

NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

TAMARA JEUNE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

One of the most litigated issues under the Federal Rules of Evidence is the use of Fed. R. Evid. 404(b) as a conduit for introducing prior bad acts or previous convictions of a defendant during a trial for a separate matter. Rule 404(b) was adopted to safeguard defendants from the inherent prejudice that bad acts and bad character could trigger. At the same time, Rule 404(b) provided some avenues for admitting such evidence as long as it was for a proper purpose not implicating criminal propensity, and as long as the prejudice did not overwhelm the evidence's probative value. The operation of Rule 404(b) is a source of concern because it often enables the government to present highly prejudicial evidence of other criminal conduct by defendants which can distract from the main issues and facts in the case.

The federal circuit courts are in conflict regarding how to properly apply Rule 404(b). The Third Circuit requires a strong connection between the evidence to be introduced and a proper 404(b) purpose that permits its admission, all in the context of the material issues of the trial. This application of Rule 404(b) is a substantive analysis, and it requires the proponent of the evidence to establish a real non-propensity purpose. In contrast, the Eleventh Circuit takes more of a theoretical approach to Rule 404(b). The Eleventh Circuit allows admission of the evidence even if there is a weak connection between the evidence and its stated 404(b) purpose within the context of the material issues of the trial.

Accordingly, the Question Presented is:

How are the courts to properly apply Fed. R. Evid. 404(b)? Should they apply the Third Circuit's more substantive approach which requires a close connection between the 404(b) evidence and the material issues in the case, as explained in *United States v. Caldwell*, 760 F.3d 267 (3d Cir. 2014)? Alternatively, should the courts apply the Eleventh Circuit's more theoretical approach which requires a lower connection between the 404(b) evidence and the material issues in the case as demonstrated in the case at bar?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

RELATED PROCEEDINGS

United States District Court (S.D. Fla.):

United States v. Tamara Jeune, No. 18-20684-Cr-Scola
(November 19, 2019)

United States Court of Appeals (11th Cir.):

United States v. Tamara Jeune, No. 19-13018 & 19-14890
(August 23, 2021)

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PETITION FOR WRIT OF CERTIORARI

Tamara Jeune respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case numbers 19-13018 & 19-14890 in that court on August 23, 2021, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida, is contained in the Appendix (A-1).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on August 23, 2021. This petition is timely filed pursuant to SUP. CT. R. 13.1. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely on the following provisions:

Fed. R. Evid. 404(b)

(b) Other Crimes, Wrongs, or Acts.

(1) Prohibited Uses. Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) Permitted Uses. 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.

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Fed. R. Rule 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.

STATEMENT OF THE CASE

The petitioner, Tamara Jeune (“Ms. Jeune”) was convicted of conspiracy to defraud the government, filing false tax returns, and assisting in the preparation of false tax returns in violation of 18 U.S.C. §§ 286, 287, and 26 U.S.C. §7206. The timeframe of the conspiracy and the other tax fraud violations in the instant action was 2011-2016. The government’s theory was that Ms. Jeune was the central figure in those crimes through an entity called Investment Equity Development (“IED”). The government’s case consisted of testimony by tax-payers, IRS agents, a probation officer, and Ms. Jeune’s estranged ex-husband. The government also relied on documents consisting of tax returns; bank records, records from the State of Florida, receipts and evidence of a prior tax fraud conviction that occurred in 2004-2005, for which Ms. Jeune sustained a conviction in 2009.

The problem with the evidence (as stated by the government in its own words) was that while “there [was] overwhelming evidence of fraud in this case,” “what [was] not overwhelming in this case [was] evidence that this defendant [Jeune] was the one who did it.” *United States v. Jeune*, 2021 WL 3716406, *24 (11th Cir. 2021) (Martin, J., dissenting) (unpublished) (citing to statements made by the government in a motion in limine to the district court below).

Before trial, the government filed a motion in limine pursuant to Fed. R. Evid. 404(b) to admit extensive evidence concerning a prior tax fraud conviction that Ms. Jeune sustained in 2009. In its motion, the government argued that the prior tax

fraud conviction was relevant to intent under Fed. R. Evid. 404(b). It further proposed that the evidence of the prior conviction should include the judgment of conviction as well as the underlying facts of the case as shown in the plea and sentencing hearings through transcripts and additional witnesses.

Ms. Jeune opposed the motion, arguing that the 2009 conviction which was for conduct back in 2004-2005 was separate and/or attenuated from and not intertwined with or relevant to the instant case. Specifically, with respect to 404(b), Ms. Jeune argued that the 2009 conviction crossed into illegal propensity evidence which would unfairly prejudice and confuse the jury. She also argued that the unfair prejudice and jury confusion of the evidence outweighed its probative value.

After a hearing, and subsequently after hearing evidence at the trial, the district court admitted the evidence of Ms. Jeune's prior 2009 tax fraud conviction under Fed. R. Evid. 404(b). The district court permitted the government to introduce this evidence through two witnesses, and allowed them to discuss the underlying facts of the 2009 case in detail through their testimony. In fact, the court allowed the government witnesses to read line-by-line from the plea and sentencing transcripts of the 2009 conviction.

Having secured permission to use this evidence, the government made Ms. Jeune's prior 2009 tax fraud conviction the centerpiece of its case. Not only that, but the government threw caution to the wind at trial, when it abandoned any attempt to link the 2009 conviction to proper limited 404(b) purposes which allegedly justified

its admission. The government, instead, proceeded at trial on a straight propensity theory. In fact, the government set out its propensity theory at the very beginning of its case, opening with the 2009 conviction, not the facts pertaining to the current charges. The government stated:

[AUSA] Thank you, Your Honor. May it please the Court. This case is about how this defendant stole people's identities and then stole hundreds of thousands of dollars from the government. In February of 2009, this defendant stood in a courtroom just like this courtroom, and she stood in front of a Judge, just like this Judge, and she admitted, under oath, that she had prepared false tax returns. She admitted that she falsified documents, that she falsified tax returns, and that she lied to the government. And she did it in order to line her own pockets with taxpayer money. This case, the reason why we are here today is a continuation of what the defendant admitted back then because one thing is going to be very clear, ladies and gentlemen, this defendant did not stop stealing taxpayer money. . . . When she came out of prison, she went back to what she knew best,

*Jeune, 2021 WL 3716406, *20.*

Moreover, the government continued to hammer this theme throughout its opening statement. *Id.* And it continued its propensity theme through its two witnesses who discussed the prior conviction and the underlying facts of that previous case. One of these witnesses went line-by-line through the partially redacted plea and sentencing transcripts of the case, as well as through each page of the 2009 judgment. *Id.* at *21. The second witness commented further on Ms. Jeune's 2009 conviction. *Id.* Finally, the government emphasized in closing the same theme. It argued explicitly that the 2009 conviction could be used to prove Ms. Jeune's propensity to commit tax fraud, and that it could convict her on that basis in the

instant case. *Jeune*, 2021 WL 3716406, *20-*21 (Martin, J., dissenting).

Notwithstanding this great effort, the government was not able to sustain half of its charges against Ms. Jeune, as the district court dismissed five of the ten counts of the indictment in response to defense motions for judgments of acquittal pursuant to Fed. R. Crim. P. 29.

Ms. Jeune also presented a defense. She identified evidence that showed that she did not commit tax fraud in the instant case, but that other people did. She showed that fraud existed, even in her absence, as she was incapacitated for approximately nine months while she was incarcerated. She also presented evidence that taxpayers who tried to blame her for fraud actually received the tax refunds in full. Ms. Jeune also took the unusual step of calling the case agent as a witness to establish that his investigation was biased and incomplete, and that it focused solely on her because she had a criminal conviction, and thus, was an easy target for prosecution.

After Ms. Jeune presented her defense, she rested and renewed her Rule 29 motions for the outstanding charges that remained. The district court denied Ms. Jeune's motion, and thus, five counts of tax fraud went to the jury.

As noted above, the government concluded its case in much the same way it began. The government explicitly argued that after Ms. Jeune was released from prison for the 2009 conviction, she went "right back to her fraud factory, her tax preparation business." *Id.* at *21. The government also argued that Ms. Jeune had

conspired with her sister Dorothy in the instant case because she had admitted to a conspiracy with Dorothy at her plea in the 2009 case. *Id.* at *21.

Ultimately, the jury convicted Ms. Jeune of the remaining tax fraud counts in this case. Ms. Jeune was subsequently sentenced to 180 months imprisonment, and Ms. Jeune timely appealed.

On appeal, Ms. Jeune challenged the government's use of the 2009 tax fraud conviction as propensity evidence. She argued that the evidence concerning her 2009 tax fraud conviction was not connected to any proper purpose, and that the extensive presentation of the underling facts of the 2009 case was unduly prejudicial. She argued that the government used the 2009 conviction as propensity evidence which is prohibited. She further argued that the marginal probative value of the 2009 conviction was substantially outweighed by its undue prejudice. And she further argued that the government's propensity case prejudiced her trial and resulted in her wrongful conviction in the instant case.

With respect to the 404(b) issue, the Eleventh Circuit panel was unanimous in finding that the government was brazen in its violation of Rule 404(b). Thus, it censured the government for its conduct, stating:

But the government's four references to Jeune's having gone "back" to committing tax fraud were simply impermissible under Rule 404(b). For example, in its opening, the government urged, "When she came out of prison, she went back to what she knew best, committing more tax fraud but this time it was different."

This is a clear propensity argument – which, by its express terms, Rule 404(b) does not allow. The government must do better. As the Supreme Court explained nearly a century ago, “The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.” *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935). For this reason, the Court has cautioned that the prosecutor “is in a peculiar and very definite sense the servant of the law He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.” Thus, the court has opined, “It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.”

Jeune, 2021 WL 3716406, *10.

Notwithstanding its disapproval of the government’s tactics, the Eleventh Circuit determined that the admission of the 404(b) evidence was proper because it could have been relevant to issues of intent, identity, knowledge, and absence of mistake. *Id.* at *7. It further held that the evidence’s probative value was not substantially outweighed by any undue prejudicial effect, and that the evidence “otherwise satisfied Federal Rule of Evidence 403.” *Id.* at *8. The Eleventh Circuit came to this conclusion by separating out the theoretical 404(b) uses of Ms. Jeune’s prior tax fraud conviction from the actual way the evidence was used at trial. It isolated the 404(b) analysis from the 404(b) evidence that was used from the beginning of the opening statements to the end of the closing arguments. *See Jeune*, 2021 WL 3716406, *6-*8 (finding proper 404(b) purposes of intent, identity,

knowledge, and absence of mistake and no undue prejudice for Ms. Jeune’s previous tax fraud conviction without reference to the government’s use of the prior conviction for propensity); *cf., id.* at *10 (censuring the government for urging the jury on several occasions to use Ms. Jeune’s prior 2009 tax fraud conviction as evidence of her propensity to commit tax fraud in the instant case without reference to the 404(b) standards and limitations). By parsing out the different aspects of the error and analyzing them separate from each other, the Eleventh Circuit was able to simultaneously find no 404(b) error while at the same time acknowledging blatant 404(b) abuse and error warranting censure.

The panel’s 404(b) resolution was not unanimous, and it drew a dissent which stated:

The government began the presentation of its 2019 tax fraud case against Tamara Jeune by telling the jury that, after she was convicted of committing a different tax fraud in 2009, she “came out of prison [and] went back to what she knew best.” It then closed its presentation by telling the jury that, after her 2009 fraud conviction, Ms. Jeune went “right back to her fraud factory.” Even in isolation, these statements constitute improper propensity evidence. Yet in Ms. Jeune’s prosecution, these statements were mere bookends for her trial, which was filled with improper propensity-based and prejudicial evidence and statements concerning her earlier crime.

* * *

Jeune, 2021 WL 3716406, *20.

The dissent then detailed the government’s explicit propensity prosecution through its opening statements, its two propensity witnesses, and its final statements to the jury in closing arguments. Based on the record, the dissent found that

evidence of Ms. Jeune's prior tax fraud conviction was prejudicial 404(b) error warranting reversal. *Id.* at *21.

In parsing-up the 404(b) error and affirming the admission and use of the 404(b) evidence in a vacuum from the context of the trial, the Eleventh Circuit has put itself in conflict with the Third Circuit, *United States v. Caldwell*, 760 F.3d 267 (3d Cir. 2014), which requires a substantive analysis of the 404(b) issues in context with the material issues of the trial. The outcome of Ms. Jeune's case demonstrates the failings of the Eleventh Circuit's theoretical 404(b) analysis. Under the Third Circuit's substantive 404(b) analysis, Ms. Jeune's conviction would have been reversed. Ms. Jeune requests this Court to grant her petition for writ of certiorari to resolve the circuit conflict, and she further requests this court to grant her relief by reversing the Eleventh Circuit's decision in her case.

REASON FOR GRANTING THE WRIT

An Important Circuit Conflict Must Be Resolved for the Proper and Uniform Application of Fed. R. Evid. 404(b) to Maintain the Integrity of Rule 404(b) and of trials that involve 404(b) Evidence.

Petitioner seeks review of how Fed. R. Evid. 404(b) was applied in her case. She requests that this Court review the approaches used by the circuits for the admission of Rule 404(b) evidence, and that it clarify the proper approach for the lower courts. Petitioner submits that the analysis used by the Third Circuit as explained in *United States v. Caldwell*, 760 F.3d 267 (3d Cir. 2014) is the proper approach to balance the competing interests embodied in Rule 404(b), to prevent the abuse of Rule 404(b), and to maximize fairness in trials.

In 2019, Ms. Jeune was convicted of conspiracy to defraud the government, filing false tax returns, and assisting in the preparation of false tax returns in violation of 18 U.S.C. §§ 286, 287, and 26 U.S.C. §7206. Petitioner's instant tax fraud case was based on circumstantial evidence, a case where there was obvious tax fraud involved, but there was not much evidence that petitioner was the one who did it. *Jeune*, 2021 WL 3716406, *24. Citing to Fed. R. Evid. 404(b), the government secured permission to use a prior tax fraud conviction sustained by the defendant in 2009. Although the government cited to 404(b) non-propensity purposes, those purposes, in reality, had little or no connection to the use of the 2009 conviction in the context of the current case. At the trial, the government abandoned all pretexts

of using the 2009 conviction for anything but criminal propensity. This trial strategy of pervasive propensity evidence was effective to prejudice the jury, and the Eleventh Circuit affirmed the result through its theoretical 404(b) analysis which relies on a listing of 404(b) purposes without substantive consideration of whether the government actually used the 404(b) evidence for such non-propensity purposes at trial.

Fed. R. Evid. 404(b) states as follows:

Fed. R. Evid. 404(b)

(b) Other Crimes, Wrongs, or Acts.

(1) Prohibited Uses. Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) Permitted Uses. 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.

Rule 404(b) was adopted to protect defendants from the very real prejudice that existed with respect to character evidence. As the Advisory Committee's Note to Rule 404(a) explained:

Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened.

Fed. R. Evid. 404(a) Advisory Comm. Note. This Court has also recognized:

The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so over persuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge,. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of the issues, unfair surprise and undue prejudice.

Michelson v. United States, 335 U.S. 469, 475-76 (1948); *see also Caldwell*, 760 F.3d 267 (3d Cir. 2014) (“Rule [404(b)] reflects the revered and longstanding policy that, under our system of justice, an accused is tried for *what* he did, not *who* he is.”).

In light of these policies, the Third Circuit maintains that the provisions of “404(b) must be applied with careful precision.” *Caldwell*, 760 F.3d at 274. It views Rule 404 as a rule of exclusion which carries “no presumption of admissibility.” *Id.* at 276 (cleaned up). Thus, it treats (b)(2) as an exception to the rule of exclusion, and the proponent of the evidence is required to bear the burden “of demonstrating its applicability.” *Id.* at 276.

The Third Circuit uses a four-prong test which prohibits 404(b) evidence as *inadmissible* unless the evidence was: “(1) offered for a proper non-propensity purpose that was at issue in the case; (2) relevant to that identified purpose; and (3) sufficiently probative under Rule 403 such that its probative value was not outweighed by any inherent danger of unfair prejudice.” *Id.* at 278. The fourth

requirement was that a limiting instruction needed to be given if a party requested it. *Id.*

With respect to prong one of the Third Circuit’s 404(b) test, the court required a proponent to identify a proper purpose, and that purpose had to be “at issue” or “relevant” to the case. *Id.* at 276. Thus, the purpose had to be considered in connection with the material issues in the case. *Id.* The court stressed that, “a proponent’s incantation of the proper uses of [prior act] evidence . . . does not magically transform inadmissible evidence into admissible evidence.” *Id.*

With respect to prong two, the Third Circuit required the proponent and the trial court to explain how the evidence is relevant to a non-propensity purpose. *Id.* “The task is not merely ‘to find a pigeonhole in which the proof might fit,’ but to actually demonstrate that the evidence ‘prove[s] something other than propensity.’” *Id.*, citing Mueller, *Federal Evidence* §4:28 at 731. The government and the district court are required to “explain how [the evidence] fits into a chain of inferences – a chain that connects the evidence to a proper purpose, no link of which is a forbidden propensity inference.” *Id.* If the chain of inferences is not met, the evidence must be excluded or it is reversible error. *Id.*

For the third step, the court must also find that the evidence is sufficiently probative, “such that its probative value is not outweighed by the inherently prejudicial nature of prior bad act evidence.” *Id.* at 277. “This balancing requires great care on the part of the district court, “because few categories of evidence bring

greater risk of prejudice to the accused under Rule 403.” *Id.* at 277, citing Mueller, *Federal Evidence* §4:28 at 731.

For the fourth step, the court must give a limiting instruction if the defendant requests one. *Id.*

In the *Caldwell* case, the Third Circuit reviewed and reversed the defendant’s felon-in-possession conviction in violation of 18 U.S.C. §922(g)(1). The defendant had a prior §922(g) conviction which the Third Circuit determined had been improperly admitted under Fed. R. Evid. 404(b). The district court had admitted the defendant’s prior conviction under Rule 404(b) based on the theory that it was relevant to the non-propensity purpose of a knowing *mens rea*. The Third Circuit found otherwise. *Caldwell*, 760 F.3d at 278. Indeed, the Third Circuit found that the evidence did not pass muster on any of the prongs of its 404(b) test. *Id.* at 281, 283.

First, although recognizing that a claim of innocence at trial could put knowledge at issue, the Third Circuit found that those issues had to be truly material at trial. The Third Circuit disagreed that a general denial of guilt automatically opened the door to admissibility of prior convictions of the same crime on the issue of intent or knowledge. *Id.* at 281. It found that, “Such a holding would eviscerate Rule 404(b)’s protection and completely swallow the general rule against admission of prior bad acts.” *Id.* Rather, the Third Circuit looked at the theories and evidence at trial, and noted that the government’s prosecution based on actual possession of a

firearm did not raise the issue of knowledge. Either the defendant actually possessed the firearm or he did not. If actual possession was proven, than a knowing mens rea was presumed. If actual possession was not proven, than knowledge and intent were irrelevant. Therefore, there was no legitimate need for the prior 922(g) conviction to assist the jury on the issue of a knowing mens rea in the current case. *Id.* at 279.

Second, the Third Circuit found that the government and the court failed to explain how the evidence fit into a chain of inferences that did not contain a link or inference relating to propensity. *Id.* at 282. Neither the district court nor the government gave a reason to explain how the defendant's prior possession of a gun suggested he possessed a gun in the current offense. And the Third Circuit could think of no reason except for propensity. *Id.* Based on the record, it appeared that the district court was in error because once it concluded that knowledge was at issue (based on a general denial of guilt), it was "content to allow any evidence offered for that purpose." *Id.* at 283. Thus, the Third Circuit found error because admission of the evidence was based on "precisely the propensity based inferential logic that rule 404(b) forbid." *Id.* at 282.

As to grounds three, the Third Circuit also found that the probative value of the evidence which was claimed to bear on knowledge, was outweighed by undue prejudice under Fed. R. Evid. 403. *Id.* at 283. As noted above, the issue of a knowing mens rea was not a material issue in Caldwell's case. The case was based

on actual possession. Since possession, and not a knowing mens rea, was the contested material issue, 404(b) evidence to prove knowledge was of marginal probative value. *Id.* at 283-84. In contrast, the 404(b) evidence of the same prior conviction had much prejudicial effect. Since prejudice outweighed the marginal probative value, its admission was in error under prong three as well. *Id.*

In contrast to *Caldwell*, the Eleventh Circuit uses a more theoretical approach for determining the admissibility of 404(b) evidence. To begin, the Eleventh Circuit's 404(b) test, variously stated, has the following elements: (1) the evidence must be relevant to an issue other than character; (2) the prior act must be proven sufficiently so the jury can determine that the defendant did the prior act; and (3) the probative value of the evidence cannot be outweighed by its undue prejudice under Fed. R. Evid. 403. *Jeune*, 2021 WL 3716406, *6 (11th Cir. 2021), *citing United States v. Nerev*, 877 F.3d 956, 974 (11th Cir. 2017); *Id.* at *21 (Martin, J., dissenting), *citing United States v. Eckhardt*, 466 F.3d 938, 946 (11th Cir. 2006).

Because the Eleventh Circuit's test allows for more theoretical than real adherence to 404(b), it is in conflict with the Third Circuit's "real purpose" test. And application of the Eleventh Circuit's test is fully demonstrated in petitioner's case.

For the first prong, the government was able to quote familiar non-propensity purposes listed in Rule 404(b) such as motive, intent, preparation, and absence of mistake. *Id.* at *7. On appeal, the Eleventh Circuit adopted these as 404(b) purposes. *Id.* However, these 404(b) purposes were not material because Ms.

Jeune did not dispute that fraud existed. Nor did she dispute the methods or patterns of fraud. Rather she argued that she did not participate in the fraud during the current case, during 2011-2016. And she established that the same patterns of fraud existed in her absence, even when she was incapacitated for nearly a year. Thus, like the 404(b) evidence in *Caldwell*, the 404(b) evidence of Ms. Jeune's prior tax fraud conviction was not material to the issues in her case. Ms. Jeune either participated in the fraud during 2011-2016 or she did not. Her prior tax fraud conviction which reached back to 2004-2005 could not provide relevance to her motive, intent, preparation or absence of mistake, in the current case based on the 2011-2016 timeframe. Regardless, under the current Eleventh Circuit test, the listing of possible 404(b) purposes was sufficient, even if those purposes were not demonstrably material to the issues in the current case.

The Eleventh Circuit set out its reasons for its approval of the government's listed 404(b) purposes. However, unlike the requirements of the Third Circuit, the Eleventh Circuit's rationale did not demonstrate a chain of inferences that was free from propensity evidence. As explained by the Eleventh Circuit in petitioner's case, intent was an a 404(b) purpose because "Jeune entered a not guilty plea, [and thus] intent was [automatically] a material issue." *Jeune*, 2021 WL 3716406 at *7 (internal quotation marks omitted). Under the Third Circuit test, however, this reasoning does not hold up. *Caldwell*, 760 F.3d at 281 (finding that general denial of guilt was not sufficient basis for admissibility of 404(b) evidence based on

knowledge or intent because such a rule would “eviscerate Rule 404(b)’s protection and completely swallow the general rule against admission of prior bad acts.”). Beyond intent, the Eleventh Circuit listed identity, knowledge, and absence of mistake, as 404(b) purposes based on the similarity between Ms. Jeune’s prior conviction and the charges brought in the current case. But again, Ms. Jeune did not contest that fraud existed, and she did not contest that fraudulent patterns similar to her 2004-2005 case existed. Rather she established that although those patterns existed during 2004-2005, they continued to exist even while she was incapacitated and incarcerated for nine months in jail. The fact that the fraud continued in the same manner and means, even in her absence, showed that the similarities of the 2009 conviction and the current charges did not raise a legitimate 404(b) purpose of identity, knowledge, or absence of mistake in the current prosecution. Because evidence of her prior 2009 conviction did not shed light on the Eleventh Circuit’s proposed 404(b) purposes, its probative value was very low, and its undue prejudice was very high. Moreover, since the government did not have a true 404(b) purpose, it used the evidence for what it could, which was criminal propensity. Since the Eleventh Circuit’s stated 404(b) purposes were of marginal probative value vis-à-vis the actual issues in the case, the only other value the evidence contained besides propensity was that of undue prejudice.

Indeed, in order for the Eleventh Circuit’s stated 404(b) purposes to make sense, the Eleventh Circuit majority opinion had to separate the context of the trial

and the government’s actual use of the 404(b) evidence at trial, from its theoretical analysis of what 404(b) purposes could potentially apply. *Id.* at *7. The Eleventh Circuit’s rationale amounted to “find[ing] a pigeonhole in which the proof might fit,” without actually demonstrating that the evidence “prove[d] something other than propensity.” *Caldwell*, 760 F.3d at 276 (citations omitted).

The most egregious lapse in the Eleventh Circuit’s 404(b) analysis is that it completely excised the government’s explicit, actual, intentional, unapologetic, and repeated use of the evidence for pure propensity reasons during trial. The Eleventh Circuit was aware of the prosecution’s brazen emphasis on propensity, and even took the time to censure the government for its actions. However, it separated its censure language concerning the government’s abuse of Rule 404(b) from the question of whether the 404(b) evidence was proper or unduly prejudicial. It acknowledged that the government’s presentation was “simply impermissible under Rule 404(b),” and a “clear propensity argument – which, by its express terms, Rule 404(b) does not allow.” The court then chided the government that it, “must do better,” and it reminded the government that its “interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.” *Jeune* at *10.

But in spite of its laudatory language and expressed indignation, the Eleventh Circuit did not factor this trial context and actual use into its Rule 404(b) equation.

The disconnect between the Eleventh Circuit's sanitized analysis of Rule 404(b) and the actual context of the trial drew a powerful dissent which stated:

I begin by setting out the specific government misconduct that fuels my dissent. Among the very first words the jury heard from the government in its opening statement were the following:

In February of 2009, this defendant stood in a courtroom just like this courtroom, and she stood in front of a Judge, just like this Judge, and she admitted, under oath, that she had prepared false tax returns.... [T]he reason why we are here today is a continuation of what the defendant admitted back then because one thing is going to be very clear, ladies and gentlemen, this defendant did not stop stealing taxpayer money.... When she came out of prison, she went back to what she knew best, committing more tax fraud....

Minutes later, the government repeated its propensity-based assertion that “[a]fter [Ms. Jeune] went to prison, she went back to doing the same thing.” And then again, the government told the jury that after her 2009 conviction, Ms. Jeune “went back to what she knew best.”

The government introduced Ms. Jeune’s 2009 conviction through Andrew Schmit, the former IRS agent who investigated Jeune’s conduct underlying that conviction. The government did not limit Mr. Schmit’s testimony to only Ms. Jeune’s 2009 conviction and facts relevant to her “motive, opportunity, intent, preparation,” etc. related to the 2019 case. Rather, the government painstakingly took Mr. Schmit through the details of Ms. Jeune’s 2009 case. Mr. Schmit’s testimony went almost line-by-line through partly redacted transcripts of Ms. Jeune’s previous plea hearing and sentencing.

These actions by the government exposed the jury to irrelevant and prejudicial facts regarding Ms. Jeune’s 2009 conviction. Although the District Court’s ruling on this topic allowed the government to tell the jury about Ms. Jeune’s conviction for one count of tax fraud, the government read to the jury from the plea hearing transcript that she was originally charged with 30 counts of tax fraud. Then from the 2009 sentencing transcript, the government quoted Ms. Jeune’s “pray[er]” for

“favor and mercy” from the court. And the government told the jury that Ms. Jeune’s sentence for her 2009 conviction was 18 months.

The government closed its case largely the same way it opened. The government told the jury that after Ms. Jeune was released from prison for the 2009 conviction, she went “right back to her fraud factory, her tax preparation business.” The government also argued Ms. Jeune conspired with her sister to commit tax fraud in this case because Jeune “admitted she had conspired with [her sister] to commit tax preparation fraud in 2009,” “which led to that conviction.”

Jeune, 2021 WL 3716406 at *20-21 (Martin, J., dissenting).

Taken in context, it was clear that the evidence of Ms. Jeune’s prior tax fraud conviction was used for pure propensity purposes. The government framed and built its case on propensity evidence, repeatedly emphasizing the propensity theme at every opportunity through both argument and evidence at trial. Moreover, there was no overwhelming evidence of guilt in this case. The absence of overwhelming evidence was clear from the district court’s dismissal during Rule 29 motions of half of the charges that the government originally brought. And the absence of overwhelming evidence was further established by the government’s own admissions when it told the district court in its original 404(b) motion that while “there is overwhelming evidence of fraud in this case,” “what is not overwhelming in this case is evidence that this defendant was the one who did it.” *Id.* at *24. In Ms. Jeune’s case, the error is clear, the prejudice is clear, there is no doubt that the government’s tactics substantially affected the jury’s verdict. This was an all-out propensity

prosecution, a fundamental abuse of Rule 404(b), which not only harmed the petitioner, but also impaired the integrity and the fairness of the judicial proceedings.

This Court should stop the abuse of Rule 404(b), and make clear that the Third Circuit's substantive "real purpose" 404(b) analysis governs. Accordingly, Ms. Jeune requests that this Court grant the petition for writ of certiorari.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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