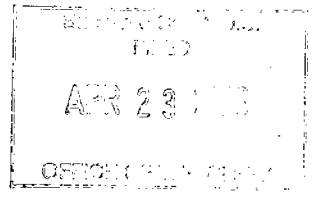
No. 19-8380

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES



SAMORY AZIKIWE MONDS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

PARRISH KRUIDENIER DUNN BOLES
GRIBBLE GENTRY BROWN & BERGMANN, L.L.P.

Alfredo Parrish
Counsel of Record
2910 Grand Avenue
Des Moines, Iowa 50312
Telephone: (515) 284-5737
Facsimile: (515) 284-1704
Email: Aparrish@parrishlaw.com

QUESTION PRESENTED FOR REVIEW

Whether Federal Rule of Evidence 404(b) should be construed, contrary to its purpose and history, as a rule of inclusion resulting in certain admissibility of prior bad acts and use of propensity evidence to convict in controlled substances cases.

RELATED PROCEEDINGS

I. *United States v. Samory Azikiwe Monds*, S.D. Iowa No. 4:17-CR-00170; Judgment entered September 12, 2018.

II. *United States v. Samory Azikiwe Monds*, Eighth Circuit Court of Appeals No. 18-3000; Judgment entered December 20, 2019.

III. *United States v. Samory Azikiwe Monds*, Eighth Circuit Court of Appeals No. 18-3000; Petition for Further Rehearing Denied January 24, 2020.

IV. *United States v. Samory Azikiwe Monds*, Eighth Circuit Court of Appeals No. 18-3000; Mandate issued January 31, 2020.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

404(b), 608(b) and 609(a), 38 Emory L.J. 135 (1989) 10
Advisory Cmte. on R. of Evid., Fall 2016 Meeting Agenda 69 (Oct. 21, 2016), https://www.uscourts.gov/sites/default/files/2016-10-evidence-agenda-book.pdf (last accessed Apr. 9, 2020) 8
Andrew J. Morris, *Federal Rule of Evidence 404(b): The Fictitious Ban on Character Reasoning from Other Crime Evidence*, 17 Rev. Litig. 181 (1998) 10
David A. Sonenshein, *The Misuse of Rule 404(b) on the Issue of Intent in the Federal Courts*, 45 Creighton L. Rev. 215 (2011) 10
David P. Leonard, *In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial by Character*, 73 Ind. L.J. 1161 (1998) 10
Edward J. Imwinkelried, *The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition*, 51 Ohio St. L.J. 575 (1990) 10
Fed. R. Evid. 404, Advisory Cmte. Notes (1991) 9
Harry Kalven, Jr. & Hans Ziesel, The American Jury (2d ed. 1971) 10
Jeffrey Bellin, *Circumventing Congress: How the Federal Courts Opened the Door to Impeaching Criminal Defendants with Prior Convictions*, 42 U.C. Davis L. Rev. 289 (2008) 10
Miguel A. Mendez, *Character Evidence Reconsidered: "People Do Not Seem To Be Predictable Characters,"* 49 Hastings L.J. 871 (1998) 10
Paul S. Milich, *The Degrading Character Rule in American Criminal Trials*, 47 Ga. L. Rev. 775 (2013) 10
Richard B. Kuhns, *The Propensity To Misunderstand the Character of Specific Acts Evidence*, 66 Iowa L. Rev. 777 (1981) 10
Thomas J. Reed, *Admitting the Accused's Criminal History: The Trouble with Rule 404(b)*, 78 Temp. L. Rev. 201 (2005) 10

OPINIONS BELOW

On December 20, 2019, the Eighth Circuit affirmed the district court for the Southern District of Iowa's evidentiary rulings under Fed. R. Evid. 404(b). *United States v. Monds*, 945 F.3d 1049 (8th Cir. 2019). App. 1.[1]

JURISDICTION

Jurisdiction of the district court was pursuant to 18 U.S.C. §3231. Jurisdiction of the Eighth Circuit was pursuant to 28 U.S.C. §1291. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

[1] "App.___" refers to the attached appendix.

STATUTORY PROVISIONS

18 U.S.C. §3231

The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.

28 U.S.C. §1254(1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree[.]

28 U.S.C. §1291

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

Fed. R. Evid. 404

(a) Character Evidence.

(1) ***Prohibited Uses.*** Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

(2) ***Exceptions for a Defendant or Victim in a Criminal Case.*** The following exceptions apply in a criminal case:

(A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it.

(B) subject to the limitations in rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:

(i) offer evidence to rebut it; and

(ii) offer evidence of the defendant's same trait; and

(C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut the allegation that the victim was the first aggressor.

(3) ***Exceptions for a Witness.*** Evidence of a witness's character may be admitted under Rules 607, 608 and 609.

(b) Crimes, Wrongs, or Other Acts.

(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.

STATEMENT OF THE CASE

1. Procedural History.

On September 26, 2017, Monds was charged by indictment with possession with intent to distribute a controlled substance, cocaine and cocaine base, in violation of 21 U.S.C. § 841(a)(1) and 841(b)(1)(C). (DCD 15[2].) He pled not guilty. (DCD 21.)

Monds filed a Motion in Limine (DCD 59) seeking to exclude, among other things, evidence of three prior convictions. During a hearing prior to the start of the first day of trial, the district court denied the motion to exclude the prior convictions under Rule 404(b). Trial Tran. Vol. 1 Apr. 3, 2018, at 9:24-10:12 (DCD 87), App. 1a-3a.

The jury returned a guilty verdict (DCD 73), and judgment was entered on September 12, 2018. App. 4a-10a. Notice of appeal was filed September 18, 2018. (DCD 117.)

The Eighth Circuit affirmed. App. 11a. Monds sought en banc rehearing. The Eighth Circuit denied rehearing. App. 20a. This Petition for Writ of Certiorari followed.

2. Facts Regarding the Admissibility of the Prior Convictions.

Prior to trial, the Government filed a notice of intent to offer evidence related to three prior convictions: (1) April 22, 2011 conviction for possession of a controlled substance with intent to deliver; (2) May 1, 2014 conviction for conspiracy to deliver cocaine base; and (3) August 4, 2017 conviction for possession of a controlled

---

[2] "DCD #" refers to the document as numbered in the District Court Docket.

substance with intent to deliver, second or subsequent offense. (DCD 51.) Monds objected to the admission of these prior convictions under Rule 404(b) as inadmissible prior bad acts offered to prove action in conformity therewith. (DCD 63.)

During the April 3, 2018 hearing the morning before trial, the district court held the evidence was admissible despite the prohibition on proving a defendant's guilt through their prior bad character:

> THE COURT: Okay. Well, I'm familiar with the case that defendant cited to me where Judge Kelly talks about the fact that you have to have some specific reason for using the evidence in a particular case. Then Judge Gruender a little later on wrote something that suggested that was not a particularly high burden; but that may be the distinction between Judge Gruender and Judge Kelly. But I think, under the circumstances of this case, I'm compelled to rule that they are admissible.
>
> With regard to the third [conviction], I think if that were by itself, that might be a closer call; but given the fact that the two more recent ones are more significant anyway, I don't think that the third one adds any particular additional prejudice. So I think they are admissible.

(DCD 87 at 9:24-10:12.)

In light of this ruling, Monds stipulated to the three prior convictions and the Government entered certified records of conviction for each. (DCD 88 at 242:9-243:12.) The Government also introduced the fact that Monds was on state probation and federal supervised release for the latter two convictions at the time of the alleged offense. (DCD 88 at 193-97, 202-03, 206-07.)

During closing arguments, the Government relied on the prior convictions to blatantly argue propensity, twice describing Monds as "the poster child of drug dealing." (DCD 88 at 333:2-3, 354:13-14.)

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

A United States Court of Appeals has entered a decision conflicting with decisions of other United States Courts of Appeals and several State Courts of Last Resort.

The Eighth Circuit treats Rule 404(b) as a rule of inclusion. *See, e.g. United States v. Turner*, 583 F.2d 1062, 1065 (8th Cir. 2009) (*quoting United States v. Benitez*, 531 F.3d 711, 716 (8th Cir. 2008). In practice, similar prior convictions are always admissible against defendants who take their case to trial in the Eighth Circuit. The Fifth and Eleventh Circuits join the Eighth Circuit's position in this circuit split, admitting prior bad acts evidence that can be connected to an "admissible purpose" for using such evidence under Rule 404(b) without regard to whether that use depends on propensity evidence. *See United States v. Butler*, 102 F.3d 1191 (11th Cir. 1997); *United States v. Gadison*, 8 F.3d 186 (5th Cir. 1993).

By contrast, the Third and Seventh Circuits have construed Rule 404(b) as a rule of exclusion. In *United States v. Caldwell*, the Third Circuit stated: "On this point, let us be clear: "Rule 404(b) is a rule of general exclusion, and carries with it 'no presumption of admissibility.'" 760 F.3d 267, 276 (3d Cir. 2014) (*citing* 1 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 4:28 at 731 (4th ed. 2013)). The Seventh Circuit similarly rejected a rule of admission in clear terms:

> Rule 404(b) does not provide a rule of automatic admission whenever bad acts evidence can plausibly be linked to "another purpose," such as knowledge or intent, listed in the rule. . . . [T]he 'list of exceptions in Rule 404(b), if applied mechanically, would overwhelm the central principle. Almost any bad act evidence simultaneously condemns by besmirching character and by showing one or more of "motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident," not to mention the "other purposes" of which this list is meant to be illustrative.

United States v. Miller, 673 F.3d 688, 696-97 (7th Cir. 2012) (citation omitted). The Sixth Circuit does not appear to have made as clear a statement as the Third and Seventh Circuits, but it is obvious from the Sixth Circuit's careful parsing of Rule 404(b) it considers the rule one of exclusion, rather than inclusion. *See, e.g. United States v. Haywood*, 280 F.3d 715 (6th Cir. 2002) (evidence of prior drug possession not admissible to prove intent to distribute on an unrelated incident, rejecting Eighth Circuit analysis). Finally, at least nine States also explicitly characterize Rule 404(b) (or their own versions of the prior bad acts rule) as a rule of exclusion.[3]

The circuit split has led the Rules of Evidence Advisory Committee to consider amending the Rule, recognizing how the Rule has been diluted, other than in the Third and Seventh Circuits:

> Developments in the application of Rule 404(b). . . . [T]here have been important case law developments in applying the rule in the last five

---

[3] *State v. Mosley*, 223 So.3d 158, 169 (La. Ct. App. 2017) (describing Rule 404(b) as a "rule of exclusion"); *Frye v. State*, 185 So. 3d 1156, 1162 (Ala. Crim. App. 2015) (discussing history of prior bad acts rule as a "general exclusionary rule"); *People v. Villatoro*, 281 P.3d 390, 415 (Cal. 2012) ("In enacting [California's version of Rule 404(b)], the Legislature codified a rule of evidentiary exclusion at least three centuries old in the common law." (emphasis added)); *State v. Merida*, 960 A.2d 228, 232 n.8 (R.I. 2008) ("It should at all times be remembered, however, that Rule 404(b) is fundamentally a rule of exclusion.") ; *Jackson v. Commonwealth.*, No. 2003-SC-000777-MR, 2005 WL 2045482, at *3 (Ky. Aug. 25, 2005) ("This court has long interpreted KRE 404(b) and the preceding rules governing other crimes evidence as exclusionary in nature.10 This construction is justified by the danger of prejudice to the defendant inherent in evidence of other crimes."); *State v. Sullivan*, 679 N.W.2d 19, 24 (Iowa 2004) ("[U]nless the prosecutor can articulate a valid, noncharacter theory of admissibility for admission of the bad-acts evidence, such evidence should not be admitted."); *Conyers v. State*, 693 A.2d 781, 793 (Md. Ct. App. 1997) (discussing "presumptive rule of exclusion"); *State v. Lerchenstein*, 726 P.2d 546, 549-50 (Alaska 1986) (Mem.) (courts should begin with assumption that the evidence should be excluded); *Commonwealth v. Bohannon*, 378 N.E. 987, 991 (Mass. 1978) (discussing "general rule" against admission of prior bad acts evidence).

> years. This case law development, described below, is essentially to assure that Rule 404(b) arguments are closely scrutinized so that the rule is not used as a device to admit evidence offered for propensity. The fact that some courts – mainly the Seventh and Third Circuits – are taking a fresh look at the scope and meaning of Rule 404(b) raises questions about whether the rule can and should be amended to accommodate these new developments. It also raises questions about what, if anything, should be done about the conflict between the circuits that are looking more closely at Rule 404(b) and those who are still taking the traditional approach.

Advisory Cmte. on R. of Evid., Fall 2016 Meeting Agenda 69 (Oct. 21, 2016), https://www.uscourts.gov/sites/default/files/2016-10-evidence-agenda-book.pdf (last accessed Apr. 9, 2020). The Committee recognized the Third and Seventh Circuit interpretations as "probably the most important evidentiary developments in the last ten years – to one of the most important rules of evidence." *Id.* at 69.

While the Committee has not pursued any changes to Rule 404(b), textual changes are not necessary to implement the Third and Seventh Circuit's interpretation; rather, clearer caselaw is needed. This circuit split requires this Court to resolve this important dispute.

1. <u>The Eighth Circuit is on the Wrong Side of the Split</u>

The Eighth Circuit's interpretation of Rule 404(b) as a rule of inclusion inverts the history and purpose of the rule.

Common law has long recognized a defendant should not be convicted on his character or lack thereof. In 1948, the Supreme Court stated:

> Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of guilt. Not that the law invests the defendant with a presumption of good character, *Greer v. United States*, 245 U.S. 559, 38 S.Ct. 209, 62 L.Ed. 469, but it simply closes the whole matter of character, disposition, and reputation on the

> prosecution's case-in-chief. The State may not show the defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such evidence might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is relevant; on the contrary, it is said to weigh too much with the jury and to over persuade them as to prejudge one with a bad general record and deny him fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

Michelson v. United States, 335 U.S. 469, 475-76 (1948) (footnotes omitted).

The policy of *excluding* character evidence from use by the prosecution was the basis for adopting Rule 404. Yet, since the Rule's adoption, the Committee has noted the Rule is frequently cited by prosecutors to *justify the admission* of prior bad acts evidence:

> Rule 404(b) has emerged as one of the most cited Rules in the Rules of Evidence. And in many cases evidence of an accused's extrinsic acts is viewed as an important asset in the prosecution's case against the accused. . . . [T]he overwhelming number of cases involve introduction of that evidence by the prosecution.

Fed. R. Evid. 404, Advisory Cmte. Notes (1991).

The admission of prior criminal convictions is particularly damaging to a defendant's case. The Tenth Circuit notes the "obvious truth that once prior convictions are introduced the trial is, for all practical purposes, completed and the guilty outcome follows as a mere formality." *United States v. Burkhart*, 458 F.2d 201, 204 (10th Cir. 1972); *see also State v. Saunders*, 12 P. 441, 445 (Or. 1886) *overruled in part on other grounds in State v. Marsh*, 490 P.2d 491, (allowing "prosecution to show . . . that he has before been implicated in similar affairs, no matter what explanation of them he attempts to make, it will be more damaging evidence against

him, and conduce more to his conviction, than direct evidence of his guilt in the particular case. Every lawyer who has had any particular experience in criminal trials knows this."). Empirical studies confirm the anecdotal evidence of trial lawyers and judges. *See* Edward J. Imwinkelried, *The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition*, 51 Ohio St. L.J. 575, 581–82 (1990); Harry Kalven, Jr. & Hans Ziesel, *The American Jury* 389-96 (2d ed. 1971) (discussing further empirical studies). A growing chorus of academic voices have authored their opinions on the broken system that allows prior bad acts evidence under the guise that juries can "understand" it and that it is used for a nonpropensity purpose.[4]

If the Rule is meant to protect defendants' from undue prejudice and require the prosecution to prove guilt based on the facts of a particular case rather than the defendant's character, a "mechanical" or per se rule admitting character evidence

---

[4] *See, e.g.* Paul S. Milich, *The Degrading Character Rule in American Criminal Trials*, 47 Ga. L. Rev. 775 (2013); Jeffrey Bellin, *Circumventing Congress: How the Federal Courts Opened the Door to Impeaching Criminal Defendants with Prior Convictions*, 42 U.C. Davis L. Rev. 289 (2008); David A. Sonenshein, *The Misuse of Rule 404(b) on the Issue of Intent in the Federal Courts*, 45 Creighton L. Rev. 215 (2011); Thomas J. Reed, *Admitting the Accused's Criminal History: The Trouble with Rule 404(b)*, 78 Temp. L. Rev. 201 (2005); Miguel A. Mendez, *Character Evidence Reconsidered: "People Do Not Seem To Be Predictable Characters,"* 49 Hastings L.J. 871 (1998); Andrew J. Morris, *Federal Rule of Evidence 404(b): The Fictitious Ban on Character Reasoning from Other Crime Evidence*, 17 Rev. Litig. 181 (1998); David P. Leonard, *In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial by Character*, 73 Ind. L.J. 1161 (1998); Imwinkelried, 51 Ohio St. L.J. 575; Abraham P. Ordover, *Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b) and 609(a)*, 38 Emory L.J. 135 (1989); Richard B. Kuhns, *The Propensity To Misunderstand the Character of Specific Acts Evidence*, 66 Iowa L. Rev. 777 (1981).

anytime the defendant opts for trial defies its very purpose. Although the Eighth Circuit set out a four-part test to determine whether prior bad acts evidence is admissible under Rule 404(b), *see, Turner*, 583 F.2d at 1066, the practical result of treating the Rule as one of inclusion is that every defendant in the Eighth Circuit who exercises their trial right will have their prior bad acts admitted against them as a matter of course. In fact, every Eighth Circuit defendant to appeal their conviction following the admission of prior bad acts evidence in 2019 and 2018 lost their case.[5]

The Rule holds true even in the face of a "general denial" defense – since at least 2006, the Eighth Circuit has followed a nearly per se rule that prior drug convictions are admissible in drug cases as a matter of course. *See, e.g. United States v. Johnson*, 439 F.3d 947, 952 (8th Cir. 2006). As a practical matter, it begs credulity

---

[5] *See Monds*, 945 F.3d at 1053 (prior controlled substances convictions admissible where defendant made general denial at trial); *United States v. Patino*, 912 F.3d 473, 476 (8th Cir. 2019) (conviction from 1998 for same crime was admissible to prove knowledge where defendant made general denial at trial, concerning conduct in 2014 and 2015); *United States v. Escobar*, 909 F.3d 228, 242 (8th Cir. 2018) (defendant made a general denial, ten year old drug trafficking convictions were admissible); *United States v. Thundershield*, 744 Fed. Appx. 312, 318-19 (8th Cir. 2018) (prior unrelated and dissimilar assault conviction was admitted in murder/assault case); *United States v. Adkins*, 723 Fed. Appx. 388, 389 (8th Cir. 2018) (mem) (summary affirmation of district court); *United States v. Valerio*, 731 Fed. Appx. 551, 553 (8th Cir. 2018) (personal use defense, prior convictions entered to prove intent to distribute); *United States v. Brown*, 727 Fed. Appx. 902, 906-07 (8th Cir. 2018) (defendant plead general denial in possession of firearm case, prior conviction for misuse of a firearm deemed admissible); *United States v. Buckner*, 868 F.3d 684, 689-90 (8th Cir. 2018) (defendant raised mere presence defense in felon in possession of a firearm case, 12 year old conviction for reckless discharge of firearm resulting in injury case deemed admissible). Sex abuse cases were excluded from this list because separate rules of evidence (Rules 413 through 415) also govern those cases.

to conclude Rule 404 – which *twice* states character evidence is not admissible to prove action in conformity therewith – can *never* be construed to exclude prior bad acts. Under the Eighth Circuit's approach, every drug defendants' prior convictions are admissible at trial, completely undermining the Rule's purpose.

2. The Third, Sixth and Seventh Circuits' Method is Correct

The Third, Sixth, and Seventh Circuits' application of Rule 404(b) correctly allows the government to use prior crimes in its case in chief when the crime can be linked to an "admissible purpose" of the Rule *without* utilizing a "propensity inference" to create the link.

First, these Circuits correctly accept the starting point that Rule 404(b) is a rule of *exclusion*, not inclusion. By clarifying that the prosecution should not be able to use character evidence in most case, the Third, Sixth, and Seventh Circuits hold the prosecution to its burden as the proponent of character evidence to demonstrate *why* that evidence should be admitted, rather than talismanically quoting the rule.

Second, this approach avoids convictions based on propensity evidence. In *Caldwell*, the Third Circuit rejected the Government's argument that the defendant's prior unlawful possession of a firearm logically proved his knowledge or intent to possess a firearm in the present case. 760 F.3d at 276-77. Instead of "find[ing] a pigeonhole in which the proof might fit," the Government was required to "explain how [the evidence] fits into a chain of inferences – a chain that connects the evidence to a proper purpose, no link of which is a forbidden propensity inference." *Id.* at 276-77. Officers testified they saw the defendant in a vehicle with a firearm, and the

defendant disputed the officers' testimony. *Id.* at 278-79. Thus, while knowledge and intent were technically in issue (as they are elements to a conviction under 18 U.S.C. § 922(g)(1)), the real issue in the case was whether the defendant possessed the gun. *Id.* at 278-79. There is no chain of inferences connecting the prior extrinsic unlawful possession of a firearm to the present possession of a different firearm without relying on propensity – the Government asked the court to conclude because the defendant illegally possessed a firearm on a prior date, he did so on a later date. Excluding the prior bad act under these circumstances clearly comports with the Rule in *Michelson* that a defendant should be convicted based on the facts of a particular case, rather than his character.

Third, this approach prohibits an application of a per se rule of admissibility wherever defendants go to trial. In *Miller*, the Seventh Circuit held the government to its burden to prove a non-propensity purpose for admitting a prior conviction for dealing crack cocaine in a crack cocaine case:

> Confusion and misuse of Rule 404(b) can be avoided by asking the prosecution exactly how the proffered evidence should work in the mind of a juror to establish the fact the government claims to be trying to prove. Here, Miller claimed that the drugs found in the shoe box and on the bed were not his, that he was in effect an innocent bystander. Witnesses told the jury about Miller's arrest and conviction for dealing drugs in 2000. The government defends use of that evidence on the ground that it showed his intent to distribute drugs in 2008. How, exactly, does Miller's prior drug dealing conviction in 2000 suggest that he intended to deal drugs in 2008? When the question is framed this way, the answer becomes obvious, even though implicit: "He intended to do it before, ladies and gentlemen, so he must have intended to do it again." That is precisely the forbidden propensity inference.

673 F.3d at 698. Put another way, the prior distribution conviction would not have aided the jury in determining whether the drugs were defendant's other than by

propensity evidence, because the 2000 conviction does not show defendant's possession of drugs in 2008.

3. **Monds was Prejudiced by the Circuit Split**

If Monds had been tried in a district located in the Third, Sixth, or Seventh Circuits, his prior convictions would not have been admissible. His three prior convictions were only relevant because they demonstrated propensity for drug dealing. Under a proper interpretation of the Rule 404(b), true to its purpose and holding the Government to the proper standard, the prior convictions would have been excluded.

As the Eighth Circuit recited the facts, Monds' probation officer was arresting Monds for a violation of his probation when a third party – Tommy Johnson, approached the house. *Monds*, 945 F.3d àt 1051. Johnson attempted to run away when he saw law enforcement officers, but he was arrested and found to be in possession of baggies of cocaine and a heroin pipe. *Id.* Officers then searched Monds' home pursuant to a search warrant, finding cocaine and some evidence of paraphernalia used for distributing drugs. *Id.* At trial, Monds' counsel argued several common indicators of distribution were *not* present at the home, and the possibility that the drugs belonged to this third person was not sufficiently investigated by the police. (DCD 88 at 336:4-337:7.) The basis of Monds' defense was that the items found in the house belonged to Johnson, but the police did not thoroughly investigate Johnson. The Government argued the prior convictions were necessary to show that Monds intended to distribute the controlled substances and he was familiar with the

drugs found at his home. (DCD 87 at 8:3-9:6). The court concluded it was "compelled" to admit the prior convictions under existing Eighth Circuit precedent. *Id.* at 10:5-7.

The *Miller* case in the Seventh Circuit demonstrates how Monds' prior convictions were relevant because of their tendency to prove propensity, rather than a fact in issue in his case. Like the defendant in *Miller*, Monds was found with controlled substances in his home. Like the defendant in *Miller*, Monds claimed the controlled substances belonged to a third person and held the Government to its burden of proof to demonstrate that Monds was the one who actually possessed the drugs. Finally, like in *Miller*, if the jury determined Monds had possessed the drugs, there was evidence from which a jury could reasonably conclude the controlled substance was intended for distribution rather than personal use (although there was certainly no requirement for the jury to reach that conclusion).

The court rejected the use of prior convictions in *Miller* because the *only way* the prior convictions demonstrated intent to distribute was through propensity: he possessed drugs with intent to distribute eight years ago, therefore he did so today. 673 F.3d at 698. The same "implicit yet obvious" statement was before the jury in Monds case: he distributed drugs in 2011, 2014, and 2017. He's the "poster boy of drug dealing." He did it before, members of the jury, and you can assume he did it again.

CONCLUSION

The fairness of a trial and the right to be tried on the strength of the government's case, rather than the strength of one's past character, should not

change circuit to circuit. In this case, the circuit split resulted in a conviction being affirmed where it otherwise would have been reversed. The Petition for Writ of Certiorari should be granted.