

NO: 23-5332

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 2023

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TAMARA JEUNE,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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

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REPLY BRIEF OF THE PETITIONER

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## REPLY BRIEF OF THE PETITIONER

The government's Response to the Petition for Writ of Certiorari casts the Federal Rule Evidence 404(b) error in Ms. Jeune's case as harmless, factual, and not properly preserved. (Brief for United States in Opposition to Petition for Writ of Certiorari at pp. 14-22) (hereinafter "Gov't Opposition"). However, those characterizations are not accurate. It is undisputed that the court below admitted improper FRE 404(b) evidence at trial, and it is also undisputed that the government explicitly argued on multiple occasions that such evidence could be used for propensity purposes and used as evidence of guilt at trial. *United States v. Jeune*, 2021 WL 3716406, \*10 (11<sup>th</sup> Cir. 2021); *Id.* at \*20 (Martin, J., dissenting). The government's repetitive injection of improper 404(b) evidence and its explicit use for propensity purposes was a "drumbeat . . . [that] infected Ms. Jeune's entire trial." *Jeune*, 2021 WL at \*23 (Martin, J., dissenting). This skewing of the trial from the beginning to the end cannot in any sense be categorized as harmless without a complete disintegration of the functioning and purpose of FRE 404(b).

Moreover, these issues are not factual matters of dispute; they are issues of law. It is the legal standard that gave rise to such a bold abuse of FRE 404(b) – not the underlying facts of the case. The facts of petitioner's case merely showed the logical results of the Eleventh Circuit's defective FRE 404(b) standards.

The Eleventh Circuit's admissibility standard for FRE 404(b) evidence fails to provide a close nexus between the government's proffered 404(b) purpose and the actual material issues at trial or the government's actual use of the evidence at trial.

Thus, the Eleventh Circuit’s approach permits the government to list 404(b) purposes from the text of the rule without having to establish that those reasons are at issue in the case and without having to follow-through by actually using the evidence for the proffered purposes at trial. *See Jeune*, 2021 WL at \*10 (acknowledging the government’s propensity arguments to the jury). The Eleventh Circuit’s approach, therefore, reduces FRE 404(b) to a rule that seeks to find “a pigeonhole in which the proof might fit.” *See id.*; *United States v. Caldwell*, 760 F.3d 267, 276 (3d Cir. 2014).

Additionally, the Eleventh Circuit’s approach is at odds with the Third Circuit’s 404(b) standards as established in *United States v. Caldwell*, which requires a strong nexus between the government’s proffered 404(b) purpose and the use of the 404(b) evidence at trial. 760 F.3d at 276-77. *Caldwell* requires that the 404(b) evidence be relevant to a proper purpose that is at issue in the case; that the government prove a chain of inferences that does not have any propensity-based link; and that weak chains of inferences be given low probative value. *Id.*

The government attempts to harmonize *Caldwell* and the Eleventh Circuit’s approach to avoid the circuit split that exists concerning FRE 404(b) standards. (Gov’t Opposition at p. 15). However, its arguments are not well founded.

There are two critical steps that focus *Caldwell’s* inquiry on a tight nexus between the 404(b) evidence and the 404(b) purpose. The government argues that the first step of identifying a proper 404(b) purpose is the same step in the Third and Eleventh circuits. However, a substantial difference exists between the Eleventh Circuit’s test which requires a mere identification of a 404(b) purpose versus the

Third Circuit which requires identification of a proper 404(b) purpose that is related to a material disputed issue in the case. *Compare United States v. Delgado*, 56 F.3d 1357, 1365 (11<sup>th</sup> Cir. 1995) and *United States v. Edouard*, 485 F.3d 1324, 1345 (11<sup>th</sup> Cir. 2007) with *Caldwell*, 760 F.3d at 276. This difference is clear because the Eleventh Circuit presumes that 404(b) evidence addresses a disputed material issue whenever a defendant maintains a plea of not guilty and insists on going to trial. *Delgado*, 56 F.3d at 1365 and *Edouard*, 485 F.3d at 1345. Since FRE 404(b) issues are only relevant when a case goes to trial – as such issues will be waived in a plea – the Eleventh Circuit’s test means that the first step is automatically fulfilled whenever a case goes to trial. The Third Circuit’s test does not embrace this automatic result. Instead, it requires a substantive review of the trial issues in relation to the government’s stated 404(b) purposes. *Caldwell*, 760 F.3d at 276. Thus, the Third Circuit’s test requires a strong nexus between the FRE 404(b) evidence and the 404(b) purpose that has been identified.

Had petitioner’s case been decided in the Third Circuit, the 404(b) inquiry would not have proceeded beyond the first step. Ms. Jeune’s defense was that other people filed fraudulent tax returns during the time period of this case, but that she did not file any such tax returns. Her defense did not depend on whether she had some sort of innocent intent or filed false returns through a mistake, nor did her defense depend on whether she did or did not have knowledge of other people’s fraudulent activities. Rather, Ms. Jeune simply argued that she was not the perpetrator in the filing of any fraudulent tax returns at all. And she proved

through objective evidence that many of the fraudulent returns could not have been filed by her because she was incarcerated at the time those returns were filed. Thus, evidence of Ms. Jeune’s previous tax fraud case did not bear on any material issue of knowledge or intent that was relevant in her case. Neither did the 404(b) evidence implicate a *modus operandi* purpose because the evidence did not establish unique methods for committing the tax fraud. The only purpose that the 404(b) evidence served was to indicate that Ms. Jeune had a propensity for tax fraud. And in fact, propensity was what the government argued to the jury as the purpose for this evidence. The Third Circuit’s test would have short-circuited this blatant abuse of FRE 404(b), but the Eleventh Circuit’s test did not.

Relatedly, the government completely ignored the second step in the Third Circuit’s test which required the government to prove a chain of inferences between the 404(b) evidence and its proper 404(b) purpose. The Third Circuit requires that the chain of inferences be free from a propensity “link.” *Caldwell*, 760 F.3d at 277. If there is a propensity link, the Third Circuit would deny admission of the 404(b) evidence. *Id.* There is nothing remotely comparable in the Eleventh Circuit’s FRE 404(b) test. The failure of the Eleventh Circuit to have such a step illuminates the circuit split that exists in FRE 404(b) standards. The government’s failure to address this significant difference belies its arguments that the circuits are in harmony. Had there been such a component in the Eleventh Circuit’s FRE 404(b) analysis, the 404(b) errors would have been fatal at that point. Not only did the government fail to establish a propensity-free chain of inferences, but it made the

propensity link explicit and central to its case. *Jeune*, 2021 at \*10; *id.* at \*20 (Martin, J., dissenting).

There is a fundamental difference underlying the Third Circuit’s and the Eleventh Circuit’s different FRE 404(b) tests. The underlying issue is that the Third Circuit views FRE 404(b) as a rule of exclusion, while the Eleventh Circuit views FRE 404(b) as a rule of inclusion. The government attempts to obscure this difference by arguing that the Third Circuit finds FRE 404(b) to be inclusive, but that argument is a misconstruction of the Third Circuit’s precedent. (Gov’t Opposition at p. 20). The Third Circuit stated in *United States v. Repak*, that non-propensity FRE 404(b) purposes were not limited to those enumerated in the text of Rule 404(b). 852 F.3d 230, 241 (3d Cir. 2017). In that sense, the Third Circuit deemed FRE 404(b) to be “inclusive.” *Id.* However, that “inclusive” sense of FRE 404(b) was never at issue in Ms. Jeune’s case. The government never argued that a proper unenumerated non-propensity purpose was a basis for admission of the 404(b) evidence.

At issue here, was *Repak*’s exclusionary sense of FRE 404(b). Under *Repak*, FRE 404(b) “excludes evidence unless the proponent [government] can demonstrate its admissibility. . . .” 852 F.3d at 241; *See also Caldwell*, 760 F.3d at 276 (“On this point, let us be clear: Rule 404(b) is a rule of general exclusion, and carries with it “no presumption of admissibility.”). As noted above, the government’s failure to demonstrate the admissibility of the 404(b) evidence under the Third Circuit’s first two steps of its analysis required exclusion of the evidence at Ms. Jeune’s trial. Moreover, the government’s exacerbation of the error by explicitly emphasizing the

propensity purpose and urging the jury to convict on a propensity basis was a further blatant abuse of FRE 404(b). Due to the Eleventh Circuit’s lax FRE 404(b) test, a textbook violation of FRE 404(b) occurred and caused fundamental unfairness and prejudice in the trial. This Court should grant the petition for writ of certiorari and correct the Eleventh Circuit’s defective FRE 404(b) test. It should adopt the Third Circuit’s test as set out in *Caldwell* to protect the integrity of FRE 404(b) and the fairness of trials.

The government also argues that Ms. Jeune’s case is not a good vehicle for review because the issues were not properly preserved. However, the government is incorrect on this point as well. Petitioner did properly preserve the issue below by contesting the 404(b) errors through pretrial motions, renewing those motions at trial, and raising her 404(b) challenges on appeal. *United States v. Jeune*, 11<sup>th</sup> Cir. No. 19-14890 (DE 22:17-18, 49-55<sup>1</sup> (initial brief); DE 25-4: 249-250 (defendant’s appendix)). Although *Caldwell* was not cited at that stage, an argument to change the Eleventh Circuit’s FRE 404(b) standards was foreclosed by circuit precedent. In any event, Ms. Jeune pressed the *Caldwell* standard in the appeal of her Amended Judgment and in a Petition for Rehearing of the Amended Judgment. *United States v. Jeune*, 11<sup>th</sup> Cir. No. 21-14420 (DE 13 (initial brief); DE 14 (defendant’s appendix); DE 33 (petition for rehearing)). Pursuant to this Court’s precedent, *United States v. Williams*, 504 U.S. 36, 41 (1992), an issue may be considered by this Court when the

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<sup>1</sup> Page numbers cited are the page numbers assigned by the Eleventh Circuit’s PACER electronic filing system.

petitioner “pressed” the issue below, even if the issue was not ruled upon by the lower court. As noted in the *Williams* case, an issue is proper for review on a petition for writ of certiorari when it was “pressed or passed upon below.” This Court in *Williams* further noted that the “rule operates (as it is phrased) in the disjunctive.” Thus in *Williams*, review was permitted when an issue had not been pressed by the parties but had been passed upon by the lower court. Because the rule is disjunctive, the reverse is also true: an issue is appropriate for cert review if it was pressed by the party, even if the lower court failed to rule upon it. Accordingly, the government’s argument that Ms. Jeune’s case is not a good vehicle for review should be rejected by this Court. Instead, this Court should find that the government’s clear and blatant abuse of FRE 404(b), as well as the clear circuit split on the FRE 404(b) standards make Ms. Jeune’s case an excellent vehicle for review. This Court should grant the petition for writ of certiorari.

Respectfully submitted,

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