No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT DONELSON,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the
Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Federal Rule of Evidence 404(b)'s prohibition against prior act evidence requires the government to demonstrate a propensity-free link between the prior bad act evidence and the element at issue in a defendant's criminal case.

PARTIES INVOLVED

The parties identified in the caption of this case are the only parties before the Court.

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Petitioner Robert Donelson respectfully requests a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The Eleventh Circuit Court of Appeals' panel opinion in *Donelson v. United States,* 797 F. App'x 496 (11th Cir. Dec. 30, 2019), is reproduced here as Appendix A-1.

JURISDICTION

The judgment of the Eleventh Circuit was entered on December 30, 2019. On March 19, 2020, this Court issued an order automatically extending the time to file a petition for certiorari to 150 days from the date of the lower court judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1) and 28 U.S.C. § 2253.

STATUTORY PROVISIONS INVOLVED

Federal Rule of Evidence 404(b) provides:

> (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

A. LEGAL BACKGROUND

Federal Rule of Evidence 404(b)(1) provides that evidence of a person's prior "crime, wrong, or other act" is inadmissible "to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." In other words, Rule 404(b)(1) forbids prior acts from being used to show that because a person has done something once, that person has a propensity for acting in a certain way, and is likely to commit a similar act again. The Rule "reflects" a "common-law tradition," which prohibits the admission of such evidence because "it is said to weigh too much with the jury and to so over persuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." *Old Chief v. United States*, 519 U.S. 172, 181 (1997) (quoting *Michelson v. United States*, 335 U.S. 469, 475-76 (1948)).

Rule 404(b)(2), however, permits the admission of prior acts "for another purpose," including "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." *Id.* This case concerns the application of Rule 404(b)(2) to a frequently recurring set of facts: the defendant is charged with drug and firearm crimes, and has previously been investigated for the same or similar offenses. The question presented is whether the mere fact of the prior incident is admissible under Rule 404(b)(2), to show knowledge and intent in the subsequent offense.

The circuits are divided on that question. The Eleventh Circuit applies the rule liberally, permitting the prosecution to introduce evidence of prior possession to prove a conspiracy charge. *See, e.g, United States v. Butler,* 102 F.3d 1191, 1197 (11th Cir. 2005). The Eighth Circuit applies a similarly lenient standard, holding "a prior conviction for distributing drugs, and even the possession of user-quantities of a controlled substance, are relevant under Rule 404(b) to show knowledge and intent to commit a current charge of conspiracy to distribute drugs." *United States v. Escober, et. al,* 909 F.3d 228, 242 (8th Cir. 2018).

Four other circuits have rejected the Eleventh and Eighth Circuit's application of the rule, however, instead holding that evidence of prior acts or convictions should ordinarily be excluded in drug cases under Rule 404(b). Several of these decisions have explicitly acknowledged the circuit split and rejected the reasoning of the circuits on the other side of the split. The Federal Judicial Conference's Advisory Committee on Evidence Rules has recognized there is "unquestionably a dispute in the courts" on this issue. *See infra* at 21.

The Court should resolve this circuit split. As catalogued below, there are numerous detailed appellate decisions addressing the question presented, making additional percolation unnecessary.

The Eleventh Circuit's decision warrants review because it is wrong. The decision fundamentally misunderstands Rule 404(b). Under that rule, district courts should conduct a particularized analysis of whether the specific facts underlying a prior conviction establish a propensity-free basis for admissibility in light of the

specific circumstances of a drug distribution prosecution. The Eleventh Circuit's overly permissive rule of admissibility is antithetical to the gatekeeping role prescribed by the Rules of Evidence.

B. PROCEDURAL BACKGROUND

Petitioner Robert Donelson was charged with possession with intent to distribute methamphetamine, possession of a firearm in furtherance of a drug trafficking crime, and unlawful possession of a firearm or ammunition. App. 1 at 2. He proceeded to trial. *Id.* There the government admitted evidence under Rule 404(b), that a few months before the instant offense, Mr. Donelson had been the subject of an investigation involving traffic stop of a car containing drugs and firearms. *Id.* at 2-3. On appeal he argued the evidence of the prior investigation was impermissibly admitted and that the only real purpose for its admission was to prove criminal propensity. *Id.* at 1.

The Eleventh Circuit affirmed, holding the district court did not abuse its discretion in admitting the evidence because it was "probative of intent to distribute a controlled substance offense." *Id.* at 3.

REASONS FOR GRANTING THE WRIT

I. THERE IS A CIRCUIT SPLIT ON THE QUESTION PRESENTED.

As several courts of appeals have recognized, there is a circuit split on whether the mere fact of a defendant's prior drug related activity is admissible to show knowledge and intent in a subsequent drug prosecution. The Eighth and Eleventh Circuits apply a virtually *per se* rule of admissibility for any prior drug activity. Those circuits do not require the government to identify any particularized connection

between the prior drug activity and the charged crime supporting a non-propensity inference - if the defendant is charged with distribution, the defendant's prior acts are admissible. The Fifth Circuit has an intra-circuit conflict on this issue. The Third, Fourth, Sixth, and Seventh Circuits reject this blanket rule, instead holding that prior drug possession convictions should ordinarily be excluded.

The Court should grant certiorari to resolve the split.

a. The Eighth and Eleventh Circuits apply a blanket rule of admissibility for a defendant's prior drug activity.

In the Eighth and Eleventh Circuits, there is a virtually automatic rule of admissibility for prior drug activity in drug prosecutions.

i. The Eighth Circuit.

The Eighth Circuit applies a blanket rule that any drug distribution or possession conviction is admissible under Rule 404(b) in a drug distribution prosecution.[1] Two prior Eighth Circuit decisions characterized the blanket rule of admissibility for prior drug possession convictions as settled circuit precedent. *United States v. Robinson*, 639 F.3d 489, 494 (8th Cir. 2011) ("It is settled in this circuit that a prior conviction for distributing drugs, and even the possession of user-quantities of a controlled substance, are relevant under Rule 404(b) to show knowledge and intent to commit a current charge of conspiracy to distribute drugs." (quotation marks

[1] The sole exception to this rule is when the prior convictions are too remote in time. The Eighth Circuit "ha[s] generally been reluctant to uphold the introduction of evidence relating to acts or crimes which occurred more than thirteen years prior to the conduct challenged." *Escobar,* 909 F.3d at 242. In that case, the Eighth Circuit held the defendant's convictions were "not too remote in time" because they occurred "within the 13-year period." *Id.* at 242-243.

omitted)); *United States v. Frazier*, 280 F.3d 835, 847 (8th Cir. 2002) ("We have held on numerous occasions that a prior conviction for distributing drugs, and even the possession of user-quantities of a controlled substance, are relevant under Rule 404(b) to show knowledge and intent to commit a current charge of conspiracy to distribute drugs."). A steady stream of Eighth Circuit cases have articulated the same rule. *See, e.g., United States v. Patino*, 912 F.3d 473, 476 (8th Cir. 2019); *United States v. Valerio*, 731 F. App'x 551, 553 (8th Cir. 2018), *cert. denied*, No. 18-5898, 2019 WL 113237 (U.S. Jan. 7, 2019); *United States v. Davis*, 867 F.3d 1021, 1029 (8th Cir. 2017), *cert. denied*, 138 S. Ct. 1441 (2018); *United States v. Horton*, 756 F.3d 569, 579 (8th Cir. 2014).

Typically, the Eighth Circuit conducts no analysis of either the facts underlying the prior conviction or the facts of the prosecution itself, and does not explain how the prior conviction could support a non-propensity inference. Prior drug possession is simply *per se* admissible in drug distribution prosecutions in the Eighth Circuit. Here is a typical example of the Eighth Circuit's reasoning:

> Evidence of a defendant's prior possession of drugs in amounts consistent with personal use is admissible to show her knowledge and intent when intent is an element of the offense charged. This evidence is admissible even if the defendant has not raised a defense based on lack of knowledge or lack of intent. A necessary element of conspiracy to manufacture methamphetamine is knowingly joining such a conspiracy, and Davidson's recent convictions for possession of methamphetamine were relevant to prove that.

United States v. Davidson, 195 F.3d 402, 408 (8th Cir. 1999) (quotation marks omitted). This reasoning would permit *any* prior drug conviction to be admitted in

any drug distribution case - and indeed, the Eighth Circuit applies its rule mechanically in virtually every case.

The Eighth Circuit's rule applies even if the defendant does not contest knowledge or intent. So long as a defendant is "charged with a crime in which intent to distribute drugs is an element," "evidence of prior possession of drugs, even in an amount consistent only with personal use, is admissible." *United States v. Logan,* 121 F.3d 1172, 1178 (8th Cir. 1997). "This is so even if the defendant has not raised a defense based on lack of knowledge or lack of intent." *Id.; accord United States v. Robinson,* 639 F.3d 489, 494 (8th Cir. 2011) (same); *Davidson,* 195 F.3d at 408 (same).

Mr. Donelson is aware of only a single case in which the Eighth Circuit held that the admission of a prior drug conviction violated Rule 404 (although it held that the error was harmless). *See United States v. Turner,* 781 F.3d 374 (8th Cir. 2015). In that case the government offered literally *no* non-propensity explanation for the admission of the evidence. *Id.* at 390-91. Subsequent cases have held that the government satisfies its burden under Rule 404(b) with *any* explanation. Crucially, even in those subsequent cases, the Eighth Circuit has not required the explanation to be based on the particular facts of the prior conviction; explanations that could apply to any prior conviction are sufficient. *See United States v. Wright,* 866 F.3d 899, 905 (8th Cir. 2017) (explanation that defendant had the "motive to commit these types of offenses, that he ha[d] the knowledge to do so, and that he was not mistaken in his handling of controlled substances" was sufficient); *Valerio,* 731 F. App'x at 553

(explanation that defendant's counsel had cross-examined prosecution witnesses about knowledge and intent was sufficient).

ii. The Eleventh Circuit.

The Eleventh Circuit applies the same rule as the Eighth Circuit: prior drug acts are *per se* admissible in subsequent drug distribution prosecutions. The Eleventh Circuit first addressed this issue in *Butler,* 102 F.3d 1191 (11th Cir. 1997). There the government sought to introduce evidence of "prior personal drug use in a subsequent, unrelated prosecution for the distribution of drugs." *Id.* at 1195. As the Eleventh Circuit observed, the "circuits are not unanimous on this issue." *Id.* The Eleventh Circuit noted that under Fifth Circuit precedent, " '[a] prior conviction for possession of cocaine is probative of a defendant's intent when the charge is conspiracy to distribute.' " *Id.* at 1196 (quoting *United States v. Gadison,* 8 F.3d 186, 192 (5th Cir. 1993)). But, it observed, "other circuits have reached a contrary conclusion." *Id.* "After considering the rationales enunciated by the various courts of appeals," the court "conclude[d] that the logical extension of our current jurisprudence is to admit evidence of prior personal drug use to prove intent in a subsequent prosecution for distribution of narcotics." *Id.* The court reasoned that "[i]ntent is clearly at issue in a conspiracy prosecution; thus, we follow the Fifth Circuit's conclusion that evidence of prior use is relevant to proof of intent." *Id.*

Based on *Butler,* the Eleventh Circuit now applies the same rule as the Eighth Circuit: "circuit precedent regards virtually any prior drug offense as probative of the intent to engage in a drug conspiracy." *United States v. Matthews,* 431 F.3d 1296,

1311 (11th Cir. 2005). The Eleventh Circuit routinely applies that rule to reject challenges to the admission of prior drug crimes, including possession crimes. *See, e.g., United States v. Smith,* 741 F.3d 1211, 1226 (11th Cir. 2013) ("Our precedent similarly contradicts Smith's argument that evidence of his earlier *possession* convictions ought not to have been admitted as probative of his later intent to *distribute.* This Court has specifically rejected that argument." (emphasis in original)); *accord, e.g., United States v. Hunter,* 758 F. App'x 817, 823-24 (11th Cir. 2018); *United States v. Jarriel,* 499 F. App'x 860, 861 (11th Cir. 2012); *United States v. Sawyer,* 361 F. App'x 96, 99 (11th Cir. 2010).

Not all Eleventh Circuit judges agree with the Eleventh Circuit's rule, however. In *Matthews,* Judge Tjoflat filed a lengthy concurring opinion expressing his view that "the circuit's doctrine with respect to admission of Rule 404(b) evidence in conspiracy cases has evolved into one that undermines Rule 404(b) itself and represents a perversion of the origins of the circuit's doctrine in this context." 431 F.3d at 1313 (Tjoflat, J., concurring). Judge Tjoflat rejected the view "that the intent involved in a small-scale drug transaction (not to mention personal drug use) is somehow probative of one's intention to conspire with others to commit a drug offense." *Id.* (citation omitted). As Judge Tjoflat explained, "[t]he intent necessary to possess an illegal drug is no more relevant to the intent to either conspire to distribute illegal drugs or to distribute them than any other criminal act." *Id.* at 1318. "Its only relevance is sheer propensity: the theory being that the defendant acted illegally

then, and is likely to be acting illegally now. This is precisely the inference the law does not allow." *Id.*

b. The Fifth Circuit has conflicting case law, but has acknowledged the circuit split on this issue.

The Fifth Circuit's law on this issue is unsettled. In *United States v. Gadison,* 8 F.3d 186 (5th Cir. 1993), the Fifth Circuit held a "prior conviction for possession of cocaine is probative of a defendant's intent when the charge is conspiracy to distribute," because the defendant "put his intent at issue when he entered his plea of not guilty to the conspiracy charge in the indictment." *Id.* at 192. In *United States v. McDonald,* 905 F.2d 871 (5th Cir. 1990), however, the court took the contrary view: "[T]here is a large leap from evidence that McDonald in the past used cocaine and speed to an inference that he therefore likely knew his car contained marijuana that day. The leap is too large. We think this evidence was only truly probative of McDonald's character - i.e., a drug user is more likely to be involved in a deal like this than a non-drug user. It was therefore inadmissible." *Id.* at 875.

Recently, the Fifth Circuit concluded that "the threshold question of whether personal drug use, standing alone, is relevant to show motive, intent, or knowledge in a drug importation or trafficking case has received unsettled treatment by our court," citing *Gadison* and *McDonald. United States v. Muniz-Saavedra,* 694 F. App'x 216, 217 (5th Cir. 2017). It observed that "[o]ther circuits have also split on the issue," and catalogued the courts on both sides of the split. *Id.* The court declined to reach the issue because "any error here was harmless," but concluded that "down the line, however, this apparent conflict will require resolution." *Id.* at 218.

c. The Third, Fourth, Sixth, and Seventh Circuits ordinarily exclude prior drug possession convictions.

The Third, Fourth, Sixth, and Seventh Circuits apply a far more restrictive rule. Those circuits hold that any prior act evidence is ordinarily inadmissible in drug cases. Such acts are admissible only if the government can show the underlying facts of the prior acts - not the mere fact they occurred - are tied to the facts of the charged crimes in a way that supports a propensity-free inference.

i. The Third Circuit.

In *United States v. Davis,* 726 F.3d 434 (3d Cir. 2013), the Third Circuit reversed the defendant's conviction for cocaine distribution, on the basis of the district court's erroneous admission of his prior convictions for cocaine possession. In a lengthy opinion, the court emphasized the longstanding tradition of excluding evidence of prior bad acts, which "reflects a fear that the jury will place too much weight on past crimes and prior misdeeds." *Id.* at 440. The court explained that for a prior conviction to be admissible, "the government must explain how it 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 442. The court held that the mere fact of a prior possession conviction, with no particularized facts *about* the prior conviction to link it to the crime being prosecuted, was insufficient to satisfy this burden.

The court first held that the prior conviction was irrelevant to proving knowledge. It explained: "Possession and distribution are different in ways that matter - something that both the District Court and the government failed to

appreciate. As to knowledge, one who possesses a drug might not recognize the same drug when prepared for distribution. The packaging or quantity might be different, and objects in greater quantities often have an appearance or smell of their own." *Id.* at 443. The critical point was that the jury was not told any information about the prior conviction that could make it relevant to establishing knowledge: "The jury knew nothing of the packaging or quantity that led to those convictions, so it could not have known whether Davis's

past helped him to recognize the nearly one kilogram of cocaine in the Jeep." *Id.* at 443-44.

The court further held that the prior conviction was irrelevant to proving intent. The court explained: "Possession and distribution are distinct acts - far more people use drugs than sell them - and these acts have different purposes and risks. A prior conviction for possessing drugs by no means suggests that the defendant intends to distribute them in the future." *Id.* at 444. The court pointed to the "ever-present danger that jurors will infer that the defendant's character made him more likely to sell the drugs in his possession. But that is precisely the type of inference that Rule 404(b) forbids." *Id.*

The court expressly noted that it was taking sides in a circuit split. Citing cases from the Fifth, Eighth, and Eleventh Circuits it held that "[o]ther circuits have reached the opposite result, but we are not persuaded." *Id.* at 445.

ii. The Fourth Circuit.

In *United States v. Hall,* 858 F.3d 254 (4th Cir. 2017), the Fourth Circuit reversed the defendant's conviction for possession with intent to distribute drugs based on the improper admission of prior convictions for drug possession and drug distribution.

The court first addressed the prior drug possession conviction, holding it was inadmissible for purposes of showing both intent and knowledge. *Id.* at 267. As to intent, the court found the prior conviction to be irrelevant, pointing to the significant differences between possession and distribution. *Id.* at 267-68. Quoting a leading evidence treatise, the court explained: " '[I]f the act of possessing or using marijuana is to be admissible to prove intent to transport and sell marijuana, … then there is no reason why participation in any drug-related crime could not be used to prove intent to engage in any other drug-related crime, or why any robbery could not be used to prove the requisite intent with respect to any other robbery. A rule allowing such evidence would eviscerate almost entirely the character evidence rule.' " *Id.* at 267 (alterations in original) (quoting David P. Leonard, *The New Wigmore, A Treatise on Evidence: Evidence of Other Misconduct & Similar Events* § 7.5.2). The court further observed: "Because Defendant's prior possession conviction did not require a finding of specific intent, the only relevance that conviction could have to his intent to distribute marijuana on a later, unrelated occasion is that it tends to suggest that Defendant is, in general, more likely to distribute drugs because he was involved with

drugs in the past. This is precisely the propensity inference Rule 404(b) prohibits." *Id.*

The court also noted "several of our sister circuits have held that evidence of a defendant's prior conviction for possession of drugs for personal use is inadmissible under Rule 404(b) to prove a defendant's intent to distribute a controlled substance on a later, unrelated occasion." *Id.* at 267-68. The court agreed with that out-of-circuit law, and concluding "a defendant's prior conviction for possession of a drug is not relevant to establishing the defendant's intent to distribute a drug at a later time, absent some additional connection between the prior offense and the charged offense." *Id.* at 268. In an apparent acknowledgment of the circuit split, the court added a "*But see, e.g.,*" signal in its citation to the Eleventh Circuit's decision in *Butler*. *Id.*

The court then turned to the question of whether the defendant's prior possession conviction was admissible for purposes of establishing knowledge. Citing the Third Circuit's *Davis* decision, the court held a "defendant's prior conviction for possession of a particular drug will not always be relevant to establishing the defendant's knowledge of the same drug when prepared for distribution." *Id.* at 268 (quotation marks omitted). In the specific marijuana case at issue, the court held "prior experience with the smell of unburnt marijuana, as evidenced by a prior marijuana-related conviction, is relevant to establishing that the defendant knew, based on smell, of the presence of unburnt marijuana on a later occasion." *Id.* at 268 (emphasis omitted). Nonetheless, the court held that the conviction was inadmissible

to prove knowledge. It concluded that the prior conviction had minimal probative value because the defendant did not contest that marijuana was present, and "Defendant's knowledge of the odor of marijuana was minimally probative of the crucial issue regarding his knowledge: whether Defendant knew that there was marijuana *inside the locked bedroom*." *Id.* at 269 (emphasis in original). It further found that the admission of the conviction was "highly prejudicial." *Id.* at 270. It explained: "Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened." *Id.* (quoting Fed. R. Evid. 404(a) advisory committee note).

The court went on to hold, even more broadly, that the district court abused its discretion in admitting prior convictions for possession with intent to distribute. *Id.* at 271-76. The court first held these prior convictions were irrelevant for purposes of proving intent, because "[t]he government did not put forward any evidence before or during trial that Defendant's prior intent to distribute convictions were related in manner or arose from the same 'pattern of conduct' as the instant offense." *Id.* at 272. The court explained "the government introduced the fact of Defendant's prior possession with intent to distribute convictions without providing *any* evidence linking the prior convictions to the charged offense." *Id.* at 274 (emphasis in original). It observed that the district court, therefore, could not have determined "whether

there was a sufficient 'linkage' or 'nexus' between the prior offenses and the charged conduct to render the prior convictions relevant and warrant their admission under Rule 404(b) to establish Defendant's intent." *Id.* at 275. The court held that the prior conviction for possession with intent to distribute was also inadmissible to establish knowledge. *Id.* at 275-76. The court deemed this evidence to have "minimal probative value" and be highly prejudicial. *Id.* at 275.

iii. The Sixth Circuit.

In *United States v. Haywood,* 280 F.3d 715 (6th Cir. 2002), the Sixth Circuit reversed the defendant's conviction for possession with intent to distribute crack cocaine, on the ground that the district court had erroneously admitted evidence that the defendant had possessed crack cocaine on a different occasion. The court concluded, "[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. One activity involves the personal abuse of narcotics, the other the implementation of a commercial activity for profit." *Id.* at 721 (quotation marks and citation omitted) (alterations in original). The court held that the defendant's possession of cocaine "sheds no light on whether he intended to distribute crack cocaine in his possession on another occasion nearly five months earlier." *Id.* at 721. The court recognized that there were "cases from the Fifth, Eighth, and Eleventh Circuits that have held that a defendant's possession of drugs for personal use is relevant to prove his intent to distribute drugs found in his possession on another occasion." *Id.* (citing *Logan,*

Butler, and *Gadison*). But the court was "unable to discern a compelling rationale for this approach." *Id.*

More recent Sixth Circuit decisions have articulated the same rule, relying on *Haywood. See United States v. Carter,* 779 F.3d 623, 627 (6th Cir. 2015) ("We have … held repeatedly that mere possession of a controlled substance is not sufficiently similar to distribution to be probative of a specific intent to distribute controlled substances, even though both are obviously controlled-substance offenses."); *United States v. Miller,* 562 F. App'x 272, 283-85 (6th Cir. 2014) (holding that eight-year-old conviction for drug possession was inadmissible to establish possession with intent to distribute).[2]

iv. The Seventh Circuit.

In a line of several cases, the Seventh Circuit has held that prior drug convictions – including both possession and distribution convictions – are inadmissible to establish drug distribution. In *United States v. Miller,* 673 F.3d 688 (7th Cir. 2012), the Seventh Circuit reversed a defendant's conviction for possession with intent to distribute, in light of the erroneous admission of a prior conviction for

[2] There is conflicting Sixth Circuit precedent on the distinct question of whether a prior conviction for drug *distribution* can be admitted under Rule 404(b) without any specific connection between the prior conviction and the crime being prosecuted. In *United States v. Bell,* 516 F.3d 432 (6th Cir. 2008), the court held that prior drug distribution convictions were inadmissible under Rule 404(b) unless "the past and present crime are related by being part of the same scheme of drug distribution or by having the same modus operandi." *Id.* at 443 (emphasis omitted); *see id.* at 440-47. But in *United States v. Hardy,* 643 F.3d 143 (6th Cir. 2011), the Sixth Circuit held that *Bell* is "not controlling" because it was "inconsistent with prior precedent" from the Sixth Circuit that had held that "prior drug-distribution evidence is admissible under Rule 404(b) to show intent to distribute." *Id.* at 151-52 (brackets and quotation marks omitted). On the issue of prior convictions for drug *possession,* however, *Haywood* remains controlling, as Sixth Circuit, decisions postdating both *Bell* and *Hardy* make clear. *United States v. Carter,* 779 F.3d 623, 627 (6th Cir. 2015); *United States v. Miller,* 562 F. App'x 272, 283-85 (6th Cir. 2014).

the same crime. The court held that "details about his prior conviction could have served only to suggest to the jury that Miller possessed drugs with intent to distribute in 2008 because he had possessed drugs with intent to distribute in 2000. Use of a prior drug distribution conviction to prove intent to distribute is often a disguised use for impermissible propensity purposes, and was so here." *Id.* at 692. Likewise, in *United States v. Lee,* 724 F.3d 968 (7th Cir. 2013), the Seventh Circuit reversed a defendant's conviction for possession with intent to distribute crack cocaine, on the ground that the district court had improperly admitted a prior conviction for cocaine possession. The court found it "clear" that "despite the label, the jury is essentially being asked to rely on the evidence as proof of the defendant's propensity to commit the charged offense." *Id.* at 978.

The Seventh Circuit returned to the issue in *United States v. Gomez,* 763 F.3d 845 (7th Cir. 2014) (en banc). Expressly endorsing *Miller* and *Lee, id.* at 863, the en banc court unanimously concluded that in a prosecution for large-scale cocaine distribution, evidence that the defendant possessed cocaine in his apartment was inadmissible under Rule 404(b). The court acknowledged that under Rule 404(b), prior convictions are admissible for purposes such as "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." *Id.* at 855. But it cautioned "it's not enough for the proponent of the other-act evidence simply to point to a purpose in the 'permitted' list and assert that the other-act evidence is relevant to it." *Id.* at 856. That is because "Rule 404(b) excludes the evidence if its relevance to 'another purpose' is established only through the forbidden

propensity inference." *Id.* at 856. Thus, "a district court should not just ask whether the proposed other-act evidence is relevant to a nonpropensity purpose but how exactly the evidence is relevant to that purpose - or more specifically, how the evidence is relevant without relying on a propensity inference." *Id.* at 856 (emphasis omitted).

Two Seventh Circuit cases post-dating *Gomez* illustrate *Gomez*'s rule in action - and how far that rule diverges from the Eleventh Circuit's approach. In *United States v. Stacy,* 769 F.3d 969 (7th Cir. 2014), the defendant was charged with conspiracy to manufacture methamphetamine, and the government introduced evidence that the defendant had previously possessed methamphetamine. *Id.* at 971. The court held that under *Gomez,* the evidence was inadmissible under Rule 404(b). *Id.* at 974. The government "maintain[ed] that the events surrounding Stacy's prior possession of methamphetamine - particularly the presence of pseudoephedrine pills - were probative of his intent to use pseudoephedrine to make methamphetamine and his knowledge of the process for making methamphetamine." *Id.* But the court found that "this argument relies on a propensity inference: that Stacy's history of involvement with methamphetamine manufacturing makes it more likely that he intended to use the pseudoephedrine pills he collected in 2010 through 2012 to make methamphetamine." *Id.* The court held, however, that the error was harmless. *Id.* at 975-76.

In *United States v. Chapman,* 765 F.3d 720 (7th Cir. 2014), the court reversed a conviction based on *Gomez,* finding a prior drug *distribution* conviction was

inadmissible in a subsequent drug distribution prosecution because its admission rested on an impermissible propensity inference. The court explained that "the details of the prior heroin conviction are relevant to Chapman's knowledge and intent only through a paradigmatic inference about propensity: because Chapman sold heroin before he must have intended to do so again in this instance." *Id.* at 726.[3]

d. The split is widely recognized.

Thus, there is a circuit split on whether the mere fact of prior drug activity by a defendant is admissible in subsequent drug distribution prosecutions. The Eighth and Eleventh Circuits almost invariably hold that such evidence is admissible, based on the bald assertion that it is relevant to knowledge or intent; those circuits do not require any particularized facts about the prior activity supporting a non-propensity inference. By contrast, in the Third, Fourth, Sixth, and Seventh Circuits, such evidence is inadmissible absent particularized facts about the prior activity supporting a non-propensity inference. As catalogued above, courts on both sides have acknowledged the split and repudiated the reasoning of courts taking the opposite view.

The Federal Judicial Conference's Advisory Committee on Evidence Rules has also acknowledged the circuit split. *See* Daniel J. Capra, Memorandum to Advisory Committee on Rules of Evidence (Apr. 1, 2018),

[3] The Ninth Circuit has also indicated its agreement with this side of the split, albeit once in dicta and once with little reasoning. *See United States v. Ono,* 918 F.2d 1462, 1465 (9th Cir. 1990) (noting 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," but "[t]he issue in this case does not present that stark difference"); *see also United States v. Santini,* 656 F.3d 1075, 1078 (9th Cir. 2011) (stating that prior convictions for "simple possession" were "not similar to the importation of marijuana" but offering no additional explanation).

https://www.uscourts.gov/sites/default/files/agenda_book_advisory_committee_on_rules_of_evidence_-_final.pdf. The Advisory Committee noted that Professor Imwinkelried had "surveyed the case law in drug cases" and found that "[i]t is a commonplace observation that the courts have been very liberal in admitting uncharged misconduct evidence of other drug transactions to prove intent in drug prosecution … The opinions are replete with sweeping assertions that 'virtually any prior drug offense' is admissible to prove intent in a drug prosecution." *Id.* at 7 (quoting Edward J. Imwinkelried, *Criminal Minds: The Need to Refine the Application of the Doctrine of Objective Chances as a Justification for Introducing Uncharged Misconduct Evidence to Prove Intent,* 45 Hofstra L. Rev. 851, 871 (2017)). Conducting its own survey of the relevant decisions, the Advisory Committee concluded that there is "unquestionably a dispute in the courts" on this issue. It explained, "[s]ome circuits have recently pointed out that in assessing probative value for the non-character purpose, the court must assure itself that the inferences to be derived from the act are *independent of any propensity inference." Id.* (emphasis in original); *see id.* at 7-9 (citing Seventh Circuit's *Gomez* decision and Third Circuit's *Davis* decision). By contrast, "many courts simply look to find probative value for the proper purpose cited by the prosecution without investigating whether the probative value for that purpose relies on a propensity inference." *Id.* at 9; *see id.* at 9-10 (citing, among others, Eleventh Circuit's *Matthews* case and Eighth Circuit's *Logan* case). The Advisory Committee concluded: "there is conflict in the courts, and significant difficulty, in how and even whether to determine if the probative value of the bad act

to prove the proper purpose actually proceeds through a nonpropensity inference." *Id.* at 10.

Numerous commentators, too, have acknowledged the split. *See, e.g.,* Brian Byrne, *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,* 36 Pace L. Rev. 624, 632-39 (2016) (cataloguing split); 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, 528-40 (2015) (same); James DeCleene, *A Prosecutor's Guide to Character Evidence: When is Uncharged Possession Evidence Probative of a Defendant's Intent to Distribute?,* 98 Marq. L. Rev. 1383, 1400-07 (2015) (same); Ashley Hinkle, *Every Consumer Knows How to Run a Business: the Dangerous Assumptions Made When a Prior Possession Conviction Is Admitted as Evidence in a Case Involving Commercial Drug Activity,* 35 N. Ill. U. L. Rev. 401, 415-16 (2015) (same); Daniel P. Ranaldo, *Is Every Drug User A Drug Dealer? Federal Circuit Courts Are Split In Applying Fed. R. Evid. 404(B),* 8 Fed. Cts. L. Rev. 147, 150-56 (2014) (same). The New Wigmore and Jones treatises have recognized the split as well. 3 Clifford S. Fishman & Anne T. McKenna, *Jones on Evidence* § 17:71.30, Westlaw (database updated Dec. 2017); David P. Leonard, *The New Wigmore, A Treatise on Evidence: Evidence of Other Misconduct & Similar Events* § 7.5.2, Westlaw (2018-2 Supp.).

In sum, courts, the Advisory Committee, and commentators are unanimous that there is a circuit split on the question presented in this case.

II. THE COURT SHOULD RESOLVE THE CIRCUIT SPLIT IN THIS CASE.

The question presented is important enough to warrant this Court's review. First, as this petition illustrates, it recurs constantly. This petition catalogues multiple cases from the Eighth and Eleventh Circuits applying the more lenient and permissive rule, and these cases reflect only a small fraction of the number of times district courts must apply Rule 404(b) in drug and firearm trials nationwide.

This issue has also received unusually sustained attention from federal appellate judges. Rarely will the Court see an issue with so many detailed and scholarly judicial opinions on point. The writings of the Advisory Committee and other commentators similarly confirm that the question is important. Given how frequently Rule 404 is applied, the entrenched and widely acknowledged nature of the circuit split, and the absence of guidance from this Court, certiorari is warranted.

III. THE ELEVENTH CIRCUIT'S DECISION IS WRONG.

The Eleventh Circuit erred in upholding the admission of evidence of Mr. Donelson's prior drug related activity. The government's boilerplate assertions fall far short of the type of showing necessary to establish that evidence is admissible under Rule 404(b). The opinions from the Third, Fourth, Sixth, and Seventh Circuits, as well as Judge Tjoflat's concurrence in *Matthews,* are extremely thorough and persuasively explain that there should be no blanket rule of admissibility for drug activity in drug prosecutions. Without such a blanket rule, the government's case for admitting the prior investigation here is non-existent.

It is easy to see why Rule 404(b) requires exclusion of the prior act evidence in this case. There is an obvious danger that the jury made an impermissible propensity

inference. The jury learned Mr. Donelson was in a car where drugs and firearms were present months before the trial. There was no evidence this prior possession of drugs and firearms had anything to do with the current case, yet the jurors were expressly told that they could consider it. The sole logical inference the jurors could have drawn was that because Mr. Donelson was in a car where drugs and firearms were present before, this must mean he was a criminal, and therefore was more likely to have intended to distribute drugs and possess the firearm in furtherance of distribution in the current case. This is the precise type of inference Rule 404(b) is designed to prevent. Rule 404 requires courts to make a threshold admissibility ruling. If evidence is irrelevant to any non-propensity purpose, a judge is supposed to exclude it, not admit it with a boilerplate limiting instruction.

CONCLUSION

WHEREFORE, for the reasons set forth above, Petitioner Robert Donelson prays that this Court will grant his Petition for a Writ of Certiorari.

Respectfully submitted,

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