

CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October 2020 Term

MERWIN SMITH

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for a Writ of Certiorari
To the Eighth Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

Submitted By:

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QUESTION PRESENTED

The circuits of the United States Court of Appeals disagree on whether federal prosecutors can introduce evidence of a person's prior conviction for unlawful gun possession in a prosecution based on police testimony that the same person had physical possession of a firearm on a subsequent date—a weapon the accused denies ever having. Fed. R. Evid. 404(b)(1) provides 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 that character.” Rule 404(b) provides that evidence of a crime, wrong or other act “may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.”

Three circuits hold that when an accused denies police claims of personal possession of a firearm, the question of “knowing” or “intentional” possession is not a material issue justifying proof of prior guilt for the same kind of conduct, and the prior convictions establish knowledge based on propensity inferences the rule prohibits. Two circuits deem the prior convictions may be shown when the accused denies the charge and demands a trial. The issue here is

1. Are prior gun possession convictions admissible under Rule 404(b) to prove knowing or intentional gun possession on a later date when the government claims the accused physically possessed a gun the defendant claims he never possessed?

Parties to the Proceedings

Petitioner Merwin Smith was represented in the lower court proceedings by his appointed counsel, Lee T. Lawless, Federal Public Defender, and Assistant Federal Public Defender Melissa K. Goymerac, 1010 Market, Suite 200, Saint Louis, Missouri 63101. The United States was represented by United States Attorney Saylor Fleming and Assistant United States Attorney Rodney Holmes, Thomas Eagleton Courthouse, 111 South 10th Street, Saint Louis, Missouri 63102.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is published at 978 F.3d 613. The opinion appears in the Appendix (“Appx.”, at 1).

JURISDICTION

The Eighth Circuit Court of Appeals entered its judgment on October 26, 2020. Appx. 1-10. Mr. Smith filed a timely motion for rehearing and rehearing *en banc*, which was denied December 21, 2020. Appx. 8. This petition is timely filed within 150 days of that ruling, pursuant to the revised deadline this Court established during the pandemic. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

FEDERAL STATUTORY PROVISIONS

18 U.S.C. § 922(g) Unlawful acts.

It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

. . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

FEDERAL RULES OF EVIDENCE

Fed. R. Evid. 105. Limiting Evidence That Is Not Admissible Against Other Parties or for Other Purposes

If the court admits evidence that is admissible against a party or for a purpose—but not against another party or for another purpose—the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly.

Fed. R. Evid. 401. Test for Relevant Evidence

Evidence is relevant if:

- (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
- (b) the fact is of consequence in determining the action.

Fed. R. Evid. 402. General Admissibility of Relevant Evidence.

Relevant Evidence is admissible unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court

Irrelevant evidence is not admissible.

Fed. R. Evid. 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons.

The Court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following; unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”

Fed. R. Evid 404(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 that character.

(2) Permitted Uses. 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.

STATEMENT OF THE CASE

The evidentiary contest at Merwin Smith's trial exemplifies the analytical problems federal judges repeatedly face in gauging admissibility of uncharged crimes evidence under Fed. R. Evid. 404(b) and the ever-present risk that a prior conviction for the same type of offense on trial will prejudice one's right to an impartial verdict. Mr. Smith's jury had one issue to decide: whether he possessed on his person a handgun an officer found up the street from where Mr. Smith parked his car in an off-street driveway. The jury struggled to decide this, declaring itself unable to reach a verdict at one point. This case offers a proper vehicle to resolve circuit conflict on this very common scenario. It also provides an opportunity to clarify the analysis by which Courts should balance probative value and prejudicial impact of other crimes evidence under Fed. R. Evid. 403 to uphold Rule 404(b)(1)'s prohibition of proof tending to show a propensity to commit crime in relation to Rule 404(b)(2)'s non-exhaustive list of issues for which bad acts may prove a material issue without relying on inferences of criminal propensity.

Corporal Blayke Walz, claimed he "saw" Mr. Smith toss a hand-sized object out of a passenger window of a Chevrolet Impala after he parked at the off-street end of a 44-foot-long driveway at about 2 a.m. on July 17, 2016. Cpl. Walz was patrolling the area after losing sight of an unrelated pedestrian he saw tampering with a vehicle a couple of blocks away. He claimed he followed Mr. Smith after he saw him run a stop sign as he drove down a street on his way to park by the house at the top of the driveway. The officer testified he saw Mr. Smith "toss" a hand-sized object out the passenger window and heard a metallic clunk as Mr. Smith got out of the car. Cpl. Walz subsequently found a handgun 7'5" up from the bottom of the driveway on the public sidewalk. Mr. Smith denied the accusation and contested the credibility of Cpl. Walz's claim, citing the implausibility that one could toss a handgun from where he parked his car on the

trajectory required for it to land where Cpl. Walz found a firearm. The defense noted Cpl. Walz's failure to take pictures to establish the passenger window of his car was open rather than closed for air-conditioning, the alteration of Cpl. Walz's account of his own vantage point from his original written report and the likelihood that the unrelated pedestrian the officer was originally pursuing discarded the firearm he attributed to Mr. Smith.

The Court granted the government's request to introduce evidence of Mr. Smith's 2005 conviction for unlawful gun possession in 2003 as proof that he knowingly possessed the gun Cpl. Walz recovered in 2016 and that this possession was not accidental or based on a mistaken belief it was not a gun. Mr. Smith opposed the evidence, arguing that given the government's theory that he personally possessed the gun and Mr. Smith's denial of ever having it, his prior conviction only tended to prove knowing possession or absence of mistake by inferences that he acted consistent with his 2003 conduct. Counsel asked the Court to require the prosecutor to articulate how the 2003 offense showed knowledge or absence of mistake or accident.

The Court denied counsel's request to make the government articulate how the prior conviction established knowledge or absence of mistake or accident and declared the evidence admissible to prove knowing possession and absence of mistake. Defense counsel entered a stipulation to be read to the jury about Mr. Smith's 2005 conviction, while maintaining her objection to the jury receiving this information, in light of this being "a particularly close case, hinging on uncorroborated testimony of a single police officer," making "the potential for unfair prejudice [] particularly acute" and granting "unfair advantage in bolstering the credibility of the single witness's uncorroborated testimony." The stipulation informed the jury that Mr. Smith was convicted in 2005 of "possessing a firearm in his vehicle in St. Louis County, Missouri" on May 29, 2003. The jury took over four hours to decide the case, at one point during which it

reported itself unable to reach a unanimous verdict, despite the government's emphasis in summation that the only issue it had to decide was whether Mr. Smith possessed the gun.¹

The Eighth Circuit's Ruling

On direct appeal, Mr. Smith argued the district court abused its discretion in admitting evidence of his prior conviction for the same offense charged at trial, citing Eighth Circuit case law dating from 1988 stressing the duty of the Court to ensure the relevance of the other crime did not depend on an inference of the defendant's acting consistently with his prior conduct to establish the non-propensity issue for which the government offered it as proof.

The Eighth Circuit rejected Mr. Smith's arguments. It cited its own precedents declaring that "knowing possession" constitutes a "material" fact at issue within the meaning of Fed. R. Evid. 404(b) whenever a defendant makes the government prove a charge of unlawful firearm possession in a trial. Appendix at 3-4. The panel rejected Mr. Smith's reliance on the rule that trial courts must require a prosecutor to articulate a non-propensity chain-of-inferences by which a prior conviction for the same offense proves a material fact in issue:

"Smith compares admission of his prior felon in possession conviction to the one disallowed by *United States v. Mothershed*, 859 F.2d 585 (8th Cir. 1988). *Mothershed* is different. In *Mothershed*, we reversed the admission of a prior conviction because it was relevant only for propensity purposes to show "that a person who has been convicted of possessing money that he knows was stolen from a bank is more likely to be a bank robber than are most other people who have no such record." *Id.* at 589. In contrast, here it is settled law that the use of a prior conviction is relevant to Smith's knowledge and intent, and it is admissible for that purpose."

Appendix at 4. The Eighth Circuit denied Mr. Smith's timely motion for rehearing en banc on December 21, 2020. *Id.* at 8.

¹ The parties stipulated to the elements that Mr. Smith had a prior conviction punishable by more than one year in prison and that the gun traveled in interstate commerce. The trial occurred before this Court held that the offense also required as an element that the defendant knew of his prohibited status, see *Rehaif v. United States* 139 S. Ct. 2191 (2019).

GROUND S FOR GRANTING THE WRIT

- I. **The Court should decide whether Fed. R. Evid. 404(b) allows proof of prior gun possession convictions to show one knowingly had personal possession of a gun under 18 U.S.C. § 922(g) when an accused claims never to have possessed the weapon.**

The Eighth Circuit's position in Mr. Smith's case squarely conflicts with the view of the Third, Fifth, and D.C. Circuits that prior convictions for gun possession do not become relevant to a material issue and admissible under Rule 404(b) to prove knowledge, intent, or absence of mistake simply because one demands a trial to deny police claims that the accused had "actual," physical possession of a firearm. The specific evidentiary problem is recurrent in 18 U.S.C. §922(g) prosecutions, which in fiscal year 2020 led to 6,782 convictions and comprised 86.2 percent of all guidelines sentences. U.S. Sentencing Commission, *Quick Facts Felon in Possession of a Firearm*, 1 (FY 2020) (*hereinafter* "*Quick Facts*").²

The evidentiary dispute about using gun convictions to prove a new violation of Section 922(g)(1) presents a useful means to address more general disparity among the Circuits in the analysis and application of Fed. R. Evid. 403 and 404. While the Eighth Circuit describes prior convictions as presumptively admissible even when a judge finds them more prejudicial than probative, *see United States v. Adams*, 783 F.3d 1145, 1150 (8th Cir. 2015), other circuits emphasize that a district court's measure of the probative value in a prior crime must take into account the defense actually raised and that a defendant's demand for trial does not *per se* make knowledge or intent a material issue under Rule 404(b) so as to compel their admission. *See United States v. Gomez*, 763 F.3d 845, 860 (7th Cir. 2014) (en banc). The circuits' varying analyses "explains, perhaps, why the rule is the single most heavily litigated of all the Federal

² Accessible at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY20.pdf (last visited May 19, 2021).

Rules of Evidence.” New Wigmore Evid. Of Other Misconduct, §4.2 (2016), *quoting* 1 Edward J. Imwinkelried, *Uncharged Misconduct Evidence*, §1.04, at 19-20 (1998).

The basic analytical framework for the issue starts with Fed. R. Evid 404(b)(1)’s declaration that “evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” Although Rule 404(b)(2) adds that such proof may be admissible for another purpose such as proving intent or knowledge, Fed. R. Evid. 401’s definition of relevant proof limits such evidence to matters that make “a fact [that] is of consequence to deciding the action” more or less probable. Fed. R. Evid. 403 excludes even relevant evidence if “its probative value is substantially outweighed by the danger of unfair prejudice.” *Huddelston v. United States*, 485 U.S. 681, 688, 691 (1988).

The source of the specific circuit conflict Mr. Smith presents is the logical and legal relevance of prior gun possession to prove a charge under 18 U.S.C. §922(g)(1) that a prior felon had “actual” or physical possession of a gun on his person that the accused denies ever having. The three circuits that prohibit prior convictions to show knowledge, intent, or absence of mistake incorporate the actual defense presented at trial into the Rule 403 balancing. The Eighth and the Eleventh Circuits stress admissibility of the prior convictions based on a defendant’s choice to go to trial which compels the government to prove every element beyond a reasonable doubt.

Three Circuits recognize a defendant’s denial of actual possession reduces the probity of prior gun possession offenses.

In 2004, the District of Columbia Circuit reversed a felon-in-possession conviction that the government based on testimony by three eyewitnesses that another man handed the defendant a gun that he later fired out of the window of his car and then threw away as arresting officers

approached. *United States v. Linares*, 367 F.3d 941, 948 (D.C. Cir. 2004). The trial court allowed evidence of Mr. Linares's conviction four years earlier for being a felon-in-possession of a firearm to prove intent, knowledge, and absence of mistake. Reversing, the District of Columbia Circuit held that Linares's prior conviction lacked relevance to prove his knowledge of the gun's presence on the date in question, given the government's eyewitness proof that he held the gun in his hand:

...If the jury believed [the government's] eyewitnesses, then Linares possessed the gun knowingly; if it did not, then it should have acquitted based on the government's failure to prove possession rather than its failure to prove knowledge. Indeed, no reasonable jury could have acquitted Linares based on the belief that the government proved possession but failed to prove knowledge. The [evidence of Linares's prior conviction] was thus inadmissible to prove knowledge. . .

Id. at 946-47. The D.C. Circuit further rejected the prior conviction's probity to establish intent, reasoning that 18 U.S.C. §922(g)(1), does not require intent as an element. *Id.* at 948.

The Fifth Circuit followed *Linares* to reverse the admission of prior convictions for gun possession under a factual scenario similar to that in Mr. Smith's case. In *United States v. Jones*, 484 F.3d 783, 785 (5th Cir. 2007), a police officer on patrol claimed he saw Mr. Jones adjust an object in his waistband. The officer claimed he chased Mr. Jones into an alley and saw him extract a gun from his waistband to throw it under a house. *Id.* Mr. Jones produced a cousin's testimony contradicting the officer's testimony. His cousin testified she was with Mr. Jones when police detained him and that he never entered the alley. She further claimed the officer entered the alley only after Mr. Jones was in custody and that the officer later returned with the gun used to prosecute him. *Id.* The district court admitted proof that Mr. Jones was previously convicted for possessing a gun he threw under a house, declaring the prior conviction admissible to (1) show that Mr. Jones had knowingly and intentionally possessed the gun the testifying officer found under the house only minutes later, and (2) disprove any claim of accidental or

mistaken possession or rebut a “mere presence” defense. *Id.* The trial judge also speculated that the government might need the evidence to prove Mr. Jones had constructive possession of the firearm found under the house, and that the prior conviction supported a finding of knowledge of the presence of the gun under the house and his intent to exercise dominion or control over it. *Id.*

The Fifth Circuit reversed. *Id.* at 790. It concluded the evidence in the trial presented a choice between finding Jones had sole possession based on the police officer’s testimony that he saw Mr. Jones pull the gun from his pants and discard it, or believing the cousin’s testimony that Mr. Jones had no gun and did not go into the alley where police found a gun. “As this was the extent of the material evidence presented, the jury could have either believed [the Detective] and found actual possession or believed [the cousin] and found no possession.” *Id.* at 790. The Fifth Circuit concluded Mr. Jones’s prior conviction for gun possession lacked relevance to the material facts the jury had to decide.

The Third Circuit reached the same result as in *Jones* and *Linares* in another felon-in-possession prosecution premised on actual possession of a gun. In *United States v. Caldwell*, 760 F.3d 267 (3rd Cir. 2014), the prosecution offered evidence at trial that detectives observed Mr. Caldwell physically remove the gun from his waistband and held it behind the back of another person. The government’s theory of guilt rested purely on Mr. Caldwell’s actual possession of the gun. *Id.* at 278-79. The government sought to use Mr. Caldwell’s two prior convictions for illegally possessing firearms to establish knowing possession of the gun in the incident on trial, plus intentional possession and absence of mistake or accident. *Id.* at 278.

The District Court in *Caldwell* rejected the government’s reliance on proving “absence of mistake or accident,” on the simple basis that Mr. Caldwell did not claim that he mistakenly or accidentally possessed a gun. The Third Circuit rejected the trial court’s conclusion that the

convictions had probative value to show intent because the felon-in-possession statute did not require intentional possession, and because Mr. Caldwell did not claim he lacked intent to possess a firearm. *Id.* at 279. The Third Circuit further rejected the District Court's suggestion that the convictions had relevance to prove knowing possession, noting that possession can be proved either, “ (1) by showing that Defendant exercised direct physical control over the weapon (actual possession), or (2) by showing that he exercised dominion or control over the area in which the weapon was found (constructive possession).” *Id.* Because the government relied purely on the theory that Mr. Caldwell had “actual possession,” his knowledge that he possessed a firearm was not a material issue in the case:

“Although 18 U.S.C. § 922(g)(1) criminalizes the “knowing” possession of a firearm by a convicted felon, a defendant's knowledge is almost never a material issue when the Government relies exclusively on a theory of actual possession. Indeed, absent unusual circumstances (such as when a defendant claims he did not realize the object in his hand was a gun), the knowledge element in a felon-in-possession case will necessarily be satisfied if the jury finds the defendant physically possessed the firearm.”

Id., quoting *Linares*, 367 F.3d at 946-47.

The trial judge in *Caldwell* sensed the impropriety of admitting prior convictions for illegal gun possession to show knowledge in a prosecution where the government claimed the defendant had actual possession of the gun in question in his own hand. The judge noted that knowledge could justify admission of a gun if the government relied on a “constructive possession kind of situation”, but not where Mr. Caldwell was “saying he never had a gun.” 760 F.3d at 280. Mr. Caldwell's judge changed course, however, to conclude that his claim of innocence by going to trial put made his knowledge a material issue. *Id.* at 280-81. The Third Circuit rejected that reasoning:

We disagree [] with the proposition that, merely by denying guilt of an offense with a knowledge-based mens rea, a defendant opens the door to admissibility of prior

convictions of the same crime. Such a holding would eviscerate Rule 404(b)'s protection and completely swallow the general rule against admission of prior bad acts.

Id. at 281.

The Eighth and Eleventh Circuits deem prior convictions presumptively admissible when relevant to any element

In opposition to the foregoing analysis, the Eighth and Eleventh Circuits declare prior convictions for illegal gun possession generally admissible to prove knowledge and intent whenever a defendant pleads not guilty to being a felon in possession of a firearm under Section 922(g)(1). The Eighth Circuit explicitly applies a “general rule” that “[e]vidence that a defendant possessed a firearm on a previous occasion is relevant to show knowledge and intent.” *United States v. Williams*, 796 F.3d 951, 959 (8th Cir. 2015), *quoting United States v. Walker*, 470 F.3d 1271, 1274 (8th Cir. 2006); Appx. 8 (“We have held on many occasions that prior convictions of firearm offenses are admissible to prove that the defendant had the requisite knowledge and intent to possess a firearm”). In one case, the Eighth Circuit rejected a defendant’s citation of the Third Circuit’s analysis in *Caldwell* purely on the basis that this analysis was “foreclosed by our [Eighth Circuit] precedent.” *Williams*, 796 F.3d at 959, *quoting United States v. Oaks*, 606 F.3d 530, 539 (8th Cir. 2010), and *United States v. Halk*, 634 F.3d 482, 485-87 (8th Cir. 2011). In fact, Eighth Circuit precedent antedating those cases cited a duty of district courts to require the government to articulate the chain of inferences by which a prior conviction established an issue listed in Rule 404(b) to ensure it did not depend on the prohibited propensity inference. *United States v. Mothershed*, 859 F.2d 585, 589 (8th Cir. 1988) (“the inclusionary approach permits the evidence to be used to prove any issue other than propensity, but the trial court is still obliged to ask, ‘Is the evidence in any way relevant to a fact in issue

otherwise than by merely showing propensity?”).³ The Eighth Circuit simply relied on the broad “inclusion” of prior convictions in subsequent Eighth Circuit panel decisions as establishing a presumption of admissibility for prior convictions to prove charges of subsequent gun possessions that the defendant insists on contesting at trial. Appendix at 3-4. The Eighth Circuit did not articulate a chain of inferences by which Mr. Smith’s 2005 convictions established his knowing possession or absence of mistaken possession in 2016 other than by “action in conformity with prior conduct”—the propensity inferences barred by Rule 404(b)(1).

The Eleventh Circuit employs the same analysis as the Eighth Circuit to endorse evidence of prior gun possession convictions to prove the mens rea of knowingly possessing a firearm as a convicted felon in the trial of a subsequent accusation, making no distinction between prosecutions for personal possession and those based on constructive possession. *See United States v. Taylor*, 417 F.3d 1176, 1178 (11th Cir. 2005)(affirming use of prior conviction to prove Taylor knowingly and intentionally possessed a black object an officer saw him discard).

The Tenth Circuit likewise upheld admission of a man’s nine-year-old conviction for carrying a gun in his pocket to prove he knowingly carried a gun two officers claimed he pulled out of his waistband and threw away, albeit in an unpublished case. *United States v. Roberts*, 417 Fed. Appx. 812, 817, 820 (10th Cir. 2011) (unpublished). The Tenth Circuit panel declared the conviction had high probative value to prove the later charge due to the lack of DNA or fingerprints physically connecting the defendant to the firearm. *Id.* This unpublished ruling relied on a published case involving constructive possession of a single gun police found under the bench seat of a tow truck they stopped, occupied by two persons both of whom were charged for possessing the gun. *United States v. Jernigan*, 341 F.3d 1273 (10th Cir. 2003). The Tenth

³ Quoting Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 Harv. L. Rev. 988, 1004 (1938)).

Circuit framed the issue in *Jernigan* much like the Eighth Circuit, calling Rule 404(b) a “rule of inclusion,” and that, “accordingly ‘404(b) evidence, like other relevant evidence, should not lightly be excluded when it is central to the prosecution’s case.’” *Id.* at 1280 (quoting *United States v. Perez-Tosta*, 36 F.3d 1552, 1562 (11th Cir. 1994)). The Tenth Circuit reasoned that the passenger’s prior convictions for gun possession was admissible to prove his lack of mistake or accident as to the presence of the gun police found in the truck being driven by his codefendant. *Jernigan*, 341 F.3d at 1281.

The rationales these two camps of circuits follow cannot be reconciled. This longstanding and entrenched conflict produces sharp disparity in the right of accused citizens to obtain a fair trial on police accusations of firearm possession.

II. Section 922(g) prosecutions provide a useful model to resolve circuit conflict about Rule 404(b) analysis more generally.

The conflict amongst the circuits on the particular issue of prior gun possession convictions in felon-in-possession prosecutions reflect disparate approaches to Rule 404(b) evidence more generally. Circuits that refer to Rule 404(b) as a “rule of inclusion” for prior offenses offered for non-propensity issues based their admissibility and materiality primarily on the defendant’s demand for a trial. *See, e.g., Williams*, 796 F.3d at 958 (8th Cir.); *Jernigan*, 341 F.3d at 1280 (10th Cir.) (because Rule 404(b) is a rule of inclusion, Rule 404(b) evidence “should not lightly be excluded when it is central to the prosecution’s case”), quoting *Perez-Tosta*, 36 F.3d at 1562; *United States v. Stroud*, 673 F.3d 854, 861 (8th Cir. 2012) (prior possession of a machine gun was relevant because knowledge constitutes an element of the offense and therefore material).

Other circuits –and older precedents within the Eighth Circuit – mandate strict scrutiny and exclusion of any Rule 404(b) evidence the relevance of which depends on an inference of a

defendant's "action in conformity with prior conduct," Rule 404(b)(1). *See, e.g., United States v. Washington*, 434 F.3d 7, 12 (1st Cir. 2005) (bad acts offered to prove other purposes must be "specially probative of an issue in the case . . . without including bad character or propensity as a necessary link in the inferential chain."), *quoting United States v. Frankhauser*, 80 F.3d 541, 648 (1st Cir. 1996); *Caldwell*, 760 F.3d at 276-77 (3rd Circuit) ("the government must explain how [404(b) evidence] first into a chain of inferences...that connects the evidence to a proper purpose, no link of which is a forbidden propensity inference."); *United States v. Hall*, 858 F.3d 254 (4th Cir. 2017) (prior crimes admissible "when the government meets its burden to explain each proper purpose for which it seeks to introduce the evidence, to present a propensity-free chain of inferences supporting each purpose"); *Mothershed, supra* at 589.

The Seventh Circuit shifted its Rule 404(b) application to a straight-forward analysis of *how* the other crimes evidence is relevant.⁴ *See United States v. Gomez*, 763 F.3d at 860. The *Gomez* majority explained that "confusion arises because [Rule 404(b)] admissibility is keyed to the purpose for which the evidence is offered, and other-act evidence is usually capable of being used for multiple purposes, one of which is propensity." *Id.* at 855. The Court further explained:

"[b]ecause other-act evidence can serve several purposes at once, evidentiary disputes under Rule 404(b) often raise the following question: Does a permissible ultimate purpose (say, proof of the defendant's knowledge or intent) cleanse an impermissible subsidiary purpose (propensity)? On the surface the rule seems to permit this. But if subsection (b)(2) of the rule allows the admission of other bad acts whenever they can be connected to the defendant's knowledge, intent, or identity (or some other plausible non-propensity purpose), then the bar against propensity evidence would be virtually meaningless.

⁴ The Rule 404(b) evidence in *Gomez* consisted of cocaine found in an alleged drug conspirator's bedroom at the time of his arrest, offered by the government to rebut Gomez's defense that phone calls detailing cocaine transactions and made to the house where he lived must have been made by his brother-in-law who also lived there. 763 F.3d at 852. The Seventh Circuit found the admission of the evidence, harmless but took the opportunity to prescribe a more straightforward analysis of Rule 404(b) issues. *Id.* at 853-60.

The Seventh Circuit holds that Rule 404(b) is not only concerned with the ultimate conclusion the other crimes evidence proves, “but also with the chain of reasoning that supports the non-propensity purpose for admitting the evidence.” *Id.* “[T]he rule allows the use of other-act evidence only when its admission is supported by some propensity-free chain of reasoning.” *Id.*, citing *United States v. Lee*, 724 F.3d 968, 976-77 (7th Cir. 2013). The Court further stressed that other-crimes evidence “almost always carries some risk that the jury will draw the forbidden propensity inference.” *Id.* In the Seventh Circuit’s view, the extent to which the non-propensity issue is actually contested in the case constitutes an important issue in Rule 403 balancing. *Id.* at 857. “Rule 403 does much of the heaving lifting in the admissibility analysis by excluding other-act evidence that may be slightly probative through a non-propensity theory but has a high likelihood of creating unfair prejudice by leading a jury to draw conclusions based on propensity.” *Id.*

The analysis of courts sharing the concerns voiced in the Seventh Circuit’s en banc *Gomez* ruling stands in sharp contrast with the emphasis on presumptive admissibility premised on a defendant’s decision to go to trial. The Fourth Circuit has explained, “our characterization of Rule 404(b) as a rule of inclusion does not render prior convictions presumptively admissible.” *Hall*, 858 F.3d at 277. The Fourth Circuit also noted,

“[o]n the contrary, under Rule 404(b), evidence of a defendant’s prior bad acts is generally inadmissible, properly coming into evidence only when the government meets its burden to explain each proper purpose for which it seeks to introduce the evidence, to present a propensity-free chain of inferences supporting each purpose, and to establish that such evidence is relevant, necessary, reliable, and not unduly prejudicial.

Id.

These circuits also stress that “the type of defense a defendant presents at trial affects the admissibility of evidence of other acts under Rule 404(b) even when the defendant pleads not

guilty and . . . formally places all elements of the charged offense at issue.. *Id.* When a defendant does not contest a particular element of a charged offense, “that element is ‘at issue’ in only the most attenuated sense,’ minimizing the probative value of the prior bad act the Government seeks to introduce to the uncontested the element. *Id.* See also *Gomez*, 763 F.3d at 857; *United States v. Miller*, 673 F.3d 688, 697 (7th Cir. 2012) (“[I]ntent becomes more relevant, and evidence tending to prove intent becomes more probative, when the defense actually works to deny intent, joining the issue by contesting it.”).

The disparate analyses the circuits apply promote conflicting trial rulings as to the admissibility of especially prejudicial evidence, as the issue in Mr. Smith’s case shows. “Heightened” prejudice results when the other crimes evidence takes the form of a prior conviction for the same crime as that being tried. *Caldwell*, 760 F.3d at 284. Citizens in circuits that presume the admissibility of prior convictions under Rule 404(b) based on a demand for trial face greater risks contrary to the general inadmissibility of such evidence established by Rule 404(b)(1). See *Hall*, 858 F.3d at 277. This elevates the need for this Court to resolve the conflict and establish a more uniform approach to Rule 404(b) practice in trial practice nationwide.

III. The Court should grant certiorari also to correct the Eighth Circuit’s conflict with this Court’s decisions in *Michelson*, *Huddleston* and *Old Chief*.

The Eighth Circuit’s decision in Mr. Smith’s case also conflicts with this Court’s own decisions concerning Rule 404(b) and the critical role played by a district court’s balancing the probative value of prior convictions against their greater potential for prejudice. Certiorari is justified when a Circuit’s ruling conflicts with relevant decisions of this Court. Sup. Ct. R. 10(c).

The circuits that bar prior gun convictions as evidence to prove knowledge or intent in a Section 922(g)(1) trial based on a defendant’s actual control of the gun in question frame their

analysis using this Court's original explanation of why Rule 404(b) prohibits character evidence in *Michelson v. United States*, 335 U.S. 469 (1948):

The [character] inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record and deny him a 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.

United States v. Linares, 367 F.3d at 946 (quoting *Michelson*, 335 U.S. at 475-76); *United States v. Caldwell*, 760 F.3d at 275 (same). This Court first resolved circuit conflict involving Rule 404(b) in a case that addressing the safeguards the rule provided against the serious potential for prejudice posed by a jury's knowledge of an accused's criminal past. *Huddleston v. United States*, 485 U.S. 681 (1988). The Court rejected Huddleston's claim that judges must make an independent preliminary finding before submitting Rule 404(b) evidence to a jury. Citing legislative history behind Rule 404(b), this Court found that the rule's drafters instead

"indicated that the trial court should assess such evidence under the usual rules of admissibility: 'The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403.' *Ibid.*; see also S. Rep. No. 93-1277, p. 25 (1974) ('It is anticipated that with respect to permissible uses for such evidence, the trial judge may exclude it only on the basis of those considerations set forth in Rule 403, *i.e.*, prejudice, confusion or waste of time.')."

Id. Far from authorizing federal prosecutors to "parade past the jury a litany of potentially prejudicial similar acts", the Court recognized the validity of Huddleston's concerns about the prejudicial impact of Rule 404(b) evidence and designated the other evidentiary rules of factual and legal relevancy as the requisite safeguard:

We share petitioner's concern that unduly prejudicial evidence might be introduced under Rule 404(b). See *Michelson v. United States*, 335 U.S. 469, 475-476 (1948). We think, however, that the protection against such unfair prejudice emanates not from a requirement of a preliminary finding by the trial court, but rather from four other sources: first, from the requirement of Rule 404(b) that the evidence be offered for a proper

purpose; second, from the relevancy requirement of Rule 402 -- as enforced through Rule 104(b); third, from the assessment the trial court must make under Rule 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice, 8 see Advisory Committee's Notes on Fed. Rule Evid. 404(b), 28 U. S. C. App., p. 691; S. Rep. No. 93-1277, at 25; and fourth, from Federal Rule of Evidence 105, which provides that the trial court shall, upon request, instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted....

Id. at 691-92. The Eighth Circuit's approach encourages judges to admit an accused person's prior conviction *even* when the judge finds that evidence far more prejudicial than probative. , see *Adams*, 783 F.3d at 1150. This cannot be reconciled with the emphasis *Huddleston* placed both on the district court's Rule 403 balancing and on the high risk of prejudice evidence a defendant's prior conviction embodies. *Id.*

The rule of presumptive admissibility the Eighth Circuit has adopted for prior gun convictions conflicts with the prominence this Court granted to Rule 403 balancing of probity against prejudice in *Old Chief v. United States*, 519 U.S. 172 (1997). There the Court resolved circuit conflict concerning the interplay of the district court's Rule 403 balancing and Rule 404(b) concerns in Section 922(g)(1) prosecutions, *Old Chief v. United States*, 519 U.S. 172 (1997). The Court held that Rule 403 encouraged consideration of the availability of less prejudicial evidence to prove an element, such as a defendant's willingness to make a generic stipulation to prior felony conviction without specifying its nature to satisfy the prior-conviction element of Section 922(g)(1). *Id.* at 184-85. The *Old Chief* decision stressed the enhanced risk of prejudicial impact posed by the very type of prior conviction at issue in Mr. Smith's case:

"In dealing with the specific problem raised by § 922(g)(1) and its prior-conviction element, there can be no question that evidence of the name or nature of the prior offense generally carries a risk of unfair prejudice to the defendant. That risk will vary from case to case, . . . but will be substantial whenever the official record offered by the Government would be arresting enough to lure a juror into a sequence of bad character reasoning. *Where a prior conviction was for a gun crime or one similar to other charges in a pending case the risk of unfair prejudice would be especially obvious . . .*"

Id. at 185 (emphasis added). The Eighth Circuit's stance that prior convictions for the same offense are presumptively admissible cannot be reconciled with this part of *Old Chief*.

The Third Circuit and D.C. Circuit cases rejecting prior convictions in cases like Mr. Smith's noted this Court's prior cautions about the very real risk of prejudice prior convictions pose. See *United States v. Linares*, 367 F.3d at 946 (quoting *Michelson*, 335 U.S. at 475-76); *United States v. Caldwell*, 760 F.3d at 275 (same). This underscores the conflict between the Eighth Circuit's view of the "presumptive admissibility" of prior convictions to secure new convictions based on the same statute and this Court's longstanding recognition of the greater risk of prejudice such evidence poses. Only this Court can resolve this discord.

IV. This case presents the right vehicle in which to resolve these conflicts.

Mr. Smith's case presents a strong vehicle by which to resolve the circuit conflict on the admissibility of prior convictions for gun possession to convict a defendant later prosecuted for personally possessing a firearm he insists he never had. The issue was fully preserved and developed at trial. The evidentiary profile presents an extremely common trial scenario where the jury must choose between a police officer's claims to have seen an accused citizen discard a gun that the accused maintains was never possessed.

In her summation, defense counsel listed the officer's changing descriptions of his vantage point and defendant's statements and actions from his police report to his pretrial testimony to his account at trial and defendant's responses. She argued the improbability that a person in a car that drove the whole length of a 44-foot driveway to the far off-street end would be in a position to toss a gun found on a sidewalk 7'5" away from the mouth of the driveway. Defense counsel also pointed to the noise of Cpl. Walz's own actions at the time of the alleged "toss" (yelling at Mr. Smith to stand still while simultaneously radioing his position) that would

make it less likely he could hear a “clunk” multiple feet away from the opposite side of his patrol car. Mr. Smith also noted Cpl. Walz’s conspicuous failure to document whether the windows of Mr. Smith’s car were open at the time of the “toss” rather than closed for air-conditioning on this mid-July evening. When a trial presents a jury with a choice between a single police officer’s testimony to a version of an incident against the different version posed by the defense, the evidence “is less than overwhelming.” *See United States v. Holmes*, 413 F.3d 770, 776 (8th Cir. 2005). The potential for prejudicial evidence to improperly influence a jury’s determination is highest when the evidence is not overwhelming. Although the District Court read a limiting instruction intended to preclude the jury from convicting Mr. Smith on the basis of his earlier conviction, introduction of unduly prejudicial evidence is inadmissible under Rule 404(b) is a problem that “limiting instructions cannot cure.” *Hall*, 858 F.3d at 279.

The Eastern District of Missouri was the top district for the number of felon in possession of a firearm offenders (380) in Fiscal Year 2020, *See Quick Facts* at 1, and it has the third highest proportion of felon-in-possession of a firearm cases, *id.* This is the best case in which to establish and confirm the proper application of Rule 404(b) and resolve the circuit conflict on the admissibility of prior gun possession convictions in a new charge for the same crime.

CONCLUSION

WHEREFORE, Petitioner Adams requests that this Court grant his Petition for a Writ of Certiorari.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Melissa K. Goymerac', written over a horizontal line.

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ATTORNEY FOR PETITIONER

CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October 2020 Term

MERWIN SMITH

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for a Writ of Certiorari
To the Eighth Circuit Court of Appeals

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI

1. *United States v. Merwin Smith*, No. 19-2447 (8th Cir., Oct. 26, 2020) 1-7
2. *United States v. Merwin Smith*, No. 19-2447, Order denying rehearing,
(Dec. 21, 2020) 8

United States Court of Appeals
For the Eighth Circuit

No. 19-2447

United States of America

Plaintiff - Appellee

v.

Merwin Smith

Defendant - Appellant

Appeal from United States District Court
for the Eastern District of Missouri - St. Louis

Submitted: September 22, 2020

Filed: October 26, 2020

Before SMITH, Chief Judge, BENTON, and KOBES, Circuit Judges.

KOBES, Circuit Judge.

Merwin Smith appeals his conviction for unlawful possession of a firearm as a convicted felon in violation of 18 U.S.C. § 922(g)(1). Smith argues that the district court¹ should have excluded his 2005 felon-in-possession conviction and that

¹The Honorable John A. Ross, United States District Judge for the Eastern District of Missouri.

prosecutorial misconduct during rebuttal closing prevented him from receiving a fair trial. We see no error, and we affirm.

I.

In the early morning hours of July 17, 2016, a City of Normandy police officer, patrolling the neighborhood for an unrelated larceny suspect, stopped Smith for a traffic violation. As Smith got out of the car, the officer saw him lean into the car, toss something out of the passenger window, and heard it hit the ground with a “loud metallic clunk noise.” 3/6/19, Trial Tr. Vol I 171:15. The officer found a gun between 10 and 15 feet away from Smith’s car and arrested him for possessing a firearm as a felon. Smith denied throwing the gun out of the car and denied any possession of the gun.

The Government sought to introduce Smith’s 2005 conviction for being a felon in possession of a firearm to show knowledge, absence of mistake, and lack of accident under Rule 404(b) of the Federal Rules of Evidence. Smith objected, arguing that knowledge and mistake were not material issues because he denied possession of the gun, not *knowing* possession of the gun. The district court admitted the conviction and instructed the jury that the evidence should only be used to determine “knowledge, absence of mistake, or lack of accident” and could not be used for propensity purposes.

During closing arguments, Smith’s counsel suggested that the firearm could have been discarded by the escaping larceny suspect, and the officer, embarrassed about not catching that thief, made up a story about Smith: “When you tell a lie, this is the easy part to remember He remembers the toss, ladies and gentlemen. Well, of course he does. That’s this big dumb story. What he doesn’t remember is those details, because when you tell a lie, that’s what trips you up, those details.” 3/7/19, Trial Tr. Vol II 75:13–19. The Government responded by stating in rebuttal, “[n]ow what should offend anyone is that she just called this officer a liar, and said

that he set this person up. He planted this gun” 3/7/19, Trial Tr. Vol II 78:2–4. Defense counsel objected, claiming that the prosecution disparaged defense counsel and mischaracterized her argument. The district court overruled the objection. The district court also overruled an objection to the Government’s subsequent remark: “Don’t be fooled by the distractions.” 3/7/19, Trial Tr. Vol II 80:3–4. The jury convicted Smith of possessing a firearm as a felon.

Smith timely appealed the admission of Rule 404(b) prior acts evidence and the court’s rulings on his objections during closing arguments.

II.

Smith first argues the district court abused its discretion in admitting his 2005 conviction for possessing a firearm as a felon. “We review the district court’s admission of evidence of past crimes under Federal Rule of Evidence 404(b) for abuse of discretion, and we will not reverse unless the evidence clearly had no bearing on the case and was introduced solely to prove the defendant’s propensity to commit criminal acts.” *United States v. Williams*, 796 F.3d 951, 958 (8th Cir. 2015). Courts properly admit evidence under Rule 404(b) if: “(1) it is relevant to a material issue; (2) it is similar in kind and not overly remote in time to the crime charged; (3) it is supported by sufficient evidence; and (4) its potential prejudice does not substantially outweigh its probative value.” *Id.* at 959 (citation omitted). The court admitted the evidence of Smith’s conviction under a stipulated agreement, and the parties do not dispute that the prior act was supported by sufficient evidence.

Smith argues that because he denied ever touching or possessing the gun, knowledge is not relevant to a material issue and evidence of a prior conviction provides only propensity evidence prohibited by Rule 404(a) and 403. Our precedent forecloses this argument. “The defendant places his knowledge and intent at issue by pleading not guilty even when the prosecution proceeds solely on an

actual possession theory.” *Williams*, 796 F.3d at 959. “Knowing possession” is an element of 18 U.S.C. § 922(g)(1), and previous possessions are relevant to proving this element. *See id.*; *see also United States v. Oaks*, 606 F.3d 530, 539 (8th Cir. 2010); *United States v. Brown*, 727 F. App’x 902, 906–07 (8th Cir. 2018); *United States v. Graham*, 680 F. App’x 489, 492 (8th Cir. 2017).

Nor did the district court err by admitting evidence that was too dissimilar or overly remote. To support criminal intent, prior act evidence “must be sufficiently similar.” *United States v. Walker*, 470 F.3d 1271, 1275 (8th Cir. 2006) (citation omitted). “There is no absolute rule about remoteness in time, and we apply a reasonableness standard based on the facts and circumstances of each case.” *United States v. Yielding*, 657 F.3d 688, 702 (8th Cir. 2011). Both the 2005 conviction and the 2016 arrest involved a gun in a car, which makes evidence of the 2005 conviction probative of Smith’s knowledge and criminal intent to possess the gun. *See Walker*, 470 F.3d at 1273–74. And, while the 2005 conviction happened eleven years before his arrest on this charge, Smith was incarcerated for over half of that time. *See Williams*, 796 F.3d at 960 (referencing defendant’s time in custody while considering temporal remoteness). The district court did not abuse its discretion in finding that the 2005 conviction was sufficiently similar and not too remote.

Smith argues that admitting the 2005 conviction only implied that he acted consistently with his prior criminal offense and so it was unfairly prejudicial. Smith compares admission of his prior felon in possession conviction to the one disallowed by *United States v. Mothershed*, 859 F.2d 585 (8th Cir. 1988). *Mothershed* is different. In *Mothershed*, we reversed the admission of a prior conviction because it was relevant *only* for propensity purposes to show “that a person who has been convicted of possessing money that he knows was stolen from a bank is more likely to be a bank robber than are most other people who have no such record.” *Id.* at 589. In contrast, here it is settled law that the use of a prior conviction is relevant to Smith’s knowledge and intent, and it is admissible for that purpose.

Smith also submits that because this is “a particularly close case, hinging on uncorroborated testimony of a single police officer” the 404(b) evidence makes “the potential for unfair prejudice particularly [] acute” and grants “unfair advantage in bolstering the credibility of a single witness’s uncorroborated testimony.” Smith Br. 13. But this misstates the record. While it is true that only a single officer observed Smith’s disposal of the gun, the jury also considered the photographs from the scene, evidence from the agent who examined the gun, the gun itself, and stipulated evidence. The Government’s case did not depend on the officer’s testimony alone.

Finally, the district court’s application of the Rule 403 balancing test is given great deference. *Williams*, 796 F.3d at 960. The district court considered the specific purpose for which the 404(b) evidence would be admitted and its prejudicial effect after considering briefing and oral argument. The jury heard the 404(b) evidence by stipulation, omitting unrelated prejudicial facts surrounding the conviction. The district court also directed the jury to consider the conviction only as it related to Smith’s knowledge, intent, or absence of mistake. Considering the steps taken by the district court in balancing the probative value and the prejudicial effects of the prior conviction, we conclude that the district court did not abuse its discretion in admitting the 404(b) evidence.

III.

Smith next argues that the district court impaired the jury’s impartial consideration of the case by overruling defense counsel’s objections in closing arguments. Smith claims that the district court’s decision “had the unintended effect of encouraging the jury to accord weight to the prosecutor’s ongoing call to take offense at defense counsel and to dismiss the evidentiary conflicts [the defense] cited as ‘tactics’ to trick them.” Smith Br. 16. We grant trial courts “broad discretion in controlling closing arguments and we will reverse only on a showing of abuse of discretion.” *United States v. Miller*, 621 F.3d 723, 729 (8th Cir. 2010) (citation omitted).

We use a “two-part test for reversible prosecutorial misconduct: (1) the prosecutor’s remarks or conduct must have been improper, and (2) such remarks or conduct must have prejudicially affected the defendant’s substantial rights so as to deprive the defendant of a fair trial.” *United States v. Conrad*, 320 F.3d 851, 855 (8th Cir. 2003) (citation omitted). The prejudicial effect of prosecutorial misconduct is measured with three factors: “(1) the cumulative effect of such misconduct; (2) the strength of the properly admitted evidence of the defendant’s guilt; and (3) the curative actions taken by the court.” *Id.*

We consider the context of the entire trial when determining whether the Government’s remarks are improper. *Miller*, 621 F.3d at 729–30. The district court found that the prosecutor’s remarks were invited by defense counsel’s closing, that the Government made a reasonable inference from defense counsel’s remarks, and that the remarks were not directed at counsel. We agree. The Government’s remarks directly addressed defense counsel’s argument that the officer lied. They were not directed at counsel herself.

Even assuming the Government’s remarks were improper, Smith shows no prejudice. First, because Smith points to only two brief remarks in the Government’s rebuttal argument, the cumulative effect is not a factor in this case. Second, the district court properly admitted evidence supporting the crime charged: the officer’s testimony, the stipulations by the parties, photographs of the gun and the scene, and the gun itself. The strength of this evidence supports the jury’s guilty verdict. And third, after overruling defense counsel’s objections, the court cautioned the jury to “be guided by your recollection of the testimony and the evidence.” 3/7/19, Trial Tr. Vol. II at 80:8–9.

Smith says that the prosecutor’s statements “and the [district court’s] mistaken rulings upholding them may have been key to the guilty verdict that followed four hours of deliberation in this single count case.” Smith Br. 38. The trial record, viewed in its entirety, does not support this speculation.

IV.

The judgment of the district court is affirmed.

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 19-2447

United States of America

Appellee

v.

Merwin Smith

Appellant

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis
(4:16-cr-00364-JAR-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

December 21, 2020

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans