¹⁹

C. *People v. Molineux*²⁰

Decided by the New York Court of Appeals in 1901, *People v. Molineux* is considered one of the premier cases that dealt with the exclusion of bad acts prior to the adoption of the Federal Rules of Evidence.²¹ In *Molineux*, the defendant was charged with the murder of Katherine Adams.²² The undisputed facts of the case were that Harry Cornish received a package in the mail containing a substance that he believed was "bromo seltzer."²³ When his landlady, Katherine Adams, became ill, Cornish administered the substance to her, believing it was medicine.²⁴ Adams died after being administered the substance.²⁵ Shortly after, it was revealed that the contents of the bottle contained a deadly poison.²⁶ The prosecution theorized that the defendant, Molineux, had mailed the poison to Cornish with the intention of killing him.²⁷ The alleged motive was that Molineux and

18. See FED. R. EVID. 404(b)(1).

19. See generally Kenneth J. Melilli, *The Character Evidence Rule Revisited*, 1998 BYU L. REV. 1547, 1555 (1998) (arguing that the distinction between non-character use of 404(b) and a propensity inference exists in "principal only").

20. *People v. Molineux*, 61 N.E. 286 (N.Y. 1901).

21. See Reed, *supra* note 11, at 201.

22. *Molineux*, 61 N.E. at 286-87.

23. *Id.* at 287.

24. *Id.*

25. *Id.*

26. *Id.* at 288.

27. *Id.* at 289.

Cornish had developed a bitter rivalry over a woman that they were both interested in.²⁸

At Molineux's trial for the death of Adams, the prosecution was allowed to introduce evidence concerning the death of Henry A. Barnett.²⁹ Barnett had died a few months before Adams after consuming a substance that he received through the mail.³⁰ It was later established that Barnett and Adams had both died as a result of being poisoned by cyanide of mercury.³¹ In essence, the government was contending that Molineux had killed Barnett as well. On appeal, the New York Court of Appeals analyzed the admissibility of the other acts evidence that was presented against Molineux. The Court found that evidence of a prior bad act can be admissible when it tends to show motive, intent, absence of mistake, common scheme or plan, or the identity of the perpetrator.³²

After examining these different exceptions, the court found that the evidence of Barnett's death should have been excluded.³³ The court rejected the prosecution's theory that the similarity of the two killings established that Molineux killed Adams.³⁴ Despite evidence of Molineux's training as a chemist, the court found that he was not the only person who possessed the "knowledge, skill, and material to produce the poison which was sent to Cornish."³⁵ *Molineux* now stands for the principle that a prior bad act cannot be admitted without meeting specific non-character purposes. The purposes mentioned by the *Molineux* Court have become the framework of Rule 404(b).

II. Proper Purposes for Admission of Prior Bad Acts

Rule 404(b)(1) makes it clear that propensity proof is

28. *Id.* at 290.

29. *Id.* at 289, 293.

30. *Id.* at 301.

31. *Id.* at 315-16.

32. *Id.* at 294.

33. *Id.* at 309-10.

34. *Id.* at 303.

35. *Id.*

inadmissible.³⁶ However, 404(b)(2) lists a number of proper uses for the prior bad act.³⁷ The purposes in 404(b)(2) do not establish exceptions to Rule 404(b)'s prohibition on propensity proof. Rather they demonstrate non-propensity uses of the prior act evidence.³⁸

A. *Motive*

A prior bad act can be admitted to prove the defendant's motive for committing the crime.³⁹ *United States v. Cunningham*⁴⁰ is illustrative of how a prior bad act can be properly admitted to show the defendant's motive. Cunningham, a nurse, was convicted of tampering with a consumer product by allegedly removing Demerol from syringes and replacing it with a saline solution.⁴¹ After it was discovered that Cunningham had a previous addiction to Demerol, she agreed to a blood and urine test to detect for Demerol.⁴² After testing revealed that Cunningham had recently used Demerol, she was arrested for the theft.⁴³

The district court admitted evidence that Cunningham had previously had her license suspended due to her theft of Demerol at another hospital.⁴⁴ Following her conviction, Cunningham challenged the admission of this evidence on appeal. The Seventh Circuit found that evidence of Cunningham's suspension did not show a propensity to steal, but showed her motive to continue feeding her Demerol addiction.⁴⁵ In other words, the admission of Cunningham's suspension was not propensity proof, but established her motive to commit the

36. See FED. R. EVID. 404(b)(1). However, this rule is not without exceptions. See FED. R. EVID. 412-415 (allowing propensity proof when the defendant is accused of certain sex offenses).

37. See FED. R. EVID. 404(b)(2).

38. See *United States v. Gomez*, 763 F.3d 845, 855 n.3 (7th Cir. 2014) (en banc).

39. See FED. R. EVID. 404(b).

40. *United States v. Cunningham*, 103 F.3d 553 (7th Cir. 1996).

41. *Id.* at 555.

42. *Id.*

43. *Id.*

44. *Id.* at 556.

45. *Id.*

crime.

B. *Knowledge*

A prior act can also be admissible to show the defendant's knowledge in the current crime. In *United States v. Vargas*,⁴⁶ the defendant was arrested after DEA agents found 282 kilograms of cocaine in a secret compartment of a produce trailer he was driving.⁴⁷ Vargas claimed that he did not know the cocaine was there and he was only aware of the lawful items in the trailer. At trial, the government sought to introduce evidence of previous instances in which Vargas had transported drugs in refrigerated trailers similar to the vehicle he was driving in the present case.⁴⁸ The district court admitted the evidence of the other acts, finding that they were relevant to the defendant "knowingly" transporting cocaine.⁴⁹

Upon his conviction, Vargas challenged the admission of the other acts evidence as a violation of Rule 404(b). However, the Seventh Circuit found that Vargas' prior acts of transporting drugs in similar refrigerated vehicles were relevant to his knowledge that he was transporting drugs in the present case.⁵⁰ Since Vargas was claiming that he had no knowledge of the cocaine's presence, his prior acts of transporting cocaine in similar circumstances were probative of his knowledge in the present case. As such, the prosecution could argue that the prior acts made it more likely that Vargas was aware of the cocaine's presence. However, the prosecution could not argue that the evidence showed a propensity to transport drugs.⁵¹

C. *Identity*

A prior bad act can also be admitted when it is probative of the defendant's identity. Identity is an exception to 404(b) when

46. *United States v. Vargas*, 552 F.3d 550 (7th Cir. 2008).

47. *Id.* at 552.

48. *Id.* at 553.

49. *Id.*

50. *Id.*

51. It is certainly debatable whether an ordinary juror would be able to make such a fine distinction.

the prior act and the present charge share a similarity that “earmarks the behavior as that of the same person.”⁵² In other words, the acts are so distinctive that it can be fairly inferred that the same person committed them.

In *United States v. Shumway*,⁵³ the defendant, an archeologist, was convicted of charges stemming from unauthorized excavations at a site in Canyonlands National Park.⁵⁴ Shumway claimed that he was not responsible for the excavations that occurred.⁵⁵ To establish Shumway’s identity, the government moved to admit evidence of Shumway’s prior activities at the same site a number of years earlier.⁵⁶

The district court admitted the evidence of Shumway’s prior activities as relevant to proving his identity under Rule 404(b).⁵⁷ On appeal, Shumway argued that his prior archeological activities at the site lacked the distinctiveness to be admissible under the identity exception to Rule 404(b).⁵⁸ The Tenth Circuit found that the prior acts were relevant to Shumway’s identity in two respects.⁵⁹ First, both acts occurred at the same site, and the unique geographical location made the acts “distinctive.”⁶⁰ Second, the court found that the acts required specialized knowledge, also making them distinctive.⁶¹ As a result, the evidence was relevant under Rule 404(b) as proof of Shumway’s identity.⁶² The evidence was admissible since Shumway’s identity was in dispute, and the evidence was relevant towards proving that he committed the excavations.

III. The Circuit Split

52. *See also* *Allen v. State*, 720 N.E.2d 707, 711 (Ind. 1999) (finding that the rationale of the exception is that “the crimes, or means used to commit them, were so similar and unique that it is highly probable that the same person committed all of them.”).

53. *United States v. Shumway*, 112 F.3d 1413 (10th Cir. 1997).

54. *Id.* at 1417.

55. *Id.* at 1418.

56. *Id.*

57. *Id.* at 1418.

58. *Id.* at 1419.

59. *Id.* at 1420.

60. *Id.*

61. *Id.* at 1421.

62. *Id.*

A. Circuits That Have Excluded Prior Drug Use When the Defendant Is Charged With Distribution of a Controlled Dangerous Substance

The federal courts of appeals are currently divided as to whether a prior conviction for possession of a controlled substance can be admissible in a later prosecution for possession with the intent to distribute.

In *United States v. Davis*,⁶³ the Third Circuit addressed the issue of whether a prior possession conviction was admissible under Rule 404(b) in a prosecution for possession with the intent to distribute.⁶⁴ In *Davis*, Philadelphia police observed the defendant, Davis, and a companion seated in a car and engaged in what appeared to be a drug deal.⁶⁵ As the police approached the car, the two men quickly exited and began to walk away. The police conducted a *Terry*⁶⁶ stop of the two individuals and discovered that Davis and his companion were carrying large amounts of cash.⁶⁷ Inside the car, the police found 740 grams of cocaine. Davis was charged with possessing a controlled substance with intent to distribute, in violation of 21 U.S.C. § 841(a) (1).⁶⁸

Prior to trial, the government sought to introduce Davis' 2007 conviction for possession of cocaine.⁶⁹ The government contended that the prior conviction was not being offered to prove Davis' character, but was relevant to his "plan to, knowledge of, and intent to distribute and/or possess cocaine, and absence of mistake or accident."⁷⁰ Davis argued that the evidence of his prior conviction was only being offered to show his propensity to commit drug offenses.⁷¹

63. *United States v. Davis*, 726 F.3d 434 (3d Cir. 2013).

64. *Id.*

65. *Id.* at 437-38.

66. *See Terry v. Ohio*, 392 U.S. 1 (1968).

67. *Davis*, 726 F.3d at 437-38.

68. *Id.*

69. *See United States v. Davis*, No. 11-227, 2011 WL 5339280, at *2 (E.D. Pa. Nov. 7, 2011).

70. *Id.* at *3.

71. *Id.*

The district court admitted the evidence, finding that Davis' prior cocaine conviction was relevant to his knowledge of what cocaine looked like.⁷² Additionally, the court found that Davis' prior possession of cocaine made it less plausible that he was only a passenger inside the car.⁷³ The district court also concluded that Davis' prior conviction was not unduly prejudicial under Rule 403.⁷⁴

Following his conviction, Davis contended on appeal that the the admission of his prior possession conviction violated Rule 404(b).⁷⁵ The government argued that the prior conviction was admissible to show Davis' knowledge of the cocaine and his intent to distribute it.⁷⁶

The Third Circuit found that the prior possession conviction was not admissible to prove Davis' knowledge of the cocaine in the car.⁷⁷ First, the court surmised that cocaine could look differently when packaged for distribution. Moreover, the court pointed out that there are different forms of cocaine, and it was not established which form of cocaine Davis had previously possessed and whether the drugs found in the car were the same.⁷⁸ Due to these differences, the court concluded that the prior cocaine possession was not relevant to prove Davis' knowledge in this case.⁷⁹ Moreover, the court found that the prior conviction's weak probative value was outweighed by the danger of unfair prejudice.⁸⁰

Secondly, the court found the prior conviction inadmissible to prove Davis' intent to distribute the cocaine.⁸¹ The court focused on the difference between possessing a drug for personal use and distributing it commercially.⁸² Examining this distinction, the Third Circuit refused to accept the logic that prior drug use implied an intent to distribute drugs at a later

72. *Id.*

73. *Id.* at *4.

74. *Id.* at *5.

75. *Davis*, 726 F.3d at 440.

76. *Id.* at 442.

77. *Id.* at 443.

78. *Id.*

79. *Id.*

80. *Id.* at 444.

81. *Id.*

82. *Id.*

date.⁸³ While acknowledging a circuit split on this issue, the court found that Davis' prior conviction lacked probative value and should have been excluded.⁸⁴

A few days before the Third Circuit issued its ruling in *Davis*, the Seventh Circuit decided the same issue in *United States v. Lee*.⁸⁵ Defendant Eddie Lee was charged with possession with intent to distribute cocaine, and conspiracy to commit the same offense.⁸⁶ Included in the indictment were Lee's alleged co-conspirators, Darin Hurt, Anthony Clardy, and Christopher Holcolmb.⁸⁷ It was the government's theory that Lee was Hurt's cocaine supplier.⁸⁸

In December 2009, Lee was pulled over on the interstate due to an expired registration on the car he was driving.⁸⁹ Lee explained to the police that the car belonged to his goddaughter.⁹⁰ After a drug-detection dog detected the presence of narcotics, the officers conducted a search of the car but did not find any drugs.⁹¹ Following the search, the police impounded the car due to an expired registration.⁹²

Later that day, Lee was in the car with Darin Hurt when the police stopped the car as part of a narcotics investigation.⁹³ After an officer searched the car for drugs, Lee informed the police that his car had been impounded earlier that day.⁹⁴ Later that day, Drug Enforcement Agents went to the tow yard and led a narcotics dog around Lee's car.⁹⁵ After the canine signaled

83. *Id.* The court found that possession of a drug for personal use is far different than distributing it commercially. *See* *United States v. Ono*, 918 F.2d 1462, 1465 (9th Cir. 1990) (finding that "[a]cts related to the personal use of a controlled substance are of a wholly different order than acts involving the distribution of a controlled substance.").

84. *Davis*, 726 F.3d at 445.

85. *United States v. Lee*, 724 F.3d 968 (7th Cir. 2013).

86. *Id.* at 970.

87. *Id.* Of these defendants only Lee would end up going to trial.

88. *Id.* at 970-71.

89. *Id.* at 972. The stop of Lee's car was not related to the investigation of Lee's drug distribution activity.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 972.

94. *Id.*

95. *Id.* at 973.

positively at the car, the agents received a warrant to search the vehicle.⁹⁶ The agents subsequently discovered 210 grams of cocaine in a bag behind the spare tire in Lee's trunk.⁹⁷ At trial, Lee did not call any witnesses. Lee's defense was that the car was not his and he was unaware of the cocaine's presence in the trunk.⁹⁸ Lee's first trial ended in a mistrial after the jury was unable to reach a verdict on the possession or conspiracy charge.⁹⁹

Prior to Lee's second trial, the government sought to introduce Lee's 2004 conviction for possession of cocaine.¹⁰⁰ The government argued that Lee's prior conviction "helped prove that Lee was not an innocent bystander who was framed by malevolent police officers. He was an experienced cocaine dealer who was stopped while making a fifth delivery of drugs to his 'co-conspirator.'"¹⁰¹ Without explanation, the district court admitted Lee's 2004 conviction.¹⁰² Having been presented with Lee's prior conviction and other relevant evidence, the jury convicted Lee on both the possession and conspiracy charge.¹⁰³

On appeal, Lee argued that the district court had abused its discretion in admitting his 2004 possession conviction.¹⁰⁴ Agreeing with Lee, the Seventh Circuit reversed his conviction.¹⁰⁵ The court found that in order for a prior act to be admissible under 404(b), the district court must closely analyze

96. *Id.*

97. *Id.* There was an eight-hour gap between the original search of Lee's car and the second search at the tow yard.

98. *Id.* Lee also pointed out that the eight-hour gap between the two searches, although Lee's attorney denied that the defense was asserting that the drugs had been planted. *Id.* at 974.

99. *Id.* at 973.

100. *Id.* Lee's 2004 conviction was for possession of more than 15 but less than 100 grams of cocaine. *Id.*

101. Brief for Respondent-Appellee at 20, *United States v. Lee*, 724 F.3d 968 (2013)(No. 12-1718), 2013 WL 1208774 at *20. In essence, the government was arguing that Lee's prior conviction was relevant because of his claim to be an innocent bystander. There appeared to be precedent within the Seventh Circuit to support this argument. *See United States v. Chavis*, 429 F.3d 662, 668 (7th Cir. 2005) (finding that defendant's prior drug conviction was relevant to prove his intent when he claimed to be a "clueless bystander.").

102. *Lee*, 724 F.3d at 974.

103. *Id.*

104. *Id.* at 975.

105. *Id.*

the “specific matter that the evidence is being offered to establish.”¹⁰⁶ In other words, where the government claims that the prior bad act is being offered to show intent, the district court must analyze the extent to which the defendant’s intent is at issue.¹⁰⁷

The court was especially critical of the government’s theory that Lee’s five-year-old possession conviction was relevant to his intent to distribute cocaine in 2009.¹⁰⁸ While acknowledging that the government had the obligation of proving Lee’s intent, this did not automatically equate to the admission of Lee’s prior acts to show his intent.¹⁰⁹ Finding that Lee’s intent or knowledge was not in genuine dispute, the court held that the prior conviction was propensity evidence that must be excluded under Rule 404(b).¹¹⁰

Moreover, Lee’s innocent bystander defense did not bring his intent or knowledge into dispute.¹¹¹ Lee did not claim that the quantity of drugs found in the vehicle was not intended for distribution, nor did he claim that he had no knowledge of cocaine.¹¹² The court also rejected the government’s contention that the conviction was admissible to prove absence of mistake. Lee was not claiming that he had unknowingly placed the drugs in the car; he was asserting that the drugs did not belong to him.¹¹³ As a result, the prior conviction was not probative towards proving the absence of any mistake on Lee’s part.

Similar to the Seventh, the Sixth Circuit has also excluded a prior possession conviction in a prosecution for possession with intent to distribute.¹¹⁴ In *United States v. Haywood*,¹¹⁵ the defendant was prosecuted for possession with intent to distribute arising out of a sale to a government informant.¹¹⁶ At trial, the government sought to introduce evidence that

106. *Id.* at 976.

107. *Id.*

108. *Id.* at 979.

109. *Id.*

110. *Id.* at 980-81.

111. *Id.* at 980.

112. *Id.* at 978.

113. *Id.* at 979.

114. *United States v. Haywood*, 280 F.3d 715 (6th Cir. 2002).

115. *Id.*

116. *Id.* at 717.

Haywood had also been arrested for possession of cocaine within a few months of his sale to the informant.¹¹⁷ The district court admitted the arrest for straight possession, finding that it was probative of Haywood's intent to distribute the cocaine in the current case.¹¹⁸

On appeal, the Sixth Circuit found that the district court had abused its discretion by admitting evidence of Haywood's arrest for straight possession of cocaine.¹¹⁹ While acknowledging that Haywood's intent to distribute the cocaine was at issue in the case, the court determined that the possession conviction was not sufficiently probative of Haywood's intent.¹²⁰ The court found that there was a lack of similarity between possessing a small amount of cocaine for personal use and distributing it commercially.¹²¹ Due to the different quantities between the two acts, the court found that the possession conviction was irrelevant to proving Haywood's intent to distribute.¹²² Moreover, the court found that even if Haywood's possession was probative of his intent to distribute, its admission was outweighed by the danger of unfair prejudice.¹²³

Haywood's dissenting opinion criticized the majority for failing to see the relevance of Haywood's prior possession of cocaine and its probative value on his intent to distribute.¹²⁴ The dissent found it especially relevant that both acts involved the use of cocaine.¹²⁵ Carrying a certain drug on a number of occasions supports the inference that the defendant intends to distribute that drug at a later time.¹²⁶ Moreover, the dissent argued the defendant's prior possession of cocaine was probative of his knowledge that he was distributing cocaine in the present matter.¹²⁷

While *Lee*, *Davis*, and *Haywood* should not be interpreted as

117. *Id.* at 720.

118. *Id.*

119. *Id.* at 721.

120. *Id.* at 722-23.

121. *Id.* at 721-22.

122. *Id.* at 722.

123. *Id.* at 723.

124. *Id.* at 726 (Gibson, J., dissenting).

125. *Id.*

126. *Id.*

127. *Id.* at 727 (Gibson, J., dissenting).

adopting *per se* rules of exclusion, these decisions created a high standard of admissibility for a prior drug possession conviction when the defendant is charged with possession with intent to distribute. These decisions recognize that the relevance of a prior conviction for straight possession only has marginal relevance towards proving the defendant's intent to distribute, or knowledge of a controlled dangerous substance. Recognizing the highly prejudicial nature of the prior conviction and its marginal relevance, these courts have placed a heavy burden on the government to show that the prior possession conviction is probative of the defendant's intent or knowledge to distribute in the present case.

B. *The Opposing View*

However, other circuits have taken a far more inclusive approach to the admission of prior drug use to prove the defendant's intent or knowledge to distribute a controlled dangerous substance.

In *United States v. Gadison*,¹²⁸ the defendant was charged with conspiracy to possess cocaine with intent to distribute.¹²⁹ The district court admitted the defendant's prior state court conviction for possession of cocaine, finding that it was probative of his intent to distribute in the present case.¹³⁰ Upon conviction, the defendant argued that the admission of his prior cocaine convictions violated Rule 404(b). Rejecting this argument, the Fifth Circuit found that the prior conviction was admissible to prove the defendant's intent to distribute the drugs.¹³¹ The framework used by the Fifth Circuit centered on whether the prior conviction was relevant to any issue other than the defendant's character.¹³² After a very brief analysis, the Fifth Circuit concluded that the prior cocaine conviction was admissible, since it was relevant toward proving the defendant's intent.¹³³

128. *United States v. Gadison*, 8 F.3d 186 (5th Cir. 1993).

129. *Id.* at 191.

130. *Id.*

131. *Id.* at 192.

132. *Id.*

133. *Id.*

The Eight Circuit has also held that prior drug use is admissible to show the defendant's intent to distribute.¹³⁴ While the Eighth Circuit acknowledged that the defendant's prior conviction only related to personal drug use, the court concluded that it was relevant toward proving the defendant's intent to distribute in the present case.¹³⁵ Similar to the Fifth and Eighth Circuits, the Eleventh Circuit has also repeatedly admitted prior drug convictions related to personal use in order to prove the defendant's intent to distribute.¹³⁶

IV. What is the Proper Standard?

At the heart of Rule 404(b) is the belief that a defendant's propensity to commit a crime is not a valid basis for the admission of character evidence.¹³⁷ While there is broad agreement on this principle, it has proven difficult to administer where a defendant is charged with possession with intent to distribute.¹³⁸

The current circuit split on whether a defendant's prior drug possession can be properly admitted to prove the defendant's intent to distribute narcotics reflects a fundamental misconception of how Rule 404(b) should be applied. Courts that have adopted a broad standard of admissibility have focused on the fact that the defendant's intent is at issue in a drug distribution case.¹³⁹ However, just because the the defendant's intent is formally at issue does not mean that the prior conviction is admissible in a non-propensity way. Judge Easterbrook of the Seventh Circuit has noted, that the "list of exceptions in Rule 404(b), if mechanically applied, would overwhelm the central principle. Almost *any* bad evidence simultaneously condemns by besmirching character and by

134. See *United States v. Logan*, 121 F.3d 1172 (8th Cir. 1997).

135. *Id.* at 1177-78.

136. See *United States v. Butler*, 102 F.3d 1191, 1195 (11th Cir. 1997); See also *United States v. Smith*, 741 F.3d 1211, 1226 (11th Cir. 2013).

137. See FED. R. EVID. 404(b)(1).

138. See 21 U.S.C. § 841 (2012); see also *United States v. Monzon*, 869 F.2d 338, 344 (7th Cir. 1989) (finding that the defendant's intent is at issue when charged with a specific intent crime).

139. See generally *United States v. Gadison*, 8 F.3d 186 (5th Cir. 1993).

showing one or more of ‘motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake’”¹⁴⁰

One of the main points of confusion regarding the application of Rule 404(b) is how to identify whether a prior offense is only probative of the defendant’s propensity to commit the charged offense. Part of this confusion can be traced to a lack of guidance on this issue.¹⁴¹ While courts have frequently applied modifications of the four-step framework in *Huddleston*,¹⁴² these approaches have failed to closely scrutinize whether the prior act is being offered for a non-propensity purpose. In order to faithfully apply Rule 404(b), courts must adopt a framework that places a greater emphasis on analyzing how the prior act relates to the current offense without amounting to propensity proof. This can be accomplished by focusing on the core principles of Rule 404(b).

A. *The Seventh Circuit’s Approach*

A recent en banc ruling from the Seventh Circuit built upon other decisions in that Circuit to provide a solid foundation for evaluating whether a prior act is admissible under Rule 404(b). In *United States v. Gomez*,¹⁴³ the Seventh Circuit noted the recurring problems with applying Rule 404(b) in the drug context, and adopted a “rules-based approach” to determine if the prior act relates to anything other than the defendant’s propensity to commit the charged offense.¹⁴⁴

The Seventh Circuit first noted that it had previously applied a four-part test to determine the admissibility of prior acts evidence under Rule 404(b).¹⁴⁵ Finding that this test had

140. *United States v. Beasley*, 809 F.2d 1273, 1279 (7th Cir. 1987) (alterations and emphasis in original).

141. See FED. R. EVID. 404 advisory committee’s note (stating that “no mechanical solution is offered”).

142. See *United States v. Huddleston*, 485 U.S. 681 (1988).

143. *United States v. Gomez*, 763 F.3d 845 (7th Cir. 2014) (en banc).

144. *Id.*

145. *Id.* at 852. The four-part test called for the court to evaluate whether: 1) the prior act is relevant to something other than the defendant’s propensity; 2) the act must be similar to the current charge and close in time; 3) the evidence must be sufficient to establish that the prior act occurred; and 4) the probative value of the prior act cannot be substantially outweighed by the

“ceased to be useful,” the court determined that a “rules-based framework” would more effectively serve the purpose of Rule 404(b) in preventing the admission of propensity proof.¹⁴⁶

Briefly stated, Nicolas Gomez was charged with conspiracy to possess cocaine with intent to distribute.¹⁴⁷ Gomez’s alleged involvement in the conspiracy stemmed from a federal investigation of Robert Romero, a known Chicago cocaine dealer.¹⁴⁸ After federal agents wiretapped Romero’s phone, they intercepted a number of conversations between Romero, and a reseller in Milwaukee, known as “Guerro.”¹⁴⁹ The agents were able to trace these phone calls to Gomez’s residence in Milwaukee.¹⁵⁰

Four weeks after Gomez met with Romero in Milwaukee, Gomez was arrested under the theory that he was “Guerro.”¹⁵¹ After Gomez’s home was searched, federal agents found a small quantity of cocaine in the bedroom.¹⁵² At trial, the district court admitted the cocaine found in Gomez’s bedroom, finding that it was relevant to prove that Gomez was “Guerro.”¹⁵³ After being convicted, Gomez appealed on the grounds that the admission of the cocaine found in his bedroom was a violation of Rule 404(b).¹⁵⁴

On appeal, the Seventh Circuit rejected the multi-prong test it had previously used.¹⁵⁵ Rather, the focus must be on the “chain of reasoning” of why the evidence is being offered for a non-propensity purpose.¹⁵⁶ In essence, the court must examine “*how* exactly the evidence is relevant to that purpose”¹⁵⁷

The second step in the Seventh Circuit’s approach is to examine whether, even if the other act evidence is relevant

danger of unfair prejudice.

146. *Id.* at 853.

147. *Id.* at 851.

148. *Id.* at 850.

149. *Id.*

150. *Id.*

151. *Id.* at 851.

152. *Id.*

153. *Id.* at 852.

154. *Id.*

155. *See id.* at 854.

156. *See id.* at 856.

157. *See id.* (emphasis in original).

without relying on propensity, it is unfairly prejudicial under Rule 403's balancing test.¹⁵⁸ As such, even if the prior act evidence is admissible under Rule 404(b), the court must still weigh the probative value of the evidence against the danger of unfair prejudice.¹⁵⁹

Applying this rule to the facts of *Gomez*, the court found that the cocaine in Gomez's bedroom was propensity proof.¹⁶⁰ The court concluded that the prosecution's argument relied upon the premise that because Gomez possessed a small amount of cocaine in his home, it was more likely that he was part of the cocaine distribution conspiracy.¹⁶¹ Due to this reasoning, the Seventh Circuit held that the cocaine in Gomez's bedroom was propensity proof and inadmissible under Rule 404(b).¹⁶²

B. *Advantages of the Seventh Circuit's Approach*

The Seventh Circuit's approach in *Gomez* provides a solid foundation for assessing the admissibility of prior acts evidence under Rule 404(b). The *Gomez* court correctly recognized that analyzing a prior act under a multi-prong framework has the danger of creating an "artificial checklist."¹⁶³ The *Gomez* court appeared to be concerned that district judges were falling into the trap of simply identifying a proper basis, such as intent or identity under Rule 404(b), without examining whether that basis was relevant in a non-propensity way.¹⁶⁴

Despite Rule 404(b)'s prohibition on propensity evidence, the Fifth, Eighth, and Eleventh Circuits have routinely admitted evidence of prior drug use in order to show the defendant's intent to distribute, or knowledge of a controlled

158. *See id.* *See also* FED. R. EVID. 403 (allowing the court to exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice).

159. *See Gomez*, 763 F.3d at 857.

160. *See id.* at 861. A majority of the court concluded that the admission of the cocaine was harmless error. *Id.* at 864. However, four judges of the Seventh Circuit dissented, finding that the admission of the cocaine was not harmless. *See generally id.* at 865 (Hamilton, J., dissenting).

161. *Id.* at 864.

162. *Id.*

163. *Id.* at 853.

164. *Id.*

dangerous substance.¹⁶⁵ The crucial flaw in this analysis is that it fails to analyze how the prior drug use is relevant without relying on a propensity inference. Rather, their approach of automatic inclusion is satisfied when the government shows that the prior act is “(1) relevant to a material issue; (2) proved by a preponderance of the evidence; (3) higher in probative value than in prejudicial effect; and (4) similar in kind and close in time to the crime charged.”¹⁶⁶ While this approach may be sound in theory, it fails to adequately guard against propensity proof.

As the *Gomez* court realized, employing a mechanical interpretation of Rule 404(b) reduces the court’s analysis to simply checking formal boxes on the way to inevitable admissibility.¹⁶⁷ By failing to analyze how the prior drug use is relevant without relying on propensity, these courts are only paying lip-service to the requirements of Rule 404(b).

Applying the Seventh Circuit’s approach in *Gomez*, it is clear that when a defendant is charged with possession with intent to distribute, a prior act of straight possession is only relevant to show a propensity to commit the charged offense. The Third Circuit noted in *Davis* that there is a substantial difference between the two offenses.¹⁶⁸ Moreover, the idea that straight possession shows the defendant’s intent to distribute drugs later relies upon a propensity inference: he is more likely to do it again since he did it before.¹⁶⁹ The Seventh Circuit’s approach guards against this propensity inference by requiring the proponent of the evidence to show how the evidence is relevant without relying on propensity.

V. Conclusion

165. See Deena Greenberg, *Closing Pandora’s Box: Limiting the Use of 404(b) to Introduce Prior Convictions in Drug Prosecutions*, 50 HARV. C.R.-C.L. L. REV. 519, 530 (2015) (noting that at least the Fifth, Eighth, and Eleventh Circuits have applied a “presumptive approach” for admitting drug convictions under Rule 404(b)).

166. *United States v. Logan*, 121 F.3d 1172, 1178 (8th Cir. 1997) (quoting *United States v. Campbell*, 937 F.2d 404, 408 (8th Cir. 1998)).

167. See *Gomez*, 763 F.3d at 854.

168. See *Davis*, 726 F.3d 434 at 444.

169. See *Lee*, 724 F.3d at 979 (noting that Lee’s prior possession did not show his intent to distribute).

Rule 404(b) makes it clear that a defendant's prior acts cannot be used to show propensity to commit the charged offense. However, courts have had difficulty identifying propensity proof. To solve this problem, courts must look to the fundamental purpose behind Rule 404(b): to exclude evidence that is only relevant to prove the defendant's character. The Seventh Circuit's approach provides the most stable foundation for excluding propensity proof by forcing the proponent to identify how the evidence is relevant without relying on a propensity inference.