

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MEAMEN JEAN NYAH,

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 A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether Federal Rule of Evidence 404(b) should be construed, contrary to its purpose and history, as a rule of inclusion resulting in certain admissibility of prior bad acts and use of propensity evidence to convict in firearms cases.

RELATED PROCEEDINGS

- I. *United States v. Meamen Jean Nyah*, S.D. Iowa No. 4:19-CR-221; Judgment entered February 16, 2021.
- II. *United States v. Meamen Jean Nyah*, Eighth Circuit Court of Appeals No. 21-1490; Judgment entered May 27, 2022.
- III. *United States v. Meamen Jean Nyah*, Eighth Circuit Court of Appeals No. 21-1490; Petition for Further Rehearing Denied June 30, 2022.

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OPINIONS BELOW

On May 27, 2022, the Eighth Circuit affirmed the district court for the Southern District of Iowa’s evidentiary rulings under Fed. R. Evid. 404(b). *United States v. Nyah*, 35 F.4th 1100 (8th Cir. 2022). App. 10.¹ The petition for further review was denied. *Untied States v. Nyah*, 8th Cir. No. 21-1490 (June 30, 2022). App. 23.

JURISDICTION

Jurisdiction of the district court was pursuant to 18 U.S.C. §3231. Jurisdiction of the Eighth Circuit was pursuant to 28 U.S.C. §1291. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

¹ “App.____” refers to the attached appendix.

STATUTORY PROVISIONS

18 U.S.C. §3231

The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.

28 U.S.C. §1254(1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree[.]

28 U.S.C. §1291

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

Fed. R. Evid. 404

(a) Character Evidence.

(1) ***Prohibited Uses.*** Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

(2) ***Exceptions for a Defendant or Victim in a Criminal Case.*** The following exceptions apply in a criminal case:

(A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it.

(B) subject to the limitations in rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:

- (i) offer evidence to rebut it; and
- (ii) offer evidence of the defendant's same trait; and

(C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut the allegation that the victim was the first aggressor.

(3) ***Exceptions for a Witness.*** Evidence of a witness's character may be admitted under Rules 607, 608 and 609.

(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 the character.

(2) ***Permitted Uses; Notice in a Criminal Case.*** 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. On request by a defendant in a criminal case, the prosecutor must:

- (A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and
- (B) do so before trial – or during trial, if the court, for good cause, excuses lack of pretrial notice.

STATEMENT OF THE CASE

1. Procedural History.

Nyah was charged by indictment on December 18, 2019, with one count of being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). The charge arose from Nyah's arrest on December 7, 2019, when he was a passenger in a vehicle driven by William Carr.²

Officer Anderson testified, and his dash-cam footage confirmed, that he first spotted the vehicle, a Dodge Charger, around 2:30 a.m. on 22nd Street in Clive, Iowa. (Tr. Mot. to Suppress (MTS) 8:17-22³). At the time he saw this Dodge Charger, Anderson was returning to the Clive Police Department to end his shift. (Id. at 8:8-16). Anderson testified that he observed the vehicle traveling at excessive speed on 22nd Street and clocked it at 53 or 50 miles per hour using his radar. (Id. at 8:21-22, 9:10-15). However, no traffic violations were visible on Anderson's dash camera. (MTS Ex. K⁴ at 00:00-01:18). Additionally, Anderson did not make any statements to dispatch about the vehicle prior to initiating the stop or record the alleged radar readout. (Id. at 00:00-01:18; Tr. MTS 31:7-13). When Anderson decided to stop the vehicle, he only informed dispatch that it was a rental vehicle and it was fleeing from

² William Carr was separately charged with being a prohibited possessor of a firearm in violation of 18 U.S.C. §§ 922(g)(3) and 924(a)(2). (Judgment, United States v. William Carr, 4:20-CR-00033-001, SD Iowa Feb. 19, 2020).

³ Transcript citations use pp:ll-ll for citations appearing on one page, multiple lines, and pp:ll-pp:ll for citations appearing across multiple pages.

⁴ Exhibit K is the full dash-cam footage from the December 7, 2019 incident, and was submitted by the Defense electronically at the hearing on motion to suppress. (Tr. MTS 51:6-20). The government admitted Ex. 1, which was a shortened version of the same footage.

him. (MTS Ex. K at 01:25-02:00). This disclosure fell short of department policy for traffic stops. (DCD 74-4, MTS Ex. D at 2 (“When a location has been selected for the stop, the officer shall notify the communications center of its nature providing unit location, a description of the vehicle, vehicle license number and the number of occupants.”)). Anderson first reported the vehicle was speeding orally for the first time on December 9, 2019, two days after he shot Nyah. (MTS Ex. N at 11:21-24).⁵ He first claimed that the vehicle was speeding in a written report on December 23, 2019. (MTS Tr. 29:21-30:22; MTS Ex. J). Carr was never issued a ticket for speeding. (Tr. MTS at 26:8-10).

The Dodge Charger was traveling the speed limit when Anderson activated his emergency lights to initiate a traffic stop; however, after a few seconds the vehicle took off at a high rate of speed. (Tr. MTS at 12:2-5; MTS Ex. K at 01:25- 02:00). Carr ultimately crashed the Dodge Charger near the end of the 42nd Street exit ramp. (MTS Ex. K at 02:20-02:40). Carr ran away from the vehicle and across the grass on the other side of the exit ramp. (*Id.*). As Anderson approached the vehicle, Nyah was visible on the dash cam exiting the front passenger side of the Dodge Charger before he too ran into the residential neighborhood. (*Id.* at 02:40). Anderson parked his car and chased Nyah, the passenger, rather than Carr, the driver. After chasing Nyah a short distance, Anderson made the decision to seize Nyah by deploying his taser. (MTS Ex. N at 23:3-16). During the December 9, 2019 interview with Detective

⁵ Exhibit N, a transcript of Anderson’s interview on December 9, 2019, was submitted to the court electronically following the hearing on motion to suppress. (Tr. MTS 51:6-20).

Youngblood, a union representative, and an attorney representing Anderson regarding this use of force, Anderson's only justification for using the taser was to catch Nyah. (*Id.* at 17:22-24). He never indicated what crime he thought Nyah had committed when he began chasing him, nor is any crime by Nyah visible on the dashboard camera. Only after Anderson used the taser to seize Nyah did a gun become visible on the ground near him. (*Id.* at 25:3-14). At this point, Anderson used lethal force in response to the perceived threat of a gun. (*Id.* at 26:10-13).

In short, Nyah was a passenger without control in a car that eluded a police officer. Nyah was not the one who made the decision to engage in a car chase at high speeds, nor was he the one who crashed the car. Yet, when a young black man emerged from the car and fearfully ran away, Anderson decided to chase and seize him with a taser absent any concrete or particularized evidence that he had committed a crime.

Prior to trial, the government provided notice that it was going to use various photos of Nyah holding firearms and smoking alleged marijuana as exhibits during its case in chief. (See DCD 99-2; 99-3). Nyah moved in limine to exclude these exhibits from evidence under Rule 404(b) and/or 403, or, in the alternative, to limit the number of photos used. (DCD 101). The motion was denied (DCD 120). The government admitted the disputed exhibits at trial. (DCD 131, describing Gov't Exhibits 37 and 38).

The jury returned a guilty verdict and judgment was entered. This sentence was imposed consecutive to a supervised release revocation sentence of 12 months in

United States v. Nyah, 16-cr-180 (S.D. Iowa Feb. 16, 2021 at DCD 298). On March 2, 2021, Nyah filed his notice of appeal. (DCD 163). The Eighth Circuit affirmed. Nyah sought en banc rehearing. App. 11a The Eighth Circuit denied the rehearing. App. 20a. This Petition for Writ of Certiorari followed.

2. Facts Regarding the Admissibility of Prior Photographs.

During trial, the government successfully introduced nine photos of Nyah holding firearms that were obtained from a music video he shot, as well as his social media account. (R. Doc. 99-2, 99-3 and 131 (describing Gov't Exhibits 37 and 38)). The photos obtained from the music video were created in January of 2016, and the social media photos were all posted between December 2015 and May 2016. These photos pre-dated Nyah's underlying felony conviction, in fact, they were the basis for his prior felony conviction. See, e.g. *United States v. Nyah*, 928 F.3d 694, 697 (8th Cir. 2019) (describing the photos at issue in Nyah's controlled substance user in possession of a firearm case). The photos were from a time four to five years prior to the offense conduct at issue, when Nyah was not a felon. Moreover, the photos were inflammatory. They depicted Nyah with other young, Black, tattooed men, smoking marijuana and singing rap music. The goal was to make Nyah appear to be a gangster, and these photos accomplished that purpose.

Nyah moved in limine to exclude these photos pursuant to Rule 404(b) and/or 403, or, in the alternative, to limit the number of photos used. (DCD 101). The motion was denied.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

A United States Court of Appeals has entered a decision conflicting with decisions of other United States Courts of Appeals and several State Courts of Last Resort.

The Eighth Circuit treats Rule 404(b) as a rule of inclusion. *See, e.g. United States v. Turner*, 583 F.2d 1062, 1065 (8th Cir. 2009) (*quoting United States v. Benitez*, 531 F.3d 711, 716 (8th Cir. 2008)). In practice, similar prior convictions are always admissible against defendants who take their case to trial in the Eighth Circuit. The Fifth and Eleventh Circuits join the Eighth Circuit’s position in this circuit split, admitting prior bad acts evidence that can be connected to an “admissible purpose” for using such evidence under Rule 404(b) without regard to whether that use depends on propensity evidence. *See United States v. Butler*, 102 F.3d 1191 (11th Cir. 1997); *United States v. Gadison*, 8 F.3d 186 (5th Cir. 1993).

By contrast, the Third and Seventh Circuits have construed Rule 404(b) as a rule of exclusion. In *United States v. Caldwell*, the Third Circuit stated: “On this point, let us be clear: ‘Rule 404(b) is a rule of general exclusion, and carries with it ‘no presumption of admissibility.’” 760 F.3d 267, 276 (3d Cir. 2014) (*citing* 1 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 4:28 at 731 (4th ed. 2013)). The Seventh Circuit similarly rejected a rule of admission in clear terms:

Rule 404(b) does not provide a rule of automatic admission whenever bad acts evidence can plausibly be linked to “another purpose,” such as knowledge or intent, listed in the rule. . . . [T]he ‘list of exceptions in Rule 404(b), if applied mechanically, would overwhelm the central principle. Almost any bad act evidence simultaneously condemns by besmirching character and by showing one or more of “motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident,” not to mention the “other purposes” of which this list is meant to be illustrative.

United States v. Miller, 673 F.3d 688, 696-97 (7th Cir. 2012) (citation omitted). The Sixth Circuit does not appear to have made as clear a statement as the Third and Seventh Circuits, but it is obvious from the Sixth Circuit’s careful parsing of Rule 404(b) it considers the rule one of exclusion, rather than inclusion. *See, e.g. United States v. Haywood*, 280 F.3d 715 (6th Cir. 2002) (evidence of prior drug possession not admissible to prove intent to distribute on an unrelated incident, rejecting Eighth Circuit analysis). Finally, at least nine States also explicitly characterize Rule 404(b) (or their own versions of the prior bad acts rule) as a rule of exclusion.⁶

The circuit split has led the Rules of Evidence Advisory Committee to consider amending the Rule, recognizing how the Rule has been diluted outside of the Third and Seventh Circuits:

Developments in the application of Rule 404(b). . . . [T]here have been important case law developments in applying the rule in the last five

⁶ *State v. Mosley*, 223 So.3d 158, 169 (La. Ct. App. 2017) (describing Rule 404(b) as a “rule of exclusion”); *Frye v. State*, 185 So. 3d 1156, 1162 (Ala. Crim. App. 2015) (discussing history of prior bad acts rule as a “general exclusionary rule”); *People v. Villatoro*, 281 P.3d 390, 415 (Cal. 2012) (“In enacting [California’s version of Rule 404(b)], the Legislature codified a rule of evidentiary exclusion at least three centuries old in the common law.” (emphasis added)); *State v. Merida*, 960 A.2d 228, 232 n.8 (R.I. 2008) (“It should at all times be remembered, however, that Rule 404(b) is fundamentally a rule of exclusion.”) ; *Jackson v. Commonwealth.*, No. 2003-SC-000777-MR, 2005 WL 2045482, at *3 (Ky. Aug. 25, 2005) (“This court has long interpreted KRE 404(b) and the preceding rules governing other crimes evidence as exclusionary in nature.¹⁰ This construction is justified by the danger of prejudice to the defendant inherent in evidence of other crimes.”); *State v. Sullivan*, 679 N.W.2d 19, 24 (Iowa 2004) (“[U]nless the prosecutor can articulate a valid, noncharacter theory of admissibility for admission of the bad-acts evidence, such evidence should not be admitted.”); *Conyers v. State*, 693 A.2d 781, 793 (Md. Ct. App. 1997) (discussing “presumptive rule of exclusion”); *State v. Lerchenstein*, 726 P.2d 546, 549-50 (Alaska 1986) (Mem.) (courts should begin with assumption that the evidence should be excluded); *Commonwealth v. Bohannon*, 378 N.E. 987, 991 (Mass. 1978) (discussing “general rule” against admission of prior bad acts evidence).

years. This case law development, described below, is essentially to assure that Rule 404(b) arguments are closely scrutinized so that the rule is not used as a device to admit evidence offered for propensity. The fact that some courts – mainly the Seventh and Third Circuits – are taking a fresh look at the scope and meaning of Rule 404(b) raises questions about whether the rule can and should be amended to accommodate these new developments. It also raises questions about what, if anything, should be done about the conflict between the circuits that are looking more closely at Rule 404(b) and those who are still taking the traditional approach.

Advisory Cmte. on R. of Evid., Fall 2016 Meeting Agenda 69 (Oct. 21, 2016), <https://www.uscourts.gov/sites/default/files/2016-10-evidence-agenda-book.pdf> (last accessed Apr. 9, 2020). The Committee recognized the Third and Seventh Circuit interpretations as “probably the most important evidentiary developments in the last ten years – to one of the most important rules of evidence.” *Id.* at 69.

While the Committee has not pursued any changes to Rule 404(b), textual changes are not necessary to implement the Third and Seventh Circuit’s interpretation; rather, clearer caselaw is needed. This circuit split requires this Court to resolve this important dispute.

1. The Eighth Circuit is on the Wrong Side of the Split

The Eighth Circuit’s interpretation of Rule 404(b) as a rule of inclusion inverts the history and purpose of the rule.

Common law has long recognized a defendant should not be convicted on his character or lack thereof. In 1948, the Supreme Court stated:

Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant’s evil character to establish a probability of guilt. Not that the law invests the defendant with a presumption of good character, *Greer v. United States*, 245 U.S. 559, 38 S.Ct. 209, 62 L.Ed. 469, but it simply closes the whole matter of character, disposition, and reputation on the

prosecution's case-in-chief. The State may not show the defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such evidence might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is relevant; on the contrary, it is said to weigh too much with the jury and to over persuade them as to prejudge one with a bad general record and deny him 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.

Michelson v. United States, 335 U.S. 469, 475-76 (1948) (footnotes omitted).

The policy of *excluding* character evidence from use by the prosecution was the basis for adopting Rule 404. Yet, since the Rule's adoption, the Committee has noted the Rule is frequently cited by prosecutors to *justify the admission* of prior bad acts evidence:

Rule 404(b) has emerged as one of the most cited Rules in the Rules of Evidence. And in many cases evidence of an accused's extrinsic acts is viewed as an important asset in the prosecution's case against the accused. . . . [T]he overwhelming number of cases involve introduction of that evidence by the prosecution.

Fed. R. Evid. 404, Advisory Cmte. Notes (1991).

The admission of prior criminal convictions is particularly damaging to a defendant's case. The Tenth Circuit notes the "obvious truth that once prior convictions are introduced the trial is, for all practical purposes, completed and the guilty outcome follows as a mere formality." *United States v. Burkhardt*, 458 F.2d 201, 204 (10th Cir. 1972); *see also State v. Saunders*, 12 P. 441, 445 (Or. 1886) *overruled in part on other grounds in State v. Marsh*, 490 P.2d 491, (allowing "prosecution to show . . . that he has before been implicated in similar affairs, no matter what explanation of them he attempts to make, it will be more damaging evidence against

him, and conduce more to his conviction, than direct evidence of his guilt in the particular case. Every lawyer who has had any particular experience in criminal trials knows this.”). Empirical studies confirm the anecdotal evidence of trial lawyers and judges. See Edward J. Imwinkelried, *The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition*, 51 Ohio St. L.J. 575, 581–82 (1990); Harry Kalven, Jr. & Hans Ziesel, *The American Jury* 389-96 (2d ed. 1971) (discussing further empirical studies). A growing chorus of academic voices have authored their opinions on the broken system that allows prior bad acts evidence under the guise that juries can “understand” it and that it is used for a nonpropensity purpose.⁷

If the Rule is meant to protect defendants’ from undue prejudice and require the prosecution to prove guilt based on the facts of a particular case rather than the defendant’s character, a “mechanical” or per se rule admitting character evidence

⁷ See, e.g. Paul S. Milich, *The Degrading Character Rule in American Criminal Trials*, 47 Ga. L. Rev. 775 (2013); Jeffrey Bellin, *Circumventing Congress: How the Federal Courts Opened the Door to Impeaching Criminal Defendants with Prior Convictions*, 42 U.C. Davis L. Rev. 289 (2008); David A. Sonenshein, *The Misuse of Rule 404(b) on the Issue of Intent in the Federal Courts*, 45 Creighton L. Rev. 215 (2011); Thomas J. Reed, *Admitting the Accused's Criminal History: The Trouble with Rule 404(b)*, 78 Temp. L. Rev. 201 (2005); Miguel A. Mendez, *Character Evidence Reconsidered: “People Do Not Seem To Be Predictable Characters,”* 49 Hastings L.J. 871 (1998); Andrew J. Morris, *Federal Rule of Evidence 404(b): The Fictitious Ban on Character Reasoning from Other Crime Evidence*, 17 Rev. Litig. 181 (1998); David P. Leonard, *In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial by Character*, 73 Ind. L.J. 1161 (1998); Imwinkelried, 51 Ohio St. L.J. 575; Abraham P. Ordoover, *Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b) and 609(a)*, 38 Emory L.J. 135 (1989); Richard B. Kuhns, *The Propensity To Misunderstand the Character of Specific Acts Evidence*, 66 Iowa L. Rev. 777 (1981).

anytime the defendant opts for trial defies its very purpose. Although the Eighth Circuit set out a four-part test to determine whether prior bad acts evidence is admissible under Rule 404(b), *see, Turner*, 583 F.2d at 1066, the practical result of treating the Rule as one of inclusion is that every defendant in the Eighth Circuit who exercises their trial right will have their prior bad acts admitted against them as a matter of course. In fact, every Eighth Circuit defendant to appeal their conviction following the admission of prior bad acts evidence from 2018 to 2021 lost their appeal.⁸

⁸ *See Monds*, 945 F.3d at 1053 (prior controlled substances convictions admissible where defendant made general denial at trial); *United States v. Patino*, 912 F.3d 473, 476 (8th Cir. 2019) (conviction from 1998 for same crime was admissible to prove knowledge where defendant made general denial at trial, concerning conduct in 2014 and 2015); *United States v. Escobar*, 909 F.3d 228, 242 (8th Cir. 2018) (defendant made a general denial, ten year old drug trafficking convictions were admissible); *United States v. Thundershield*, 744 Fed. Appx. 312, 318-19 (8th Cir. 2018) (prior unrelated and dissimilar assault conviction was admitted in murder/assault case); *United States v. Adkins*, 723 Fed. Appx. 388, 389 (8th Cir. 2018) (mem) (summary affirmation of district court); *United States v. Valerio*, 731 Fed. Appx. 551, 553 (8th Cir. 2018) (personal use defense, prior convictions entered to prove intent to distribute); *United States v. Brown*, 727 Fed. Appx. 902, 906-07 (8th Cir. 2018) (defendant plead general denial in possession of firearm case, prior conviction for misuse of a firearm deemed admissible); *United States v. Buckner*, 868 F.3d 684, 689-90 (8th Cir. 2018) (defendant raised mere presence defense in felon in possession of a firearm case, 12 year old conviction for reckless discharge of firearm resulting in injury case deemed admissible); *United States v. Shelledy*, 961 F.3d 1014, 1021-22 (8th Cir. 2020) (Prior conviction for possession of pseudoephedrine with intent and possession of methamphetamine admissible to prove knowledge and intent to perform drug conspiracy); *United States v. Washington*, 810 F. App'x 478, 481 (8th Cir. 2020) (Prior domestic assault was used to prove knowledge and intent to coerce his victim into prostitution.); *United States v. Welch*, 951 F.3d 901, 906-07 (8th Cir. 2020) (Prior evidence of synthetic marijuana a month after the illegal firearm was found was used to show motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident for an illegal gun possession.); *United States v. Robertson*, 948 F.3d 912, 918 (8th Cir. 2020); (Prosecution's question of marijuana debt was admitted for his assault with a dangerous weapon, assault with serious

The Rule holds true even in the face of a “general denial” defense – since at least 2006, the Eighth Circuit has followed a nearly per se rule that prior drug convictions are admissible in drug cases as a matter of course. *See, e.g. United States v. Johnson*, 439 F.3d 947, 952 (8th Cir. 2006). As a practical matter, it begs credulity to conclude Rule 404 – which *twice* states character evidence is not admissible to prove action in conformity therewith – can *never* be construed to exclude prior bad acts. Under the Eighth Circuit’s approach, every defendants’ prior convictions are admissible at trial, completely undermining the Rule’s purpose.

2. The Third, Sixth and Seventh Circuits’ Method is Correct

The Third, Sixth, and Seventh Circuits’ application of Rule 404(b) correctly allows the government to use prior crimes in its case in chief when the crime can be linked to an “admissible purpose” of the Rule *without* utilizing a “propensity inference” to create the link.

First, these Circuits correctly accept the starting point that Rule 404(b) is a rule of *exclusion*, not inclusion. By clarifying that the prosecution should not be able to use character evidence in most case, the Third, Sixth, and Seventh Circuits hold the prosecution to its burden as the proponent of character evidence to demonstrate

bodily injury, and discharge of a firearm in the commission of a crime of violence.); *United States v. Drew*, 9 F.4th 718, 722-24 (8th Cir. 2021) (Six prior felonies admissible for unlawful possessed of a firearm.); *United States v. Oliver*, 987 F.3d 794, 803-04 (8th Cir. 2021) (Possession of firearms admitted showing how defendant conduct drug distribution activities); *United States v. Smith*, 4 F.4th 679, 684-85 (8th Cir. 2021) (possessed guns and trafficked synthetic marijuana admissible for conspiracy to distribute methamphetamine) Sex abuse cases were excluded from this list because separate rules of evidence (Rules 413 through 415) also govern those cases.

why that evidence should be admitted, rather than talismanically quoting the rule.

Second, this approach avoids convictions based on propensity evidence. In *Caldwell*, the Third Circuit rejected the Government’s argument that the defendant’s prior unlawful possession of a firearm logically proved his knowledge or intent to possess a firearm in the present case. 760 F.3d at 276-77. Instead of “find[ing] a pigeonhole in which the proof might fit,” the Government was 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.* at 276-77. Officers testified they saw the defendant in a vehicle with a firearm, and the defendant disputed the officers’ testimony. *Id.* at 278-79. Thus, while knowledge and intent were technically in issue (as they are elements to a conviction under 18 U.S.C. § 922(g)(1)), the real issue in the case was whether the defendant possessed the gun. *Id.* at 278-79. There is no chain of inferences connecting the prior extrinsic unlawful possession of a firearm to the present possession of a different firearm without relying on propensity – the Government asked the court to conclude because the defendant illegally possessed a firearm on a prior date, he did so on a later date. Excluding the prior bad act under these circumstances clearly comports with the Rule in *Michelson* that a defendant should be convicted based on the facts of a particular case, rather than his character.

Third, this approach prohibits an application of a per se rule of admissibility wherever defendants go to trial. In *Miller*, the Seventh Circuit held the government to its burden to prove a non-propensity purpose for admitting a prior conviction for

dealing crack cocaine in a crack cocaine case:

Confusion and misuse of Rule 404(b) can be avoided by asking the prosecution exactly how the proffered evidence should work in the mind of a juror to establish the fact the government claims to be trying to prove. Here, Miller claimed that the drugs found in the shoe box and on the bed were not his, that he was in effect an innocent bystander. Witnesses told the jury about Miller's arrest and conviction for dealing drugs in 2000. The government defends use of that evidence on the ground that it showed his intent to distribute drugs in 2008. How, exactly, does Miller's prior drug dealing conviction in 2000 suggest that he intended to deal drugs in 2008? When the question is framed this way, the answer becomes obvious, even though implicit: "He intended to do it before, ladies and gentlemen, so he must have intended to do it again." That is precisely the forbidden propensity inference.

673 F.3d at 698. Put another way, the prior distribution conviction would not have aided the jury in determining whether the drugs were defendant's other than by propensity evidence, because the 2000 conviction does not show defendant's possession of drugs in 2008.

3. Nyah was Prejudiced by the Circuit Split

The photos of Nyah surrounded by alcohol, drugs, and holding a firearm acted to unfairly prejudice the jury. Nyah had already stipulated to being a felon and knowing he was a felon. The photos served only to prejudice the jury against a young Black man.

If Nyah had been tried in a district located in the Third, Sixth, or Seventh Circuits, the photos of Nyah holding a gun years before the actions which led to his present conviction would not have been admissible. The photos were only relevant because they demonstrated a propensity for firearms: "Look, members of the jury, he held firearms in 2015, therefore he held them in this case." Under a proper interpretation of the Rule 404(b), true to its purpose and holding the Government to

the proper standard, the photos would have been excluded.

Haywood demonstrates how prior evidence of possession of an illegal object is only relevant to the extent it relates to a defendant's propensity to commit unlawful acts. 280 F.3d 715. Like the defendant in *Haywood*, Nyah previously possessed an object that was illegal for him to possess. *Id.* at 720-21. Like in *Haywood*, the jury could, but was not required to find, that Nyah knowingly and intentionally possessed the illegal object based on the circumstantial evidence surrounding the events. *Id.* at 722.

For both *Haywood* and Nyah, the prior possession of an illegal object does nothing to clarify the later possession *unless one relies on propensity*. *Id.* Nyah's possession of a firearm in 2014 or 2015 does not tell the jury what he is doing with a firearm several years later. It does not explain where that firearm came from, or why or how or even if it was carried. The old firearm only becomes relevant if one assumes that, because Nyah has unlawfully possessed a firearm in the past, he unlawfully possessed a firearm again.

Further, for both *Haywood* and Nyah, the evidence was incredibly prejudicial. Jurors are predisposed to believe that someone who has once committed a bad act is more likely to do so again. *Supra* fn. 7. In Nyah's case in particular, the photos were selected to make him appear more frightening. Nyah was pictured with other young, tattooed Black men, in aggressive poses, pointing firearms and smoking blunts. Nyah was portrayed as a gangster stereotype – the kind of person that the jurors would not want roaming their streets. The government did not need to base its case on Nyah's

character. It should not have been permitted to do so.

CONCLUSION

The fairness of a trial and the right to be tried on the strength of the government's case, rather than the strength of one's past character, should not change circuit to circuit. In this case, the circuit split resulted in a conviction being affirmed where it otherwise would have been reversed. The Petition for Writ of Certiorari should be granted.