

NO. 20-6296

IN THE SUPREME COURT OF THE UNITED STATES

DAVID LAGUE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
For the Ninth Circuit

REPLY BRIEF FOR PETITIONER

Leah Spero
Counsel of Record
Spero Law Office
255 Kansas Street, Suite 340
San Francisco, CA 94103
(415) 565-9600
leah@sperolegal.com

REPLY BRIEF FOR PETITIONER

1. In the published decision below, the Ninth Circuit expressly recognized a “split of authority” among the circuits regarding the admissibility of other-act data to show unlawful intent under Federal Rule of Evidence 404(b). App. 14a. The government attempts to distinguish away this split (Br. 15–19), but in doing so ignores the Ninth Circuit’s extended analysis of the case law and definitive conclusion that the decisions of the Eighth and Eleventh Circuits on this admissibility issue are “irreconcilable.” App. 14a. Both parties below attempted to harmonize the case law, and the Ninth Circuit rejected these attempts. App. 13a–14a. Contrary to the government’s assertions, there is a circuit split.

Further, the Ninth Circuit’s decision as to which side of the split to follow affected the outcome here. On one side of the split, the Eighth Circuit held in *United States v. Jones*, 570 F.2d 765, 768 (8th Cir. 1978), that data on a physician’s practice-wide prescriptions are inadmissible under Rule 404(b) to show an unlawful intent to prescribe outside the bounds of professional medical practice “[a]bsent any evidence bearing upon [the defendant’s] treatment of the patients in question.” On the other side of the split, the Eleventh Circuit held in *United States v. Merrill*, 513 F.3d 1293, 1303 (11th Cir. 2008), that data evidence of the quantity and combination of prescriptions alone, without evidence of the underlying patients’ needs or treatment, is admissible to show an unlawful intent.

The Ninth Circuit sided with the Eleventh Circuit’s view. App. 15a. It ruled that petitioner David Lague’s practice-wide prescription data showing “enormous

quantities, and in dangerous combinations, support[ed] a reasonable inference that the underlying prescriptions were issued outside the usual course of professional practice,” *ibid.*, without any evidence of the underlying patients’ needs and course of treatment. Had the Ninth Circuit followed the Eighth Circuit’s approach in *Jones*, the data from Lague’s practice would have been inadmissible without evidence about the impropriety of the underlying treatments.

The government draws a factual distinction between this case and the Eighth Circuit’s decision in *Jones* to explain the difference in outcome—but the distinction is inaccurate. Br. 16–17. According to the government, there was no contextual evidence in *Jones* that the uncharged prescriptions were unlawful while, here, the evidence included professional standards that revealed Lague’s deviation from the norm and thus supported an inference of illegality. *Ibid.* In *Jones*, however, there was deviation-from-the-norm evidence. The government introduced testimony that the defendant’s prescriptions accounted for 47% of one drug store’s total volume of Schedule II drug prescriptions. *Jones*, 570 F.2d at 767. This evidence reflected that the defendant prescribed well above the norm and, according to the Eighth Circuit, was introduced “to imply wrongdoing on the physician’s part from the quantity of the [uncharged] prescriptions.” *Id.* at 769. Here, the government used norm comparisons for the same effect: to imply wrongdoing and a wrongful intent.

The admissibility issue raised in Lague’s petition asks a more fundamental question underlying these comparisons. Is practice-wide data that shows a deviation from the norm admissible to prove an *intent to unlawfully prescribe*, even if the jury

learns nothing about the circumstances of the prescriptions within the data set? More broadly, are statistical aberrations indicative of guilt? Pet. 24–25.

As discussed in Lague’s petition, the Eighth and Tenth Circuits, and two district courts, have taken the view that the government must produce evidence that the other acts captured in the data were unlawful for purposes of admission under Rule 404(b) to establish unlawful intent. Pet. 11–18. Thus, in unlawful prescription cases, the government must introduce evidence of the treatment of the other patients included in the data set that establishes an inference of illegality. However, the Ninth Circuit, siding with the Eleventh Circuit, has held instead that practice-wide data are admissible to show unlawful intent based only on the large prescription amounts or outlier prescription rates compared to other practitioners. *Ibid.*

The Ninth Circuit’s published decision acknowledged the circuit split on this issue, and this Court should grant review to resolve the split.

2. Contrary to the government’s assertions (Br. 19–20), this case is an ideal vehicle to address the data admissibility issue. The Ninth Circuit squarely addressed the issue. Pet. 25–26. Further, there are enough decisions on both sides of the issue to give the Court a full understanding of the competing views. Pet. 11–21. The government does not dispute these points but argues instead that this case is a poor vehicle because the Ninth Circuit found harmless error with regard to a Rule 403 challenge that is not raised in this petition. Br. 19. The Ninth Circuit ruled that the admission of the data before the district court reviewed it under Rule 403 was not prejudicial. *Ibid.*

However, the Ninth Circuit could still decide that the admission of the data, if it was in error under Rule 404(b), was prejudicial. The court is not bound by its prejudice determination as to a different challenge. Tellingly, the district court, which has the best sense of the data's effect, candidly acknowledged that the admission of the data "reasonably could have affected whether the jury thought Mr. Lague's prescriptions were unlawful." App. 24a.

CONCLUSION

For the foregoing reasons, and those stated in the petition for writ of certiorari, the petition should be granted.

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LEAH SPERO
Counsel of Record
Spero Law Office
255 Kansas Street, Suite 340
San Francisco, CA 94103
(415) 565-9600
leah@sperolegal.com