NO: 20-8322

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

FABIAN PERPALL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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

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REPLY TO THE BRIEF OF THE UNITED STATES IN OPPOSITION

1. Introduction.

At his 2019 trial on two counts of being a felon in possession of a firearm in July 2018, the district court admitted in evidence under Federal Rule of Evidence 404(b), over Perpall's objection, Perpall's three prior convictions in 2012-13 for this very same offense, and his 2012 conviction for discharging a firearm from a vehicle. Pet. App. A1-A2. The jury convicted Perpall on both counts. On appeal to the Eleventh Circuit Court of Appeals, Perpall challenged the admission of his prior convictions. Pet. App. A1. The Eleventh Circuit rejected Perpall's challenge, relying on circuit precedent that holds that a defendant's prior convictions are admissible under Rule 404(b) when he pleads not guilty to a crime that involves his knowledge of an element of the offense. Pet. App. A1-A3.

In his Petition for Certiorari ("Pet."), Perpall argued that the Eleventh Circuit's interpretation of Rule 404(b) conflicts with the Rule 404(b) standard governing admissibility of evidence of prior crimes in other Circuits, and urged this Court to grant his petition and resolve this circuit split in his favor. Pet. 8-10, 14-18.

The government's Brief in Opposition ("Opp.") first asserts that "[t]his case does not implicate any disagreement in the circuits." Opp. 10, 14. Second, the

government notes that Rule 404(b) was recently amended, and argues that even if this case raises a circuit split, "this Court should not grant review to consider a question regarding the proper application of Rule 404(b) until the courts have had a chance to apply the recently-updated version of the rule." Opp. 17. Finally, the government argues that the "complexity" of whether his prior convictions could have been admissible under Federal Rule of Evidence 609 "weighs strongly against further review of this case." Opp. 17-18. This Reply takes up these arguments, in turn.

2. This case implicates a circuit split regarding the standard for admissibility of evidence of prior crimes under Federal Rule of Evidence 404(b).

A clear circuit split exists regarding the standard for admissibility of prior crimes under Rule 404(b). In the Eighth, Tenth, and Eleventh Circuits, once a defendant pleads not guilty to an offense that involves a defendant's knowledge of an element of the offense, evidence of prior crimes is admissible under Rule 404(b). Here, the Eleventh Circuit expressly relied on this interpretation of Rule 404(b), holding: "By pleading not guilty, Perpall put his knowledge of the presence of the gun at issue, *United States v. Jernigan*, 341 F.3d 1273, 1281 & n. 7 (11th Cir. 2003), making Perpall's prior convictions relevant to show intent, state of mind, and absence of mistake or accident." Pet. Appendix A-2. The Eighth and Tenth Circuit apply Rule 404(b) identically. Pet. 16.

But the Third, Fourth, and Seventh Circuits squarely reject this application of Rule 404(b). *See United States v. Caldwell*, 760 F.3d 267, 281 (3d Cir. 2014) ("we reject the suggestion that 'claiming innocence' is sufficient to place knowledge at issue for purposes of Rule 404(b)."); *United States v. Hall*, 858 F.3d 254, 277 (4th Cir. 2017) (2-1) ("a defendant's plea of not guilty . . . does not throw open the door to any sort of other crimes evidence.") (citation omitted); *United States v. Gomez*, 763 F.3d 845, 857 (7th Cir. 2014) (en banc) ("we have adopted a rule that other-act evidence is not admissible to show intent *unless* the defendant puts intent 'at issue' beyond a general denial of guilty) (emphasis in original) (citation omitted)).

A recent Columbia Law Review article discussed the above-cited cases, noted the "circuit split," and offered a proposed resolution. Daniel J. Capra & Liesa L. Richter, *Character Assassination: Amending Federal Rule of Evidence 404(b) to Protect Criminal Defendants*, 118 Colum. L. Rev. 769, 797 (2018). Nonetheless, the government's brief in opposition questions the existence of a circuit conflict. Opp. 16 (describing the circuit split as an "*alleged* circuit conflict") (emphasis added). And it claims that "[t]his case does not implicate any disagreement in the circuits." Opp. 10. The government's analysis is mistaken.

The defendant in *Caldwell*, like Perpall here, was charged with being a felon in possession of a fiream in violation of 18 U.S.C. § 922(g)(1). 760 F.3d at 270. At

trial, the district court admitted evidence of the defendant's prior convictions for unlawful possession of a firearm, stating: "when the Defendant, as here, is charged with a specific intent crime, the knowing possession of a firearm unlawfully, the Government may present other acts or evidence to prove intent and knowledge to possess a firearm at issue by claiming innocence." *Id.* at 273-74. The Third Circuit rejected this 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." *Id.* at 281 ("we reject the suggestion that 'claiming innocence' is sufficient to place knowledge at issue for purposes of Rule 404(b)."). Thus, *Caldwell* rejected the very interpretation of Rule 404(b) that the Eleventh Circuit applied here.

Caldwell held that "it is not enough to merely recite a Rule 404(b) purpose that is at issue; the Court must articulate how the evidence is probative of that purpose." *Id.* at 282. *Caldwell* required trial courts to consider the "chain of inferences connecting the evidence to a non-propensity purpose." *Id.* at 282. *Caldwell* pointed out that "it is beyond cavil" that, in a prosecution for being a felon-in-possession, evidence of prior firearm convictions is "highly prejudicial." *Id.* at 284. *Caldwell* stated that, although admissibility is not "predicated on the manner in which the defendant frames his defense . . . [n]evertheless . . . [the scales] may tilt in favor of

excluding highly prejudicial evidence when it is offered to establish a fact *that is completely uncontested by the defendant*." *Id.* at 284 (emphasis added). Thus, *Caldwell* requires district courts to address the chain of inferences that make prior convictions probative, and to consider whether prior convictions bear on a contested issue.

The government claims that Perpall's reliance on *Caldwell* is "misplaced" because the government in *Caldwell* "proceeded 'purely' on a theory of actual rather than constructive possession," whereas Perpall's case was a "constructive possession case." Opp. 15. This argument is far off-the-mark.

First, it would be odd for a Rule of Evidence to be interpreted differently depending on the alternative "theory" under which the government elected to proceed at trial (here, actual vs. constructive possession). In fact, this would be unworkable because in many cases the government proceeds under alternative theories in the same count, or, as here, in separate counts. *See* Opp. 16, n. 2 (noting that the first count of the Indictment proceeded under an actual possession theory, while the second count proceeded under a constructive possession theory).[1]

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[1] The government does not claim that Perpall's prior convictions had probative value as to Count 1, which proceeded under an actual possession theory. Opp. 15-16, n. 2 (stating that the prior convictions were admissible only because they "were relevant to the *second* felon-in-possession charge, which was predicated on petitioner's possession of the gun found in the stolen car.") (emphasis in original).

Second, even when the government proceeds solely under a constructive possession theory, a defendant's prior convictions do not become *ipso facto* admissible under Rule 404(b) once he pleads not guilty. *Caldwell* discussed a hypothetical where a gun was discovered inside a backpack that the defendant was carrying, and that he defended "by claiming the gun was placed there without his knowledge." 760 F.3d at 282-83. Such a case would be akin to a "constructive possession" case, since the prosecution's theory would be that the defendant, though not having "direct physical control" over the gun in his backpack, knew the gun was in the backpack and had the intent to exercise control over it. *Cf. Henderson v. United States*, 135 S.Ct. 1780, 1784 (2015) (describing the concept of "constructive possession"). *Caldwell* noted that, even in this backpack scenario, the prosecution would not necessarily be permitted to introduce evidence of prior convictions for unlawful gun possession. These prior convictions, *Caldwell* noted, could lack probative value because they "involved different firearms and [be] remote in time." *Id.*

The government claims that *Caldwell* left open the door to the admission of prior convictions under Rule 404(b) in constructive possession cases, because such cases put at issue a defendant's knowledge. (Opp. 15-16). But this interpretation of *Caldwell* is at odds with the Fourth Circuit's decision in *Hall*, 858 F.3d 254. *Hall*

was a case where "the government relied [solely] on a constructive possession theory." *Id.* at 259. *Hall* repeatedly cited the Third Circuit's decision in *Caldwell*. *Id.* at 266, 269, 270, 276, 277, 278, 288. *Hall* concluded that the district court erred in admitting the defendant's prior convictions under Rule 404(b). *Id.* at 288.

The government claims that, here, both the district court and the Eleventh Circuit undertook a "similar analysis" as the Fourth Circuit in *Hall*. Opp. 14-15. This is plainly wrong.

In *Hall*, the district court admitted in evidence prior drug trafficking convictions under Rule 404(b), finding that these prior convictions established that the defendant had the intent to distribute the marijuana. *Id.* at 259-260. Reversing the convictions, the Fourth Circuit stated:

> The government next contends that, by pleading not guilty to the charged offense, Defendant placed all elements of those offenses at issue, thereby allowing the government to introduce evidence of Defendant's prior convictions to establish his knowledge and intent. But "[a]lthough a defendant's plea of not guilty places at issue all elements of the charged crimes, *this does not throw open the door to any sort of other crimes evidence*."

858 F.3d at 277 (emphasis added) (quoting *United States v. McBride*, 676 F.3d 385, 398 (4th Cir. 2012)); *see Hall*, 858 F.3d at 278 ("We disagree, however, 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) (quoting *Caldwell*, 760 F.3d at 278); *id.* at 278 (noting the "general principle that even when a defendant enters a plea of not guilty, thereby formally placing all elements of the charged offense at issue, a defendant's decision not to contest certain elements of the charged offense may so diminish the probative value of prior bad acts evidence that such evidence becomes unduly prejudicial and, therefore, inadmissible under Rule 404(b)."") (citation omitted); *see id.* at 260-61 (faulting the dissent for adopting the view that would "allow[] admission of evidence that a defendant committed a prior drug offense to establish the defendant's knowledge and intent to commit a later drug offense, even absent any linkage between the prior offense and the charged conduct.").

Hall cited approvingly the Third Circuit's statement in *Caldwell* that "the probative value of prior bad act evidence is diminished where the defendant *does not contest* the fact for which supporting evidence has been offered." *Id.* at 269 (quoting *Caldwell*, 760 F.3d at 283) (emphasis added in *Hall*). Plainly, the reasoning in *Hall* is at odds with the Eleventh Circuit's reasoning here. *See* Pet. App. A-3 ("it does not matter what defense Perpall said he intended to raise at trial or whether he intended to raise any defense at all. The government had to present its case first, and it had the

burden of proving that he knowingly possessed the gun that the detectives found in the car.") (cited at Opp. 9).

In the Seventh Circuit's en banc decision in *Gomez*, the defendant had been charged with conspiracy to possess cocaine with intent to distribute, and with using a telephone to facilitate a drug crime. 763 F.3d at 851. The district court allowed the government to introduce in evidence the small quantity of cocaine found in pants in the defendant's bedroom, on the ground that this helped prove Gomez' "identity." *Id.* at 852. On appeal, the Seventh Circuit noted that "identity" was a permissible purpose for introducing evidence under Rule 404(b), but added if the rule "allows the admission 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." *Id.* at 855. The Seventh Circuit held: "the district court should not just ask *whether* the proposed other-act evidence is relevant to a non-propensity purpose but *how* exactly the evidence is relevant to that purpose." *Id.* at 856 (emphases in original). The Seventh Circuit stated: "Simply because a subject like intent is formally at issue when the defendant has claimed innocence and the government is required to prove his intent as an element of his guilt does not automatically open the door to proof of the

defendant's other wrongful acts for purposes of establishing his intent." *Id.* at 859 (quoting *United States v. Lee*, 724 F.3d 968, 796 (7th Cir. 2013)).

The government emphasizes that *Gomez* rejected a "categorical" rule that other-act evidence may not be admitted unless the defendant meaningfully disputes the non-propensity issue for which the evidence is offered. Opp. 14 (citing *Gomez*, 763 F.3d at 856-57). Perpall agrees that *Gomez* stopped short of adopting a "categorical rule." *Id.* at 859. Instead, *Gomez* stated: "The *general guiding principal* is that the degree to which the non-propensity issue actually is disputed in the case will affect the probative value of the other-act evidence." *Id.* at 857 (emphasis added); *see id.* at 860 ("Though not a fixed requirement, we reiterate that the district court should consider the degree to which the non-propensity issue is actually contested when evaluating the probative value of the proposed other-act evidence.").

For present purposes, however, the nuance between a "categorical rule" and a "general guiding principle" is immaterial. *Gomez* expressly rejected an application of Rule 404(b) that would merely consider whether a defendant "has claimed innocence and the government is obliged to prove his intent [or here, his knowledge] as an element of his guilt." *See Gomez*, 763 F.3d at 859. Yet, this is what the Eleventh Circuit did here. Pet. App. A-3 ("it does not matter what defense Perpall said he intended to raise at trial or whether he intended to raise any defense at all.

The government had to present its case first, and it had the burden of proving that he knowingly possessed the gun that the detectives found in the car.") (cited at Opp. 9).

The government claims that in the present case the district court properly applied Rule 404(b) when it found that "because of the 'unique circumstances in this case regarding the position of the firearm in the console and possession concerns,' the prior convictions were 'very probative.'" Opp. 11 (citing 8/1/19 Tr. 56). But in the Third, Fourth, and Seventh Circuits this assertion by the district court, without more, would not survive appellate review. In the Fourth Circuit, the district court is required to find a "nexus" or "linkage" between an element of the charged offense and the prior convictions. *Hall*, 858 F.3d at 274-275, 261 ("the fact that a defendant may have been involved in drug activity in the past does not in and of itself provide a sufficient nexus to the charged conduct where the prior activity is not related in time, manner, place, or pattern of conduct.") (citation omitted). Here, there was no finding of a linkage between the firearm found on the console of a motor vehicle after a car chase in July 2018 (charged in Count 2) and Perpall's prior convictions, dating back to 2012 and 2013, years earlier. 7/30/19 Tr. 185; GX 17; GX 18.

Moreover, in this case, the defense was *not* that Perpall, the alleged driver of a car involved in a police chase, did not know of the presence of a firearm "in plain view in front of the [car's] shifter." 7/30/19 Tr. 198 (police officer testimony).

Perpall's defense was that he was not the driver of the car. Opp. 6 (Perpall "denied that he was the driver of the stolen car that was involved in the police chase, and he contended that police had arrested him by mistake because he happened to be in a backyard very close to where the car chase concluded.") (citing 8/1/19 Tr. at 189-190). The government argues that the jury might have "disbelieved" Perpall but "nonetheless harbor doubts about [his] knowledge that the gun was in the console of the stolen car." Opp. 14. But this argument *highlights* the error in the admission of the prior convictions. If the jury (somehow) harbored doubts whether the driver of the stolen car would know that there was a firearm "in plain view" in front of its shifter, on the console, 7/30/19 Tr. at 198, this driver's prior criminal convictions were not probative of this question – aside from showing his propensity to possess firearms unlawfully, the very connection Rule 404(b) is designed to forestall.

3. The recent amendment of Rule 404(b) does not reduce the need to resolve the circuit conflict.

Perpall pointed out in his Petition that Rule 404(b) was recently revised to require the government to "articulate . . . the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose." Pet. 13 (citing Fed. R. Evid. 404(b)(3) (2020)). The government does not dispute Perpall's observation that this amendment does not "resolve the circuit conflict."

Opp. 17. Instead, the government argues that "this Court should not grant review to consider a question regarding the proper application of Rule 404(b) until the courts have had a chance to apply the recently-updated version of the rule." Opp. 17. Perpall disagrees.

Rule 404(b) was amended "principally to impose additional notice requirements on the prosecution in a criminal case." Fed. R. Evid. 404 Advisory Committee's Note to 2020 amendment. Post-amendment, the government "must not only identify the evidence that it intends to offer pursuant to the rule but 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." *Id.* The earlier notice provision "was understood by some courts to permit the government to satisfy the notice obligation without describing the specific act that the evidence would tend to prove, and without explaining the relevance of the evidence for a non-propensity purpose. This amendment makes clear *what notice is required.*" *Id.* (emphasis added).

Thus, the recent amendment addresses the *notice* that the *government* is required to give. It does not address the standard for *admissibility* that a *district court* must apply.

Here, as the government's own opposition brief demonstrates, Rule 404(b)'s new notice requirement would not alter the result in the Eleventh Circuit.

The opposition brief recounts that "[b]efore trial, the government provided notice . . . that it would seek to introduce evidence of petitioner's prior firearms convictions to show that petitioner knowingly possessed the gun and ammunition that was found in the stolen car he used during the police chase." Opp. 3. This notice stated that "because the gun 'was found in a vehicle that did not belong to' petitioner, he might well 'claim that he did not know the gun [and ammunition] w[ere] in the car, and that it was a mere accident that he had them in his constructive possession.'" Opp. 4 (quoting C.A.E.R. 30).

Far from suggesting that the government's notice might be insufficient under amended Rule 404(b), the government's opposition brief notes, approvingly, the district court's reliance on this notice when it ruled that the prior convictions were "very probative," and therefore admissible, "because of the 'unique circumstances in this case regarding the position of the firearm in the console and possession concerns.'" Opp. 11. Further, the government's opposition brief notes, once more, approvingly, the Eleventh Circuit holding that the district court "'did not abuse its discretion in admitting the prior convictions,' where 'the government had to prove that [Perpall] was aware of the firearm's presence' in the stolen car." Opp. 11. To the

contrary, the government recounts approvingly the Eleventh Circuit's holding that the prior convictions were "relevant" because "they involved 'very similar crimes.'" Opp. 15 (citing Pet. App. A2-A3).

In sum, the government's argument here demonstrates how the recent amendment to Rule 404(b) does not change the law in the Eleventh Circuit (and in the Eighth and Tenth Circuits, which apply Rule 404(b) the same way (*see* Pet. 16)). From the government's perspective, the Rule 404(b) notice given by the prosecution in this case satisfied the 2020 requirements of the revised rule, merely by stating that the prior convictions would "show that petitioner knowingly possessed the gun and ammunition . . . and that it was [not] a mere accident that he had them in his constructive possession." Opp. 3-4 (quoting C.A. E.R. 24-33, 30). Moreover, from the government's perspective, the district court made no error in concluding that the prior convictions were "very probative." and the Eleventh Circuit correctly upheld this ruling. Opp. 11, 16.

The government's opposition brief thus demonstrates that the 2020 amendment to Rule 404(b) does not resolve the circuit conflict. In circuits like the Eleventh Circuit, once the prosecution gives notice of a non-propensity purpose (here, "to show that petitioner knowingly possessed the gun and ammunition that was found in the stolen car he used during the police chase" (Opp. 4), the district court, without more

analysis, is free to agree with the government that the prior convictions were "'relevant'" because "they involved 'very similar crimes.'" Opp. 15 (quoting Pet. App. A2, A3). *Compare Hall*, 858 F.3d at 284 (faulting district court for failing to find "nexus" or "linkage") *with* Pet. App. A3 (affirming district court's ruling because "the government . . . had the burden of proving that [Perpall] knowingly possessed the gun that the detectives found in the car."). Nor need a district court articulate how a "chain of inferences" logically connects prior convictions, from years earlier, to the charged conduct. *Caldwell*, 760 F.3d at 281; *see id.* at 283 (faulting the district court for not being "more exacting"). And a district court need not consider whether knowledge of the gun in the stolen car is a disputed issue in the case. *Compare Gomez*, 763 F.3d at 860 ("the district court should consider the degree to which the non-propensity issue actually is contested") *with* App. Pet. A3 (Eleventh Circuit rules that "it does not matter what defense Perpall said he intended to raise at trial or whether he intended to present any defense at all.").

4. The possibility that Perpall's prior convictions might be admissible under Rule 609 is not a factor that "weighs strongly against further review of this case."

The government notes that because Perpall testified in his defense, he was subject to impeachment under Fed. R. Evid. 609, and argues that the "complexity" of whether his prior convictions could have been admissible under Rule 609 "weighs

strongly against further review of this case." Opp. 18-19 (citing Pet. 23). But Rule 609 was neither mentioned in the government's brief on appeal to the Eleventh Circuit, nor in the Eleventh Circuit's decision. Pet. App. A1-A3. For good reason: Rules 404(b) and 609 "operate in two completely different situations." *United States v. Valencia*, 61 F.3d 616, 619 (8th Cir. 1995).

> The probative character of evidence under Rule 609 has to do with credibility of a witness, while 404(b)'s "probativeness" essentially goes to the question of whether or not the accused committed the charged crime. Any similarity or overlap in the standards of admissibility under the respective rules is irrelevant because the rules apply to completely different situations.

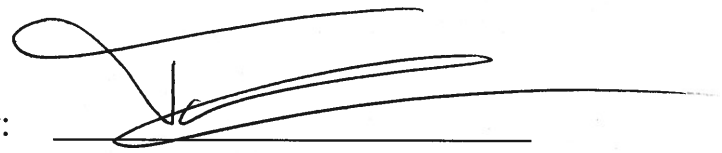
Id. Rule 609 "reflects a heightened balancing test and a reversal of the standard for admission under Rule 403." *Caldwell*, 760 F.3d at 286. Under Rule 609, when prior crimes are "similar" to the charged offense, "the balance tilts further toward exclusion." *Id.* Under Rule 609, a court "should consider whether, by permitting conviction impeachment, the court in effect prevents the accused from testifying." *Id.* (citation omitted). In *Caldwell*, the Third Circuit held that the prior convictions were inadmissible under Rule 609, because they were "similar to the charged offense," and therefore "highly prejudicial." *Id.* at 288. Moreover, "the impeachment value of the prior convictions is low because unlawful firearms convictions do not, by their nature, imply a dishonest act." *Id.* at 289. Further, the

passage of time reduced the probative value of the prior convictions. *Id.* In sum, as the Third Circuit noted in *Caldwell*, it would be "unusual" for evidence to be "excluded under Rule 404(b), yet admissible for impeachment purposes under Rule 609. 760 F.3d at 285.

CONCLUSION

Fabian Perpall respectfully requests that this Court grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,



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October, 2021