

CASE NO. 20-8143

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

**PETITIONER’S REPLY TO THE BRIEF OF THE
UNITED STATES IN OPPOSITION**

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QUESTION PRESENTED

The Third, Fifth, and D.C. Circuits of the Court of Appeals hold that Fed. R. Evid. 404(b) prohibits prosecutors from using prior gun possession convictions at trial to prove a defendant knowingly or intentionally held a gun police claim he possessed on his person when the defense claims he possessed no gun. These circuits deem such convictions irrelevant to prove knowing or intentional possession under 18 U.S.C. §922(1) of a gun police claim the accused held on his person and hold that a plea of not guilty does not make them admissible when the issue jurors must decide is whether the accused had actual possession of a gun.

The Eighth and Eleventh Circuits hold that Rule 404(b) makes prior possession of guns generally admissible to show knowing or intentional possession in a subsequent charge. The Eighth Circuit held petitioner's gun possession convictions admissible even though the trial court declared their prejudicial impact exceeded any probative value under Fed. R. Evid. 403 when police claimed he pulled a gun out of his pants and the defense denied that he had any weapon.

The question presented is:

1. Are prior gun possession convictions admissible under Rule 404(b) to prove knowing or intentional gun possession under §922(g)(1) when the government claims an accused physically possessed a gun the defendant maintains he never had?

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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 404(b) Crimes, Wrongs, or Other Acts (2020)

(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.

(3) Notice in a Criminal Case. In a criminal case, the prosecutor must:

- (A) provide reasonable notice of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it;
- (B) articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and
- (C) do so in writing before trial—or in any form during trial if the court, for good cause, excuses lack of pretrial notice.

**PETITIONER'S REPLY TO THE
BRIEF OF THE UNITED STATES IN OPPOSITION**

The Federal Circuits disagree on the admissibility of prior gun possession convictions to prove a person knowingly and intentionally possessed a gun the government claims police saw him personally possess on his person when the defense claims he had no gun. No good purpose is served by perpetuating the disparate impact this poses to the right to trial in circuits that hold a demand for trial renders prior gun convictions admissible to prove new gun charges.

The government admits that an entrenched circuit conflict exists on whether one's exercise of the right to trial to contest a charge of firearm possession *per se* opens the door to prior convictions for gun possession to show a lack of accident or mistake even when the accused raises no such claim at trial. Br. Opp. 5-6. The government argues Petitioner's case is not the proper vehicle to evaluate the issue because Corporal Walz claimed before trial that Petitioner said he threw a "remote control" out of his car. Brief in Opposition ("BIO") at 13. It conspicuously fails to note the critical fact that *neither party introduced that allegation at trial* and that Petitioner made no claim of accidental or mistaken possession before the jury.

The Government's reliance on evidence Petitioner's jury never heard exposes other constitutional problems posed when a demand for trial opens the door to prior convictions for the same type of offense. Under our system of justice, the government bears the burden of proof and the constitutional right against self-incrimination entitles the defendant to insist the government produce its case before deciding what, if any, defense evidence to present. *See Miranda v. Arizona*, 384 U.S. 436, 460 (1966) ("the government seeking to punish an individual [must] produce the evidence against him by its own independent labors[.]"). Prior to trial the judge denied Petitioner's request to reserve a ruling on the admission of his prior gun conviction to see whether any actual "material issue" arose to justify it at trial, citing the prosecutor's claim that Petitioner told Corporal Walz he threw a remote control "out of the car." D. Ct. Doc. 96, at 18-

19. The government never introduced Petitioner’s statement to Walz, a tape recording in which Petitioner told the officer that he tossed a remote control *back into the car onto the front console*—not out of it. Petitioner never suggested in the statement that he tossed anything out of the car or that he mistook anything in his possession as a gun.¹ Nevertheless, in the Eighth Circuit, the accused’s demand for a trial christened his prior conviction relevant to a “material issue” that neither party raised at trial. The Government’s resurrection in this Court of evidence never entered at Petitioner’s trial exemplifies the dangers the rule of admissibility based on a demand for trial poses in the Eighth, Eleventh, and Tenth Circuits. It demonstrates how far such expansive admissibility strays from this Court’s original ruling that legal relevance of such evidence must be gauged according to *actual* material issues arising before the jury. *See Huddleston v. United States*, 485 U.S. 681, 683 (1988) (tying the probity of Rule 404(b) proof to “the only material issue at trial”).

The government labels the circuits’ disagreement about the admissibility of prior gun offenses at issue here a “narrow” one to claim it unworthy of this Court’s time, Br. Opp. 5. The government does not address the high number of federal prosecutions where the scenario here arises: federal convictions of persons with a prior felony conviction for possessing guns numbered 6,782 convictions in fiscal year 2020—accounting for over 10% of all Guidelines sentences reported to the United States Sentencing Commission, *Quick Facts Felon in Possession of a Firearm*, 1 (FY 2020).² The Eastern District of Missouri which prosecuted Petitioner leads the Country in the number of prosecutions for unlawful gun possession (318) in Fiscal Year 2020, with the Western District of Missouri placing second (219). Such charges

¹ The government never introduced this statement at trial, likely because the fact the police found a remote on the console corroborated Petitioner’s claim of innocence.

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

commonly arise in traffic stops, which, in the State of Missouri persistently occur disproportionately against Black citizens like Petitioner. *See* Jim Salter, *Traffic stops decline in Missouri but Blacks more likely to be arrested, report finds*, p. A3 (St. Louis Post-Dispatch, June 2, 2021) (in 2020 Black motorists were 71 percent more likely to be pulled over than White motorists and 25 percent more likely to be arrested). The Government’s request that this Court let the disparities further develop disserves the salient goals of promoting confidence in the reliability and fairness in the operation of our criminal justice system.

The government’s argument that the legal issue here is too narrow repudiates its simultaneous claim that the Court should ignore the dispute because Rule 404(b) cases are too “fact-dependent” for this Court to decide. BIO 17. To the contrary, the analytical disagreement relates to a simple and largely uniform evidentiary stance in Section 922(g)(1) prosecutions: police accuse a defendant of holding a gun on his person that the accused denies ever having. Conflicting claims of *where* on one’s person one allegedly carried the gun do not alter the analysis of admissibility or inadmissibility on either side of the circuit split. Indeed, the facts in the cases outlining the circuit disagreements are remarkably similar. *Compare United States v. Linares*, 367 F.3d 941, 948 (D.C. Cir. 2004) (three eyewitnesses claimed defendant fired a gun and then threw it away and trial court admitted prior conviction for illegal gun possession to prove his intent, knowledge, and absence of mistake); *United States v. Jones*, 484 F.3d 783, 785 (5th Cir. 2007) (police claimed Jones pulled a gun from his waistband and threw it away and trial court admitted prior felon-in-possession conviction to prove intent, knowledge, and absence of mistake); *United States v. Caldwell*, 760 F.3d 267 (3rd Cir. 2014) (two detectives claimed Caldwell took a gun from his waistband and held it behind another person so the court admitted prior gun possession convictions to prove knowing, intentional, non-accidental possession);

United States v. Roberts, 417 Fed. Appx. 812, 817, 820 (10th Cir. 2011) (unpublished) (two officers claimed Roberts pulled a gun from his waistband and threw it away, and court admitted prior gun possession conviction to prove intentional and knowing possession in the new case). Furthermore, the same considerations and dangers posed by gun possession cases apply to prosecutions based on alleged personal possession of controlled substances. *See, e.g., United States v. Smith*, 741 F.3d 1211, 1225 (11th Cir. 2013) (a plea of not guilty to a charge of a drug conspiracy makes intent a material issue and opens the door to admission of prior drug-related offenses as highly probative, and not overly prejudicial); *United States v. Thomas*, 593 F.3d 752, 757-58 (8th Cir. 2010) (allowing evidence of 2008 drug conviction where plea of not guilty placed burden on government to prove every element beyond a reasonable doubt).

Contrary to the Government's claim, the 2020 amendment to Fed. R. Evid 404(b)(3) does not resolve the circuit split because it does not change the standards of admissibility. The Amendment minimally changed the Government's obligation to "generally identify" the evidence it intended to introduce, to direct the Government to "also articulate a non-propensity purpose for which the evidence is offered and the basis for concluding that the evidence is relevant in light of this purpose." Advisory Committee Notes to 2020 Amendments. Outside the Third, Fifth and D.C. Circuits, the government will satisfy the amended rule by claiming a defendant's choice to go to trial makes every element "material." *See, e.g., United States v. Adams*, 783 F.3d 1145, (8th Cir. 2015) (affirming use of a gun conviction to show Adams knew what a gun was, despite a district court finding its prejudicial impact outweighed its probity).

The Government's contention that the expansive approach to admitting a defendant's prior convictions has not led to the use of such evidence to establish a defendant's propensity, BIO at 20, is hardly a uniform view. Concurring in result due to the strength of evidence

independent of Rule 404(b), Judge Kelly of the Eighth Circuit questioned the probative basis for introducing six prior convictions involving firearms ostensibly to prove a defendant's knowing possession of a firearm in the instance on trial. *See United States v Drew*, 9 F. 4th 714, 728-29 (8th Cir. 2021) (Kelly, J., concurring) (while one prior gun conviction may be more probative than prejudicial to prove knowing possession, each of the succeeding five convictions had progressively less probity and an increasing likelihood to invite conviction based on propensity).

The Government's contention that the Court need not decide the issue because limiting instructions prevent an inference of propensity, BIO at 21, exaggerates their actual effectiveness. The maxim that jurors presumably follow limiting instructions is rooted more in pragmatism than certitude that it is true. *See Richardson v. Marsh*, 481 U.S. 200, 211 (1987). The admission of a defendant's past crimes, particularly when they are similar in nature to the crime for which the accused currently stands trial carries immense risks that jurors will not be able to follow the instruction and implicates "the practical and human limitations of the jury system[.]" *Simmons v. South Carolina*, 512 U.S. 154, 171 (1994) (plurality opinion). "[T]he risk that a jury will convict for crimes other than those charged--or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment--creates a prejudicial effect that outweighs ordinary relevance." *Old Chief v. United States*, 519 U.S. 172, 181 (1997), quoting *United States v. Moccia*, 681 F.2d 61, 63 (1st Cir. 1982). "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. The real danger that proof of an accused's prior crime might convince at least one juror to convict to incapacitate a known "bad person" counsels heavily against allowing unwarranted admission of prior crimes in reliance on curative instructions. Improperly admitted Rule 404(b) "evidence cannot be rendered admissible simply because the district court provides a limiting

instruction.” *United States v. Hall*, 858 F.3d 254, 279 (4th Cir. 2017). In fact, one or more jurors indulging this improper reasoning may well have been what led the initially deadlocked jury to ultimately vote for conviction in this one-issue case. The government’s claim of overwhelming proof, BIO at 21-22, makes no mention of the prolonged deliberation and the jury’s notice of an inability to reach unanimity (just like the Eighth Circuit’s decision).

No legitimate purpose is served by leaving the circuit conflict to generate further disparity and high potential for prejudice in the circuits that penalize the right to trial in the common case of unlawful gun possession by opening the gates for admission of prior gun convictions.

CONCLUSION

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

Respectfully submitted,



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