

No. ____

IN THE SUPREME COURT OF THE UNITED STATES

JOSE DREW,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Federal Rule of Evidence 404(b) subsection 1 prohibits the use of evidence of any other crime, wrong, or act to prove a person's character in order to show that on particular occasion the person acted in accordance with the character. Subsection 2 allows for the admission of this evidence for another purpose such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

The question presented is:

Whether the abuse of discretion review of the introduction of multiple prior convictions as rule 404(b) evidence requires the government to offer some articulable inference for the jury to draw to a material element of the charged offense.

PARTIES TO THE PROCEEDINGS

The caption contains the names of all the parties to the proceedings.

RELATED PROCEEDINGS

None.

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IN THE SUPREME COURT OF THE UNITED STATES

_____ TERM, 20____

Jose Drew – Petitioner

vs.

United States of America – Respondent

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

PETITION FOR WRIT OF CERTIORARI

The petitioner, Jose Drew, through counsel, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in case No. 20-2596, entered on August 16, 2021. Mr. Drew filed a petition for rehearing en banc and/or rehearing by the panel. The Eighth Circuit of Appeals denied the petition on September 20, 2021.

OPINION BELOW

On August 16, 2021 a panel of the Court of Appeals entered its ruling affirming the judgment of the United States District Court for the Western District

of Missouri. The decision is published and available at *United States v. Drew*, 9 F.4th 718.

JURISDICTION

The Court of Appeals entered its judgment on August 16, 2021. Jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fed. R. Crim. P. 51(b).

Fed. R. Evid. 404(b):

Admissions under 404(b) are reviewed for abuse of discretion.

U.S. Const. amend. V.:

No person shall . . . be deprived of life liberty, or property, without due process of law.

STATEMENT OF THE CASE

On November 15, 2018, a Grand Jury sitting in the United States District Court for the Western District of Missouri charged Jose Drew and codefendant Maurice Jefferson by superseding indictment with being a felon in possession of a firearm in violation of Title 18, United States Code, Sections 922(g)(1), and 924(a)(2) and (2). (DCD 23)¹

The investigation and prosecution of Jose Drew for being a felon in possession of a firearm involved use a paid informant (DeAnthony Smith) who was instructed to attempt to purchase a firearm from Maurice Jefferson who was the original target of the investigation. When Smith arrived, he found Jefferson and Drew in a parked car. Drew was seated in the passenger seat of the vehicle. Smith saw a gun on the center console between Drew and Jefferson. Smith said that the gun stayed on the center console for the majority of the failed sale but eventually, Drew held it in his hand.

At trial the jury only needed to decide if Drew knowingly possessed a gun. Smith testified that he observed Drew with the gun in his hand. An expert witness for the government testified that Drew's DNA was consistent with the DNA recovered from the firearm but that she could not say how his DNA came to be on the gun.

Part of the government's evidence, and the primary focus of Mr. Drew's appeal and this Petition, was the introduction 404(b) evidence over the objection of

¹ In this Petition, "DCD" refers to the criminal docket in the Western District of Missouri Case No. 4:18-cr-00203.

Mr. Drew. The 404(b) evidence consisted of six prior firearm related felony convictions incurred by Drew. Prior to the introduction of the prior convictions the district court provided the jury with a limiting instruction.

After submission of the case to the jury, Mr. Drew a guilty verdict was returned. This appeal followed. On appeal, Drew argued that the introduction of the five additional felony convictions turns what may have originally been permissible intent or knowledge evidence under 404(b) into impermissible propensity evidence.

At oral argument, the government described the probative value of the use of multiple prior convictions as “having done it two or three or four times is clearly more probative than one time.” The panel indicated in its decision that it was unable to determine from the record what made the introduction of the five subsequent convictions more probative than the introduction of the first. Further, the panel acknowledged that the government’s explanation could be consistent with that of improper propensity reasoning.

Nevertheless, the panel affirmed the district court finding there was no abuse of discretion in the introduction of all six prior convictions. Mr. Drew filed a petition for rehearing en banc and/or by the panel. He argued that the circuit erred in that it’s holding conflicts with authoritative decisions of the Eighth Circuit and other circuits. The Eighth Circuit denied the petition for rehearing en banc and/or by the panel on September 20, 2021.

REASON FOR GRANTING THE WRIT

Certiorari should be granted because the Eighth Circuit's decision conflicts with authoritative decisions of other circuits. Here, the Eighth Circuit acknowledges that "[n]othing in the record tells us what made the five other convictions more probative than the first." Further the government seemed to acknowledge the propensity reasoning when at oral argument it suggested that the probative value for the additional convictions as "having done it two or three or four times is clearly more probative than one time." This is propensity reasoning. However, relying on the district court's limiting instruction, the panel found that the fourth 404(b) prong (weighing unfair prejudice) fails.

The panel's holding conflicts with other circuits. The Seventh Circuit has held that it is not enough for the Government to merely identify a valid non-propensity purpose under Fed. R. Evid. 404(b) rather the government must also show that the evidence is relevant to that purpose. *United States v. Brown*, 765 F.3d 278, 292 (7th Cir. 2014). In order to do so the government "must clearly articulate how that evidence fits into a chain of logical inferences, no link of which can be the inference that because the defendant committed [the proffered prior offense], he therefore is more likely to have committed [the charged offense]." *Id.* at 292-293.

Similarly the First and Fourth Circuits have held that to establish that the evidence the government seeks to offer is relevant, it must offer "some articulable inference for the jury to draw" from the previous conduct to a material element of

the changed offense. *United States v. Hall*, 858 F.3d 254, 266, (4th Cir. 2017) (quoting *United States v. Lynn*, 856 F.2d 430, 436 (1st Cir. 1988)).

The Eleventh Circuit, in reversing the district court's admission of 12 prior convictions, found that after the government's introduction of four previous convictions, the remaining 7 convictions became cumulative propensity evidence. (*United States v. Roberts*, 735 Fed. Appx. 649, 653 (11th Cir. 2018) ("the balance tips against admissibility where five of the remaining convictions are concerned.") Additionally, the introduction of prior conviction evidence is particularly difficult for juries not to draw propensity conclusions despite limiting instructions. *Id.*

Here, the panel's decision did not require the government to articulate how Drew's multiple prior convictions fits into a chain of logical inferences, no link being propensity, he therefore is more likely to have committed the charged offense. In fact the only articulation provided by the government was [presumably Drew] "having done it two or three or four times is clearly more probative than one time." Not only is this a failure to articulate a proper purpose for admission of the prior convictions, it is confirmation that it is solely propensity evidence. Further, the introduction of this highly and unfairly prejudicial evidence was not cured by the limiting instruction.

CONCLUSION

For the foregoing reasons, Mr. Drew respectfully requests that the Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,

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