No. ____

IN THE

Supreme Court of the United States

MATTHEW PEDDICORD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Federal Rule of Evidence 404(b) governs the admissibility of prior bad acts. Rule 404(b)(1) prohibits the use of so-called propensity evidence: "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." Rule 404(b)(2) then permits the use of such evidence "for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." In this case, the Eleventh Circuit upheld the admission of Petitioner's 23-year old prior armed-robbery-with-a-firearm conviction in his felon-in-possession trial. Applying longstanding circuit precedent, the Eleventh Circuit reasoned that Petitioner's knowing possession of a firearm in the past made it more likely that he knowingly possessed a firearm in the present case.

The question presented is:

Whether evidence of prior bad acts is admissible under Rule 404(b) where its relevance to a proper purpose depends on propensity reasoning.

RELATED PROCEEDINGS

The following proceedings are related under this Court's Rule 14.1(b)(iii):

- *United States v. Peddicord*, No. 22-13882 (11th Cir. May 30, 2024);
- *United States v. Peddicord*, No. 22-cr-20208 (S.D. Fla. Nov. 15, 2022).

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Petitioner Matthew Peddicord respectfully seeks a writ of certiorari to review a judgment issued by the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's opinion is reported at 2024 WL 2764818 and reproduced as Appendix ("App.") A, 1a–10a. The district court did not issue a written opinion.

JURISDICTION

The Eleventh Circuit issued its decision on May 30, 2024. Justice Thomas granted Petitioner's application to extend the time to file this certiorari petition until September 27, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

LEGAL PROVISION INVOLVED

Federal Rule of Evidence 404 provides, in its entirety:

(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 evidence 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) 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.

(3) Notice in a Criminal Case. In a criminal case, the prosecutor must:

(A) provide reasonable notice of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it;

(B) articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and

(C) do so in writing before trial—or in any form during trial if the court, for good cause, excuses lack of pretrial notice.

INTRODUCTION

The question presented is perhaps the most important and recurring question in the law of criminal evidence. As the single most cited and contested Federal Rule of Evidence, Rule 404(b) governs the admissibility of character evidence based on prior bad acts. On the one hand, the Rule codifies the common-law prohibition on propensity evidence. This prohibition safeguards the presumption of innocence and the principle that a defendant is on trial for what he has done, not for who he is. On the other hand, the Rule also permits the use of prior bad acts for another purpose, such as knowledge or intent. Here's the dilemma: prior bad acts are routinely relevant to one of these proper purposes, but only through the use of propensity reasoning.

Does that render the evidence inadmissible? This question has mystified lower courts and scholars since Rule 404(b)'s inception. As explained below, the courts of appeals are deeply divided and fractured on the correct answer to that question. As a result, geography alone now determines whether, for example, prior firearm and drug convictions are admissible in federal firearm and drug prosecutions. This disparity is untenable. The question arises with enormous frequency, as the number of reported appellate cases reflect. And the question has enormous practical importance, as the admissibility of prior bad acts is a game-changer—both when it comes to the prosecution's ability to prove its case and the risk of unfair prejudice to defendants.

Surprisingly, this Court has never addressed this question. This case provides an ideal opportunity to do so. The Court should therefore grant review. And it should forbid the use of propensity reasoning to establish relevance for a proper purpose.

STATEMENT

A. Legal Background

1. Federal Rules of Evidence "401 and 402 establish the broad principle that relevant evidence—evidence that makes the existence of any fact at issue more or less probable—is admissible unless the Rules provide otherwise. Rule 403 allows the trial judge to exclude relevant evidence if, among other things, its probative value is substantially outweighed by the danger of unfair prejudice. Rules 404 through 412 address specific types of evidence that have generated problems." *Huddleston v. United States*, 485 U.S. 681, 687 (1988) (quotation marks omitted).

Rule 404(b) deals with evidence of "other crimes, wrongs, or acts." In the criminal context, this covers a defendant's prior bad acts that are extrinsic (not intrinsic) to the charged offense. The text of Rule 404(b) contains three subsections.

First, Rule 404(b)(1) sets out the "prohibited uses" of such evidence: "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." In other words, that a person has the *propensity* to act in a certain way.

Second, Rule 404(b)(2) sets out "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." As explained below, the question presented here concerns the interaction between these proper purposes and Rule 404(b)(1)'s prohibition on propensity—specifically, is

evidence admissible under Rule 404(b) where its relevance to a proper purpose, such as knowledge or intent, is established only through the use of propensity reasoning?

Third, Rule 404(b)(3) requires the prosecution in a criminal case to provide the defendant with written notice of any evidence that it intends to admit at trial. In addition to identifying the evidence itself, the prosecution must also "articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose." Fed. R. Evid. 404(b)(3)(B).

2. There is little dispute about the general, analytical framework governing the admissibility of Rule 404(b) evidence. It has a few distinct components.

As a "threshold inquiry," and at issue here, the evidence must be "offered for a proper purpose." *Huddleston*, 485 U.S. at 686, 691. If the evidence is not relevant to a proper purpose, then it is inadmissible. As a general matter, "[t]here is . . . no question that propensity would be an 'improper basis' for conviction." *Old Chief v. United States*, 519 U.S. 172, 182 (1997). Second, and not at issue here, the prior bad acts must be proven by "sufficient evidence to support a finding by the jury that the defendant committed" them. *Huddleston*, 485 U.S. at 684. Third, if the first two prongs are satisfied, then the trial court must apply Rule 403 and "determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice." *Id*. at 691. Finally, and to mitigate any prejudice, "the trial court shall, upon request, instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted." *Id*. at 691–92.

B. Proceedings Below

1. A federal grand jury returned an indictment charging Petitioner with being a felon who knowingly possessed a firearm, in violation of 18 U.S.C. § 922(g)(1).

Before trial, the government gave notice that, under Federal Rule of Evidence 404(b), it sought to admit a state armed robbery conviction from 23 years earlier. Dist. Ct. ECF No. 32. Because Petitioner had used a firearm to commit that armed robbery, the government argued that this prior conviction "ma[de] it more likely that he *knowingly* possessed the firearm this time as well." *Id*. at 3. In fact, the government represented that the prior conviction was "the most probative" evidence of Petitioner's "knowledge of the gun in this case." *Id*. at 7. The government therefore argued that it sought to admit the firearm for a proper purpose—*i.e.*, knowledge. In that regard, the government emphasized that the Eleventh Circuit had repeatedly held that "the fact that a defendant knowingly possessed a firearm in [the past] makes it more likely that he *knowingly* did so this time as well, and not because of accident or mistake." *Id*. at 6 (quoting *United States v. Jernigan*, 341 F.3d 1273, 1281 (11th Cir. 2003)); *see id*. at 8 ("[t]he Eleventh Circuit has reiterated this holding multiple times").

In response, Petitioner moved to exclude the prior conviction. Dist. Ct. ECF No. 35. As relevant here, he argued that the prior conviction was "pure propensity evidence," since it asked the jury to infer that, because he knowingly possessed a firearm in the past, he must have knowingly possessed one now. *Id*. at 4–5. He relied on Seventh Circuit precedent requiring the government to explain how a particular prior conviction tends to show knowledge without resorting to propensity reasoning.

Id. (citing *United States v. Miller*, 673 F.3d 688, 699 (7th Cir. 2012)). Petitioner also clarified that, at trial, he would "not argue that he is unfamiliar with firearms. He will not argue that he doesn't know how to use a firearm." *Id*. at 6. Rather, the only issue was whether he knew that there was firearm was in a car, and the prior conviction would not help answer that question without using propensity reasoning.

At trial, the district court initially reserved ruling because the prior conviction was "pretty old." Dist. Ct. ECF No. 74 at 6. But after the first day of trial, the court admitted it "given the 11th circuit authority." It acknowledged that "the line between propensity and knowledge . . . is not always a very distinct one," but it thought "the government needs" the evidence to prove knowledge. *Id*. at 232–34. The court allowed the government to admit the prior judgment showing that Petitioner had been convicted for armed robbery with use of a firearm. *See id*. at 234–39; ECF No. 52-14.

2. At trial, the parties stipulated that Petitioner knew that he was a felon, and that the firearm traveled in interstate commerce. The only dispute was whether Petitioner *knowingly* possessed the firearm. The materials facts were not in dispute.

a. Petitioner was driving a pickup truck when he lightly rear-ended a car driven by two teenage girls stopped a red light. Petitioner asked them not to call the police, but they flagged down a police car passing by. At that point, Petitioner began screaming, ripping at his shirt, and trying to climb out of his truck window. The responding officer, who captured all of this on his body-worn camera, believed that Petitioner was suffering from a drug overdose, and he called Fire Rescue for medical assistance. Petitioner ultimately ejected himself from his seat and ended up on the

ground next to the driver's side door. At that point, the driver's seat began to slowly recline. It was only then that the officer for the first time saw a holstered firearm on the driver's seat and removed it. When Fire Rescue arrived, Petitioner was unconscious, and they administered Narcan, which is used to treat opioid overdoses.

The evidence was undisputed that both the truck and the firearm were registered to Petitioner's live-in girlfriend. She testified that she mistakenly left the firearm in the truck, and Petitioner took the truck without her knowledge while she was in the shower. The government recovered no forensic evidence linking Petitioner to the firearm, and it failed to test several items for fingerprints or DNA evidence.

b. In closing, the prosecution argued that Petitioner knew that the firearm was in the truck because he was sitting on it for 20 minutes as he drove. To bolster its case, the prosecution repeatedly relied on the prior armed robbery conviction during closing. Indeed, on three separate occasions, the prosecution argued that Petitioner's prior use of a firearm to commit armed robbery supported his knowledge that the firearm was in the truck. Dist. Ct. ECF No. 75 at 133–34, 141–42, 147.

For his part, Petitioner argued that he did not know that the firearm was in the truck because he could not physically feel it. And the reason he could not feel the firearm is because it was wedged in the crevice of the seat. For support, he relied on the body camera footage, which showed the seat reclining while he was on the ground overdosing; this explained why the officer did not see the gun before that time.

Petitioner further argued that there was reasonable doubt because: there was no dispute that his girlfriend left the gun in the truck; by ejecting himself from the

seat and giving the officer an unobstructed view, he was not attempting to conceal the firearm; he was not faking the overdose, as the prosecution suggested, because he begged the officer for help, was given Narcan, and was taken to the hospital; he asked the girls not to call the police because he was under the influence, not because he knew about the firearm; and there was no forensic evidence tying him to the firearm.

c. The jury returned a guilty verdict. The district court later sentenced Petitioner to 60 months in prison and 3 years of supervised release. App. 12a–13a.

3. On appeal, Petitioner's sole argument was that the district court erred by admitting the prior armed robbery conviction under Rule 404(b). His primary contention was that, given the age and violent nature of the prior conviction, the risk of unfair prejudice substantially outweighed its probative value under Rule 403.

Aa a threshold matter, however, he maintained that the prior conviction was propensity evidence and thus lacked any legitimate probative value at all. He acknowledged that this argument was foreclosed by circuit precedent, which held that "the fact that [a defendant] knowingly possessed a firearm . . . on a previous occasions makes it more likely that he *knowingly* did so this time as well, and not because of accident or mistake." Pet. C.A. Initial Br. 15 (quoting *Jernigan*, 341 F.3d at 1281–82). However, he expressly "preserve[d] his disagreement with that precedent." *Id*. Again citing Seventh Circuit precedent, he reiterated that, "[w]hile the prior knowing possession of a firearm may allow a jury to infer that the defendant knowingly possessed the firearm in the instant case, that inference cannot depend on the use of propensity reasoning." *Id*. (citing *United States v. Gomez*, 763 F.3d 845, 855–56 (7th

Cir. 2014) (en banc)). "And," Petitioner continued, "this Court's precedent—that the knowing possession of a gun in the past helps prove a person's knowing possession of a gun in the present—depends on impermissible propensity reasoning." *Id*. at 15–16.

The Eleventh Circuit affirmed. App. A. It concluded that the risk of unfair prejudice did not substantially outweigh the probative value. *See* App. 1a, 6a–10a. As for the probative value, the court reasoned that the prior conviction "was relevant to Peddicord's knowledge" that the firearm was in the truck. App. 7a. In that regard, the court repeatedly relied on circuit precedent reasoning that "the fact that [a defendant] knowingly possessed a firearm . . . on a previous occasions makes it more likely that he *knowingly* did so this time as well, and not because of accident or mistake." App. 7a (quoting *Jernigan*, 341 F.3d at 1281–82); *see* App. 8a ("[T]he prior conviction and the felon-in-possession conviction both involve the knowing use of a firearm. As already discussed, our prior precedent has concluded that such evidence is probative to show a defendant's knowledge.") (citing *Jernigan*, 341 F.3d at 1281–82 and *United States v. Taylor*, 417 F.3d 1176, 1182 (11th Cir. 2005)); App. 9a ("His knowing possession was the central question in this case, so the [prior] conviction was probative to addressing that question.") (citing *Jernigan*, 341 F.3d at 1281–82).

The government alternatively argued that any error was harmless. U.S. C.A. Br. 11, 29–31. Petitioner disagreed, arguing that the prior conviction "is what swayed the jury to convict." Pet. C.A. Initial Br. 36–45; Pet. C.A. Reply Br. 20–23. Ultimately, the Eleventh Circuit did not address harmless error. Rather, it affirmed the conviction on the exclusive ground that the prior conviction was properly admitted.

REASONS FOR GRANTING THE PETITION

The question presented is whether evidence of prior bad acts is admissible under Rule 404(b) where its relevance to a proper purpose, such as knowledge or intent, depends on the use of propensity reasoning. The circuits are deeply fractured and hopelessly confused on that question. This recurring question is one of exceptional importance to the administration of justice. The procedural history and facts of this case squarely present that question for review. And the decision below—representing the majority view—is wrong because it permits prosecutors to circumvent Rule 404(b)'s longstanding, crucial prohibition on propensity evidence.

I. The circuits are divided on the question presented.

The legal landscape is badly fractured. Three circuits strictly prohibit propensity reasoning. Five circuits do not. And three circuits have inconsistently done both, purporting to prohibit propensity-based reasoning yet routinely employing it.

a. The Third, Fourth, and Seventh Circuits expressly prohibit the use of propensity reasoning to establish that evidence is relevant for a proper purpose.

i. For over two decades, the Third Circuit has required the party seeking to admit the evidence, as well as the district court, to identify a "chain of inferences . . . , none of which is the inference that the defendant has a propensity to commit this crime." *United States v. Sampson*, 980 F.3d 883, 888 (3d Cir. 1992). The Third Circuit has consistently reaffirmed this prohibition on propensity-based reasoning. *See, e.g.*, *United States v. Foster*, 891 F.3d 93, 108 (3d Cir. 2018) (requiring "proponent to demonstrate how the proffered evidence fits into a logical chain of inferences, no link

of which is the inference that the defendant has a propensity to commit the crime'") (brackets and quotation omitted); *accord United States v. Repak*, 852 F.3d 230, 243 (3d Cir. 2017) (same); *United States v. Steiner*, 847 F.3d 103, 111 (3d Cir. 2017) (same); *United States v. Davis*, 726 F.3d 434, 442 (3d Cir. 2013) (same).

Moreover, that court has strictly applied this requirement. In *United States v. Caldwell*, 760 F.3d 267 (3d Cir. 2014), for example, the court explained that it requires this non-propensity "chain [of inferences to] be articulated with careful precision because, even when a non-propensity purpose is 'at issue' in a case, the evidence may be . . . relevant only in an impermissible way." *Id*. at 281. Quoting Seventh Circuit precedent, the court continued: "Another way to frame this requirement is to ask the prosecution to explain '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.'" *Id*. at 282 (quoting *Miller*, 673 F.3d at 699). In that case, the court could "see only one answer to that question: If Caldwell knowingly possessed firearms in the past, he was more likely to have knowingly possessed the firearm this time. This is precisely the propensity-based inferential logic that Rule 404(b) forbids." *Id*.

Similarly, in *United States v. Brown*, 765 F.3d 278 (3d Cir. 2014), the court explained that the "fundamental problem with the Government's proffer under Rule 404(b)" was that its "chain of inferences is indubitably forged with an impermissible propensity link," because the "analysis requires the jury to conclude that because Brown used a straw purchaser in the past, he must therefore have used a straw purchaser here. This is propensity evidence, plain and simple." *Id*. at 293–94.

ii. The Seventh Circuit likewise strictly prohibits propensity-based reasoning. In *United States v. Gomez*, 763 F.3d 845 (7th Cir. 2014) (en banc), the full court synthesized and simplified its earlier precedent governing Rule 404(b) evidence.

As relevant here, the en banc court explained that "Rule 404(b) is not just concerned with the ultimate conclusion, but also with the chain of reasoning that supports the non-propensity purpose for admitting the evidence." *Id*. at 856. "In other words, the rule allows the use of other-act evidence only when its admission is supported by some propensity-free chain of reasoning." *Id*. "This is not to say that other-act evidence must be excluded whenever a propensity inference can be drawn; rather, Rule 404(b) excludes the evidence if its relevance to 'another purpose' is established *only* through the forbidden propensity inference." *Id*. And because "[s]potting a hidden propensity inference is not always easy," the court emphasized the importance of asking "*how* exactly the evidence is relevant," "or more specifically, how the evidence is relevant without relying on a propensity inference." *Id*.

In short, the en banc court concluded that relevance to a proper purpose "must be established through a chain of reasoning that does not rely on the forbidden inference that the person has a certain character and acted in accordance with that character on the occasion charged in the case." *Id*. at 860; *see id*. at 861 ("the proponent of the other-act evidence must explain *how* it is relevant to a non-propensity purpose . . . *without relying on the forbidden propensity inference*").

The Seventh Circuit has repeatedly reaffirmed this prohibition on propensity-based reasoning. *See, e.g.*, *United States v. Edwards*, 26 F.4th 449, 454

(7th Cir. 2022) ("the non-propensity relevance must be shown through a chain of reasoning that does not rely on the forbidden inference that the person has a certain character and acted in accordance with that character on the occasion charged") (quotation omitted); *United States v. Thomas*, 986 F.3d 723, 728 (7th Cir. 2021) ("The proponent of the other acts evidence must show, through a chain of propensity-free inferences, that the evidence is relevant for a reason other than propensity."); *United States v. Walter*, 870 F.3d 622, 628 (7th Cir. 2017) (same).

And that court has strictly applied this prohibition on propensity reasoning, *see, e.g.*, *Jackson v. Esser*, 106 F.4th 948, 964 (7th Cir. 2024) ("its relevance depends on a propensity inference, requiring exclusion under Rule 404")—especially in the drug context, *see, e.g.*, *United States v. Stacy*, 769 F.3d 969, 974 (7th Cir. 2014) ("this argument relies on a propensity inference: that Stacy's history of involvement with methamphetamine manufacturing makes it more likely that he intended to use the pseudoephedrine pills he collected in 2010 through 2012 to make methamphetamine. For that reason, we are persuaded that the court erred by admitting the evidence of Stacy's prior involvement with methamphetamine."); *United States v. Chapman*, 765 F.3d 720, 726 (7th Cir. 2014) ("There are two problems with this theory of admissibility. First, the details of the prior heroin conviction are relevant to Chapman's knowledge and intent only through a paradigmatic inference about propensity: because Chapman sold heroin before he must have intended to do so again in this instance."); *Gomez*, 763 F.3d at 863 ("the more important point is that it rests on pure propensity: Because Gomez possessed a small quantity of cocaine at the time

of his arrest, he must have been involved in the cocaine-distribution conspiracy. The district court should not have admitted this evidence.").

iii. The Fourth Circuit has most recently adopted the prohibition on propensity reasoning as well, relying on Third Circuit precedent. *See United States v. Hall*, 858 F.3d 254, 266 (4th Cir. 2017) ("the government must identify each proper purpose for which it will use the other acts evidence and explain how that evidence 'fits into a chain of inferences—a chain that connects the evidence to each proper purpose, no link of which is a forbidden propensity inference'") (quoting *Davis*, 726 F.3d at 442). That court has strictly applied this prohibition as well. *See United States v. McClellan*, 44 F.4th 200, 206 (4th Cir. 2022) ("The Government argues that McClellan's *prior* drug charges and the cash forfeited in 2013 are evidence that he was likely dealing drugs when the cash was seized. In doing so, the Government asks us to make exactly the kind of 'forbidden propensity inference' that the Federal Rules of Evidence prohibit."); *Hall*, 858 F.3d at 260–61 (rejecting the dissent's position that would "allow[ ] admission of evidence that a defendant committed a prior drug offense to establish the defendant's knowledge and intent to commit a later drug offense, even absent any linkage between the prior offense and the charged conduct").

b. By contrast, five circuits do not prohibit the use of propensity reasoning to establish relevance for a proper purpose. To the contrary, they have employed such reasoning—upholding the admission of evidence of knowing firearm possession in the past to show knowing firearm possession in the present, as well as evidence of drug trafficking in the past to show an intent to engage in drug trafficking in the present.

i. The decision below is a perfect example. The Eleventh Circuit upheld the admission of the prior conviction based on its precedent reasoning that "the fact that a defendant knowingly possessed a firearm on a previous occasion makes it more likely that he *knowingly* did so this time as well, and not because of accident or mistake." App. 7a (quoting *Jernigan*, 341 F.3d at 1281–82) (brackets and ellipsis omitted); *see* App. 8a ("the prior conviction and the felon-in-possession conviction both involve the knowing use of a firearm. As already discussed, our prior precedent has concluded that such evidence is probative to show a defendant's knowledge") (citing *Jernigan*, 341 F.3d at 1281–82 and *Taylor*, 317 F.3d at 1182); App. 9a ("His knowing possession was the central question in this case, so the question was probative to addressing that question.") (citing *Jernigan*, 341 F.3d at 1281–82).

As the government correctly observed below (U.S. C.A. Br. 10, 12; Dist. Ct. ECF No. 32 at 8), the Eleventh Circuit has applied *Jernigan* and "reiterated [its] holding multiple times" over the past two decades. *United States v. Perpall*, 856 F. App'x 796, 799 (11th Cir. 2021). The following cases are just a few select examples: *United States v. Hood*, 2024 WL 714131, at *5–6 (11th Cir. 2024); *United States v. Feliciano*, 2023 WL 2445029, at *1–2 (11th Cir. 2023); *United States v. Pierre-Louis*, 860 F. App'x 625, 634 (11th Cir. 2021); *United States v. Rodriguez*, 713 F. App'x 815, 818–19 (11th Cir. 2017); *United State v. Pacheco*, 709 F. App'x 556, 558–59 (11th Cir. 2017); *United States v. Clark*, 693 F. App'x 804, 807 (11th Cir. 2017); *United States v. McDonald*, 662 F. App'x 685, 689 (11th Cir. 2016); *Taylor*, 417 F.3d at 1182.

However, as Petitioner argued below, this "precedent—that the knowing possession of a gun in the past helps prove a person's knowing possession of a gun in the present—depends on impermissible propensity reasoning." Pet. C.A. Initial Br. 15–16. The Eleventh Circuit nonetheless held that, based on that precedent in *Jernigan*, the prior conviction was admitted for a proper purpose. App. 7a–9a; *see also United States v. Roberts*, 735 F. App'x 649, 651 n.4 (11th Cir. 2018) ("Roberts contends *Jernigan* was incorrectly decided because while the prior knowing possession of a firearm may allow a jury to infer that the defendant possessed the charged firearm knowingly, that inference depends on the use of impermissible propensity reasoning. We are not at liberty to disregard *Jernigan*.") (brackets and quotation omitted).

The Eleventh Circuit likewise uses propensity reasoning in drug cases. Nearly two decades ago, Judge Tjoflat wrote separately to criticize how that circuit's precedent "ha[d] morphed into a categorical-relevancy doctrine that presumes that virtually all prior drug offenses are relevant and almost automatically admissible in all drug conspiracy cases (subject only to Rule 403)," thereby "serv[ing] to admit propensity evidence in the name of intent" "and "turn[ing] Rule 404(b) on its head." *United States v. Matthews*, 431 F.3d 1296, 1318–19 (11th Cir. 2005) (Tjoflat, J., specially concurring). In his view, there should be a prohibition on the use of propensity-based reasoning: "If the inferential chain must run through the defendant's character—and his or her predisposition towards a criminal intent—the evidence is squarely on the propensity side of the elusive line." *Id.* at 1313 n.1.

In short, and as this case reflects, the Eleventh Circuit routinely employs propensity reasoning to uphold evidence of prior bad acts under Rule 404(b).

ii. The law is substantially similar in the Fifth, Sixth, Eighth, and D.C. Circuits. None of these circuits have prohibited the use of propensity reasoning.

- Fifth Circuit: *See, e.g.*, *United States v. Williams*, 620 F.3d 483, 489 (5th Cir. 2010) ("The paradigmatic constructive possession scenario in which [a firearm] is found under the defendant's seat in a car presents a classic case for introducing prior instances of gun possession, since the government would otherwise find it extremely difficult to prove that the charged possession was knowing.") (quotations omitted);[1] *but see United States v. Kinchen*, 729 F.3d 466, 477 (5th Cir. 2013) (Garza, J., dissenting) (favorably citing out-of-circuit precedent prohibiting propensity reasoning).

- Sixth Circuit: *See United States v. Johnson*, 803 F.3d 279, 283 (6th Cir. 2015) ("Johnson adds that Federal Rule of Evidence 404(b) barred the admission of this evidence because it was used to show propensity—that, if he had possessed a gun once before (as the admission of the prior conviction necessarily showed) he would do so again. But this is a predictable hazard of possessing a gun in the aftermath of a gun-related felony conviction."); *United States v. Davis*, 415 F. App'x 709, 713 (6th Cir. 2011) ("We agree with the District of Columbia Circuit that in cases involving firearm possession by a felon, evidence that the defendant possessed a gun at other times is often quite relevant to his knowledge and intent with regard to the crime charged.") (quotation omitted); *United States v. Ayoub*, 498 F.3d 532, 548 (6th Cir. 2007) ("We have repeatedly recognized that prior drug-distribution evidence is admissible to show intent to distribute."); *United States v. Chesney*, 86 F.3d 564, 572 (6th Cir. 1996) (upholding admission of prior armed robbery to show knowing gun possession in the charged case).

- Eighth Circuit: *See United States v. Williams*, 796 F.3d 951, 959 (8th Cir. 2015) ("[E]vidence that a defendant possessed a firearm on a previous occasion is relevant to show knowledge and intent.") (quoting *United States v. Walker*, 470 F.3d 1271, 1274 (8th Cir. 2006)); *accord United States v. Harrison*, 70 F.4th 1094, 1097 (8th Cir. 2023); *United States v. Drew*, 9 F.4th 718, 723 (8th Cir. 2021); *United States v. Smith*, 978 F.3d 613, 616

[1] The Fifth Circuit, however, does not permit admitting evidence of prior firearm possession where the government is proceeding exclusively under a theory of actual (as opposed to constructive) possession, since knowledge is not at issue. *Williams*, 620 F.3d at 489–90 (citing *United States v. Jones*, 484 F.3d 783, 788 (5th Cir. 2007)).

(8th Cir. 2020); *United States v. Halk*, 634 F.3d 482, 487 (8th Cir. 2011); *United States v. Oaks*, 606 F.3d 530, 539 (8th Cir. 2010); *but see Drew*, 9 F.4th at 726–28 & n.5 (Kelly, J., concurring in the judgment) (disagreeing with "this circuit's permissive precedent on the use of prior firearm convictions as 404(b) evidence in firearm possession cases," and invoking Third and Seventh Circuit precedents prohibiting propensity-based reasoning); *United States v. Turner*, 781 F.3d 374, 390–91 (8th Cir. 2015) (favorably citing Third and Seventh Circuit precedents but only in dicta).

- D.C. Circuit: *See United States v. Cassell*, 292 F.3d 788, 794–95 (D.C. Cir. 2002) ("we conclude that evidence of Cassell's prior gun possessions was relevant to show his knowledge of and intent to possess the firearms recovered from his bedroom," even though "this evidence does go to propensity"); *United States v. McCarson*, 527 F.3d 170, 173 (D.C. Cir. 2008) (reaffirming *Cassell*); *United States v. Garner*, 396 F.3d 438, 444 (D.C. Cir. 2005) (same); *see also United States v. Bowie*, 232 F.3d 923, 930–31 (D.C. Cir. 2000) (recognizing that "[e]vidence of other crimes or acts having a legitimate nonpropensity purpose undoubtedly may contain the seeds of a forbidden propensity inference," but holding that "[e]vidence that Bowie possessed and passed counterfeit notes on a prior occasion was relevant [to a proper purpose] because it decreased the likelihood that Bowie accidentally or innocently possessed the counterfeit notes on May 16").

c. Meanwhile, the case law in the First, Ninth, and Tenth Circuits is internally inconsistent. These three circuits have formally adopted a prohibition on propensity reasoning yet routinely use such reasoning to admit evidence of bad acts.

i. The First Circuit has many cases prohibiting the use of propensity reasoning. *See, e.g.*, *United States v. Pérez-Greaux*, 83 F.4th 1, 30 (1st Cir. 2023) ("the evidence must have 'special relevance' to an issue in the case such as intent or knowledge, and must not include bad character or propensity as a necessary link in the inferential chain") (quotations omitted); *accord United States v. Gentles*, 619 F.3d 75, 86 (1st Cir. 2010) (same); *United States v. Robinson*, 473 F.3d 387, 394 (1st Cir. 2007); *United States v. Tse*, 375 F.3d 148, 155 (1st Cir. 2004). At the same time, the First Circuit has "repeatedly upheld the admission of prior drug dealing by a

defendant to prove a present intent to distribute," even though "impermissible propensity reasoning lurks as one of the links in the logical chain of relevance." *United States v. Henry*, 848 F.3d 1, 8–9 (1st Cir. 2017); *see id*. at 15 (Kayatta, J., joined by Thompson, J., concurring) ("This reasoning is propensity-based," which, "although allowed" by circuit precedent, "appears to run afoul of Rule 404(b)(1)").

ii. The same is true in the Ninth Circuit. That circuit recently embraced the Seventh Circuit's prohibition on propensity reasoning. *See United States v. Rodriguez*, 880 F.3d 1151, 1168 (9th Cir. 2018) ("This logical connection must be 'supported by some propensity-free chain of reasoning.'") (quoting *Gomez*, 763 F.3d at 856); *United States v. Charley*, 1 F.4th 637, 640, 650–51 (9th Cir. 2021) ("Because the Government fails to articulate a 'propensity-free chain of reasoning' between the prior incidents and the charged offense, the evidence is inadmissible under Rule 404(b).") (quoting *Rodriguez*, 880 F.3d at 1168). But it has continued to reaffirm its precedents using propensity reasoning in drug cases. *See, e.g.*, *United States v. Jimenez-Chaidez*, 96 F.4th 1257, 1265 (9th Cir. 2024) (favorably quoting *Rodriguez* and *Gomez*, but reaffirming the general rule that, "[w]ith regard to relevance, we have consistently held that evidence of a defendant's prior possession or sale of narcotics is relevant under Rule 404(b) to issues of intent and knowledge in drug importation cases").

iii. The law in the Tenth Circuit is also internally inconsistent on this issue.

On the one hand, and favorably citing Third Circuit precedent, that court has expressly "h[e]ld that evidence is admissible under Rule 404(b) only if it is relevant for a permissible purpose and that relevance does not depend on a defendant likely

acting in conformity with an alleged character trait." *United States v. Commanche*, 577 F.3d 1261, 1267 (10th Cir. 2009); *see id*. at 1263 ("we hold that such evidence is inadmissible because the jury must necessarily use it for an impermissible purpose (conformity) before it can reflect on a permissible purpose (intent)."). The court reached that "hold[ing] based on the structure and purpose of the rule." *Id*. at 1267.

Quoting Seventh Circuit precedent, the court has separately stated that "Rule 404(b) is concerned 'with the chain of reasoning that supports the non-propensity purpose for admitting the evidence,' and it 'allows the use of other-act evidence only when its admission is supported by some propensity-free chain of reasoning.'" *United States v. Rodella*, 804 F.3d 1317, 1333 (10th Cir. 2015) (quoting *Gomez*, 763 F.3d at 856); *see United States v. Henthorn*, 864 F.3d 1241, 1252 (10th Cir. 2017) ("Rule 404(b) excludes the evidence if its relevance to another proper purpose is established only through the forbidden propensity inference.") (quoting *Rodella*, 804 F.3d at 1333).

On the other hand, that same court openly uses propensity reasoning. It has held that "the fact that Mr. Moran *knowingly* possessed a firearm in the past supports the inference that he had the same knowledge in the context of the charged offense"—despite "acknowledg[ing]" that this "involves a kind of propensity inference (*i.e.*, because he knowingly possessed a firearm in the past, he knowingly possessed a firearm in the present case)." *United States v. Moran*, 503 F.3d 1135, 1144–45 (10th Cir. 2007); *see also United States v. McGlothin*, 705 F.3d 1254, 1262–65 & n.13 (10th Cir. 2013) (reaffirming *Moran* but acknowledging "that reflexive admission of prior instances of firearm possession to prove intent is not without substantial danger");

United States v. Benford, 875 F.3d 1007, 1013–14 & n.4 (10th Cir. 2017) (expressing similar concerns). Citing *Moran*, that court has most recently stated that "[e]vidence that a district court properly admits under Rule 404(b) may involve a kind of propensity inference." *United States v. Veneno*, 94 F.4th 1196, 1208 (10th Cir. 2024).

To justify the use of such reasoning, the court has explained that this propensity "inference is specific and does not require a jury to first draw the forbidden general inference of bad character or criminal disposition; rather, it rests on a logic of improbability that recognizes that a prior act involving the same knowledge decreases the likelihood that the defendant lacked the requisite knowledge in committing the charged offense." *Moran*, 503 F.3d at 1145; *see Henthorn*, 864 F.3d at 1252–1254 & n.8. This explanation, however, only creates even more confusion.

* * *

In sum, the circuits are deeply divided, fractured, and confused on whether propensity reasoning may be used to establish relevance for a proper purpose. This confusion reflects the more general recognition by courts and scholars that Rule 404(b) is "so perplexing that the cases sometimes seem as numerous as the sands of the sea and often cannot be reconciled." *Thompson v. United States*, 546 A.2d 414, 415 (D.C. 1988) (citing various treatises); *see, e.g.*, Thomas J. Reed, Admitting the Accused's Criminal History: The Trouble With Rule 404(b), 78 Temp. L. Rev. 201, 215 (2005) (stating that judicial "experience with Rule 404(b) gives no encouragement to theoretical consistency"); Dora W. Klein, "Rule of Inclusion" Confusion, 58 San Diego L. Rev. 379, 381 (2021) (opining that "many of the federal circuits have overlaid" Rule

404(b) "with unnecessary interpretive heuristics"); Josiah Beamish, Note, A Tale of Two Wives: 404(b) Evidence Simplified, 89 Colo. L. Rev. 293, 303 (2018) (observing that "confusion highlights the complicated and inconsistent treatment of 404(b)").

II. The question presented is recurring, important, and unresolved.

Notwithstanding the persistent confusion, scholars have long recognized that the scope of Rule 404(b) "is the single most important issue in contemporary criminal evidence law." 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, 576 (1990); *see, e.g.*, Klein, *supra*, at 382 ("Rule 404(b) is an exceptionally important rule of evidence, especially for criminal defendants"); Andrew J. Morris, Federal Rule of Evidence 404(b): The Fictitious Ban on Character Reasoning From Other Crime Evidence, 17 Rev. Litig. 181, 182 (1998) ("This 'revolutionary' rule [on propensity] has undeniable practical importance."). That description is true both quantitatively and qualitatively.

1. "Since 1975, Rule 404(b) has been the most contested Federal Rule of Evidence." Reed, *supra*, at 211. In the first 15 years, "Rule 404(b) ha[d] emerged as one of the most cited Rules in the Rules of Evidence." Fed. R. Evid. 404, adv. cmte. notes (1991). Since then, courts and commentators have confirmed that "Rule 404(b) has become the most cited evidentiary rule on appeal." *United States v. Davis*, 726 F.3d 434, 441 (3d Cir. 2013); *see, e.g.*, *United States v. Queen*, 132 F.3d 991, 997 & n.1 (4th Cir. 1997) ("The question of whether evidence of prior acts is admissible under Federal Rule of Evidence 404(b) is frequently presented to our court," noting "over 60

published opinions" in the prior 7 years); Dora W. Klein, Exemplary and Exceptional Confusion Under the Federal Rules of Evidence, 46 Hofstra L. Rev. 641, 666 & n.120 (2017) ("the rule appears in appellate court decisions more than any other rule of evidence.") (citing authorities). As a quantitative matter, "[n]o other evidentiary rule comes close to this rule as a breeder of issues for appeals." Reed, *supra*, at 211.

This should come as no surprise. "In the criminal context, and especially in drug [and gun] cases, few defendants are new to criminal activity and the range of possible defenses is fairly limited, so at least three of the permitted purposes listed in the rule—knowledge, intent, and identity—are routinely in play." *Gomez*, 763 F.3d at 855. In that regard, "[t]he use of the defendant's other crimes to prove intent" or knowledge has long been "the most widely used basis for admitting" evidence of prior bad acts. Imwinkelried, *supra*, at 577. Drawing the line between evidence admitted for such a proper purpose and improper propensity evidence is therefore central to Rule 404(b)'s scope and operation. Yet despite the frequency with which that issue recurs, courts still "struggle with determining whether proof is based on propensity reasoning or is relevant for one of the other purposes." Barrett J. Anderson, Note, Recognizing Character: A New Perspective on Character Evidence, 121 Yale L.J. 1912, 1928 (2012). Indeed, the experienced District Judge in this case admitted that the dividing line "is not always a very distinct one." Dist. Ct. ECF No. 74 at 234.

The confusion is not limited to federal courts either. "Forty-four states have adopted evidence codes patterned after the Federal Rules, and most of those codes contain a provision identical or equivalent to Rule 404(b)." Edward J. Imwinkelried,

The Evidentiary Issue Crystalized by the Cosby and Weinstein Scandals: The Propriety of Admitting Testimony About an Accused's Uncharged Conduct Under the Doctrine of Objective Chances to Prove Identity, 48 Sw. L. Rev. 1, 2 (2019). And state courts have struggled just like federal courts. *See, e.g.*, Chad M. Oldfather, Other Bad Acts and the Failure of Precedent, 28 Wm. Mitchell L. Rev. 151, 152 (2018) ("the law of other bad acts evidence in Minnesota is confusing and inconsistent"). Granting review here would thus guide state courts in the application of their Rule 404(b) counterparts. And this would have the added bonus of minimizing disparity in firearm and drug prosecutions across state and federal courts within the same state.

2. Qualitatively, the question presented has an enormous practical effect. "Decisions on the admissibility of bad acts evidence may determine more criminal cases than any other type of evidence." Morris, *supra*, at 183; *see* Glenn Weissenberger, Making Sense of Extrinsic Act Evidence: Federal Rule of Evidence 404(b), 70 Iowa L. Rev. 579, 581 (1985) (stating that the admissibility of bad acts is "deadly serious business" that "possesses such enormous potential to affect the outcome of a criminal case"). On the one hand, "in many criminal cases evidence of an accused's extrinsic acts is viewed as an important asset in the prosecution's case against an accused." Fed. R. Evid. 404, adv. cmte. notes (1991). This explains why "the overwhelming number of cases [under Rule 404(b)] involve introduction of [such] evidence by the prosecution." *Id*. This case illustrates that common dynamic, as the prosecution informed the district court before trial that Petitioner's prior armed robbery conviction was "the most probative [evidence] of his knowledge of the gun in

this case." Dist. Ct. ECF No. 32 at 7. And the prosecution ultimately relied on that prior conviction three separate times during its closing argument.

On the other hand, this Court has recognized that "unduly prejudicial evidence might be introduced under Rule 404(b)." *Huddleston*, 485 U.S. at 691. That undue prejudice arises from "generalizing a defendant's earlier bad act into bad character and taking that as raising the odds that he did the later bad act now charged." *Old Chief*, 519 U.S. at 180. As Justice Robert Jackson explained, such propensity evidence is extraordinarily prejudicial: it "is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudice 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 issues, unfair surprise and undue prejudice." *Michelson v. United States*, 335 U.S. 469, 475–76 (1948) (footnote omitted).

If prosecutors may use propensity reasoning to establish that evidence of prior bad acts is being admitted for a proper purpose, then that substantially expands the prior bad acts that may be admitted under Rule 404(b). And, as explained below, it will effectively eviscerate the prohibition on propensity evidence. That is especially true in drug and firearm cases,[2] where defendants often have a history with drugs and firearms. Because those prior bad acts carry such a high risk of prejudice to

[2] In 2023 alone, there were over 17,000 federal drug cases and nearly 10,000 federal firearm cases. *See* U.S. Courts, Statistics & Reports, U.S. District Courts—Criminal Statistical Tables for the Federal Judiciary, tbl. D-3 (Dec. 31, 2023).

criminal defendants—and are made all the more prejudicial when they are relevant only through propensity reasoning—juries are far more likely to convict a defendant based not on "*what* he did" but rather on "*who* he is." *Caldwell*, 760 F.3d at 276. And, in turn, defendants will be deterred from exercising their constitutional right to trial because they know that evidence of their prior bad acts will be admitted into evidence.

But however the question presented is resolved, the stakes are too high for the disparity and confusion to persist. Under the current landscape, geography alone determines whether the government may use propensity reasoning to establish the relevance of prior bad acts for a proper purpose. As a result, geography alone now determines whether evidence of, say, prior firearm possession or drug trafficking is admissible in firearm and drug-trafficking prosecutions. And admitting that evidence will have a major impact on these cases, affecting whether the prosecution can prove the critical element of *mens rea* and whether criminal defendants will experience major prejudice. Again, this case illustrates the point: had Petitioner been charged in Philadelphia or Chicago rather than in Miami, the prosecution would not have been able to admit his 23-year old armed robbery conviction—evidence that it relied on three separate times in closing—to prove that he knowingly possessed the firearm.

3. Finally, although the question presented is a bread-and-butter matter of criminal evidence and procedure, this Court has surprisingly never addressed it. In fact, the Court has rarely addressed Rule 404(b) *at all*. The Court's only case about Rule 404(b) is *Huddleston*, but it was decided in 1988 and did not involve propensity. The Court held only that district courts need not make a preliminary finding that the

government proved the prior bad acts. 485 U.S. at 682, 685. In a pair of other older cases, the Court held that admission of bad acts under Rule 404(b) did not implicate the collateral-estoppel component of the Double Jeopardy Clause, but the Court again said nothing about the prohibition on propensity evidence. *See United States v. Felix*, 503 U.S. 378, 386–87 (1992); *Dowling v. United States*, 493 U.S. 342, 348–49 (1990).

The Court briefly addressed propensity in *Old Chief*, but that case was about Rule 403, not Rule 404(b). The Court held that a district court violates Rule 403 where it refuses to accept a defendant's offer to stipulate to a prior felony conviction, and instead admits the full record of the prior conviction, in order to prove the element of felon status in a felon-in-possession case. *Old Chief*, 519 U.S. at 174. Emphasizing the risk of unfair prejudice, the Court focused on the danger of "propensity reasoning," which was addressed by Rule 404(b). *Id*. at 181–82. The Court added that there was "no question that propensity would be an improper basis for conviction." *Id*. at 182. But the Court did not address the question here—whether parties may use propensity reasoning to show that bad-acts evidence is relevant for a proper purpose.

The time has come for the Court to address this issue at the heart of Rule 404(b), one of the most important and recurring issues in the law of criminal evidence.

III. This case is an ideal vehicle.

This case provides the Court with the perfect opportunity to do so.

1. Procedurally, the propensity-reasoning question is squarely presented for review: it was fully preserved below; and it formed the core of the decision below.

a. In the district court here, and unlike in several other circuits, the government was not required to articulate a propensity-free chain of inferences to establish that Petitioner's prior armed robbery conviction was relevant to show his knowledge of the gun in the truck. To the contrary, the government relied on settled circuit precedent employing propensity reasoning: "the fact that a defendant knowingly possessed a firearm . . . on a previous occasion makes it more likely that he *knowingly* did so this time as well, and not because of accident or mistake." Dist. Ct. ECF No. 32 at 5–6, 8 (quoting *Jernigan*, 341 F.3d at 1282) (brackets omitted).

In response, Petitioner moved to exclude the prior armed robbery conviction as "pure propensity evidence." Dist. Ct. ECF No. 35 at 4. Relying on Seventh Circuit precedent, he argued that the government could not explain why the prior armed robbery conviction was relevant to his knowledge other than through his propensity for knowingly possessing a firearm. *See id*. at 4–5 (citing *Miller*, 673 F.3d at 698–99).

Despite expressing reservations about its age, the district court admitted the prior conviction "given the 11th circuit precedent." Dist. Ct. ECF No. 74 at 6, 232–33. Although the district court acknowledged that "the line between propensity and knowledge and intent is not always a very distinct one," the court admitted the prior conviction because the government "need[ed]" it to prove knowledge. *Id*. at 232–34.

b. On appeal, Petitioner acknowledged but expressly "preserve[d] his disagreement with [Eleventh Circuit] precedent." Pet. C.A. Initial Br. 15. Again citing Seventh Circuit precedent, he explained his disagreement: "this Court's precedent—that the knowing possession of a gun in the past helps prove a person's knowing

possession of a gun in the present—depends on impermissible propensity reasoning." *Id*. at 15–16 (citing *Gomez*, 763 F.3d at 855–56). Given that adverse precedent, his main argument was that, under Rule 403, the risk of unfair prejudice substantially outweighed any probative value given the age and violent nature of the conviction.

In response, the government again relied on the Eleventh Circuit's precedent, reasoning that "the fact that a defendant knowingly possessed a firearm on a previous occasion makes it more likely that he *knowingly* did so this time as well, and not because of accident or mistake." U.S. C.A. Br. 12 (quoting *Jernigan*, 341 F.3d at 1281–82). The government correctly observed that, although "Peddicord disagrees with this precedent, it is binding." *Id*. at 12–13 (internal citation omitted).

c. The Eleventh Circuit then relied on that same circuit precedent three times to affirm. App. 7a ("The conviction showed that Peddicord had experience using a firearm, and it was relevant to Peddicord's knowledge that he was sitting on a gun while he drove a vehicle for twenty minutes. 'The fact that a defendant knowingly possessed a firearm . . . on a previous occasion makes it more likely that he *knowingly* did so this time as well, and not because of accident or mistake.'") (quoting *Jernigan*, 341 F.3d at 1281–82 (brackets and ellipsis omitted), and citing *Taylor*, 417 F.3d at 1182 for the same proposition); App. 8a ("the prior conviction and the felon-in-possession conviction both involve the knowing use of a firearm. As already discussed, our prior precedent has concluded that such evidence is probative to show a defendant's knowledge.") (citing *Jernigan*, 341 F.3d at 1281–82 and *Taylor*, 417 F.3d at 1182); App. 9a ("His knowing possession was the central question in this case, so

the conviction was probative to addressing that question.") (citing *Jernigan*, 341 F.3d at 1281–82). Thus, the court of appeals employed propensity reasoning to conclude that the prior conviction was relevant for a proper purpose, and that this probative value of the evidence was not substantially outweighed by a risk of unfair prejudice.

Moreover, the Eleventh Circuit did not affirm on any alternative ground. Although the government argued that any error in admitting the prior conviction was harmless (U.S. C.A. Br. 11, 29–31), Petitioner vigorously disputed that argument (Pet. C.A. Initial Br. 36–45; Pet. C.A. Reply Br. 20–23). After all, the government had informed the district court pre-trial that the prior conviction was "the most probative [evidence] of his knowledge of the gun in this case." Dist. Ct. ECF No. 32 at 7. In the end, the Eleventh Circuit did not address the government's harmless-error argument. As a result, that issue is not presented here. *See Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("we are a court of review, not of first view"). Thus, it would not risk obstructing the Court's resolution of the question presented. Rather, harmless error would be addressed in the first instance on remand were Petitioner to prevail here.

2. Factually too, this case presents a clean vehicle to decide the question.

The only dispute at trial was whether Petitioner knew that there was a firearm in the truck. The government argued that he knew because he was sitting on it as he drove. Petitioner argued that he did not know the gun was there because it was wedged in the crevice of the seat. How is Petitioner's use of a firearm 23 years earlier relevant to resolving that central dispute? The only way it could possibly be relevant is through propensity reasoning: because Petitioner used a firearm in the past, he

was more likely to know about the firearm in the truck in the present case. Indeed, neither the government nor the lower courts identified any other theory of relevance.

Thus, this is not a case where evidence of prior possession could be relevant to knowledge without the use of propensity reasoning. For example, if a defendant "had claimed that he was unaware that the weapon was a real gun, perhaps the government could have offered his previous conviction[ ] to prove that he was familiar with the touch and feel of an authentic firearm—and therefore likely to have known that the gun he was observed holding was not a fake." *Drew*, 9 F.4th at 727 (Kelly, J., concurring in the judgment). Or if the defendant had recently possessed the same gun that he was charged with possessing in the present case, that might be relevant to knowledge without the use of propensity reasoning. *See United States v. Washington*, 962 F.3d 901, 906–07 (7th Cir. 2020) ("emphasiz[ing] that evidence of the defendant's past possession of a different firearm would be far more likely to implicate a forbidden character-propensity inference") (citing *Miller*, 673 F.3d at 695); *United States v. Moore*, 709 F.3d 287, 295–96 (4th Cir. 2013) (drawing same distinction).

But there is nothing like that here. To the contrary, Petitioner expressly disclaimed pre-trial any argument that he was unfamiliar with firearms. Dist. Ct. ECF No. 35 at 6. There was no allegation in this case that Petitioner ever even held the firearm in his hands. And there was no allegation that the firearm in the truck was the same one that he used 23 years earlier to commit the armed robbery.

Because relevance could established *only* through propensity reasoning, the facts of this case squarely tee up the question presented. They also squarely implicate

the circuit conflict. Had Petitioner been tried in, say, the Third or Seventh Circuits—where the government and the district court would have been required to articulate a propensity-free chain of reasoning—the prior conviction would have been excluded. *See, e.g.*, *Caldwell*, 760 F.3d at 282 ("If Caldwell knowingly possessed firearms in the past, he was more likely to have knowingly possessed the firearm this time. This is precisely the propensity-based inferential logic that Rule 404(b) forbids."). And, finally, that the Eleventh Circuit ultimately upheld—against a Rule 403 challenge—the admission of a 23-year old, violent prior conviction in a non-violent felon-in-possession case illustrates just how consequential the threshold question presented is, as well as the sort of evidence that can be admitted under the majority view.

IV. The decision below is wrong.

Rule 404(b)'s text, structure, and history prohibit propensity-based reasoning.

1. Entitled "Prohibited Uses," Rule 404(b)(1) provides: "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." All agree that Rule 404(b)(1) prohibits propensity evidence. Entitled "Permitted Uses," Rule 404(b)(2) then provides that prior bad acts may be admissible for "another purpose," such as knowledge or intent. So, once again, is evidence admissible where its relevance to a proper purpose is established only through propensity reasoning?

The answer is no. Where evidence is relevant to a proper purpose only through propensity reasoning, then the evidence is being "used" in a manner "prohibited" by Rule 404(b)(1). In that scenario, "the jury must necessarily use [the evidence] for an

impermissible purpose (conformity) before it can reflect on a permissible purpose (intent)." *Commanche*, 577 F.3d at 1263. And, under Rule 404(b)(2), evidence of prior bad acts may permissibly be used only for "another" purpose—*i.e.*, one other than, or different from, the propensity use expressly prohibited by Rule 404(b)(1).

2. This conclusion is reinforced by the structure of the Rule 404 as a whole.

a. Recall that "Rule 404(b)[1] carves out an exception to the general proposition that relevant evidence is admissible," prohibiting evidence of prior bad acts for propensity. *Commanche*, 577 F.3d at 1267; *see Huddleston*, 485 U.S. at 687. Rule 404(b)(2) then lists permissible uses of prior bad acts. Because Rule 404(b) flatly prohibits the use of propensity evidence, and then lists permissible uses of prior bad acts, it would make little sense for the latter to supersede or supplant the former. *See Commanche*, 577 F.3d at 1267 ("Because of the rule's structure, we do not read the permissible purposes demarcating the boundaries of 404(b)'s prohibition on propensity inferences as trumping the general proscription contained in the rule.").

Yet that is what would happen if propensity reasoning may be used to establish a proper purpose. In individual cases, juries would be required to use that highly prejudicial form of reasoning. And it will be the rare case where the prosecution could *not* use propensity reasoning to establish a proper purpose like knowledge or intent. Many courts and scholars have long emphasized this fundamental problem. *See, e.g.*, *Gomez*, 763 F.3d at 855 ("if subsection (b)(2) of the rule allows the admission of other bad acts whenever they can be connected to the defendant's knowledge, intent, or identity (or some other plausible non-propensity purpose), then the bar against

propensity evidence would be virtually meaningless"); *Commanche*, 577 F.3d at 1268 ("Were we to condone the use of 404(b) evidence that reflects on a permissible purpose only if a jury first concludes that the defendant acted in conformity with a particular character trait, we would undercut the primary operative effect of the rule—to exclude a form of relevant evidence that is highly prejudicial."); *Thompson*, 546 A.2d at 420–21 ("This court has recognized that the intent exception has the capacity to emasculate the other crimes rule. . . . [C]ourts must be vigilant to ensure that poisonous predisposition evidence is not brought before the jury in more attractive wrapping and under a more enticing sobriquet."); Morris, *supra*, at 184, 189–96 (observing that "courts routinely admit bad acts evidence precisely for its relevance to defendant propensity" under the guise of intent); Imwinkelried, The Use of Evidence, *supra*, at 578 (arguing that admitting bad acts to establish *mens rea* poses a "grave threat[ ] to the continued viability of the character evidence prohibition").

b. The only "exceptions" to the prohibited use of propensity evidence are contained in Rule 404(a)(2). Rule 404(a)(1) prohibits the use of character evidence as a general matter. *See* Fed. R. Evid. 404, adv. cmte. notes (1972) ("Subdivision (b) deals with a specialized but important application of the general rule [in subdivision (a)] excluding circumstantial use of character evidence."). Rule 404(a)(2) then lists specific "exceptions for a defendant or victim in a criminal case" where character evidence is indeed admissible for propensity. *See, e.g.*, Fed. R. Evid. 404(a)(2)(C) ("in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor"). By contrast,

Rule 404(b)(2)'s permitted uses are not an "exception" to the prohibition on the use of propensity evidence. Thus, unlike Rule 404(a)(2)'s "exceptions," Rule 404(b)(2)'s permitted uses cannot be read as permitting the use of propensity evidence.

c. The pre-trial notice requirement in Rule 404(b)(3) confirms that Rule 404(b) prohibits the use of propensity reasoning. In addition to requiring the prosecution to notify the defense of the evidence it intends to offer, the prosecution must also "articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence *and the reasoning that supports the purpose*." Fed. R. Evid. 404(b)(3)(B) (emphasis added). Requiring the prosecution to articulate not just the proper purpose but also the "reasoning" behind it is designed to avoid the use of propensity reasoning. *See Old Chief*, 519 U.S. at 181 (observing that Rule 404(b) "address[es] propensity reasoning directly"); *Gomez*, 763 F.3d at 856 ("Rule 404(b) is not just concerned with the ultimate conclusion, but also with the chain of reasoning that supports the non-propensity purpose for admitting the evidence.").

3. Historically, Rule 404(b) "is the direct, lineal descendant of a single leading case, *People v. Molineux*, decided in 1901 by the New York Court of Appeals." Reed, *supra*, at 201 (citing 61 N.E. 286 (N.Y. 1901)); *see id*. at 201–12 (summarizing history between *Molineux* and Rule 404(b)'s adoption). As to the propensity rule, "Wigmore praised its adoption as 'a revolution in the theory of criminal trials' and 'one of the peculiar features, of vast moment, that distinguishes the Anglo-American from the Continental system of evidence.'" Morris, *supra*, at 182 (citation omitted); *see People v. Zackowitz*, 172 N.E. 466, 468 (N.Y. 1930) (Cardozo, J.) (stating that the

propensity rule is "long believed to be of fundamental importance for the protection of the innocent"). For the next 75 years, "most federal courts adhered to the *Molineux* formulation that evidence of other crimes generally was inadmissible." Thomas J. Reed, The Development of the Propensity Rule in Federal Criminal Causes 1840–1975, 51 U. Cin. L. Rev. 299, 303 (1982). A "simple exclusionary rule persisted in [a] pristine form in most federal decisions until the adoption of the Federal Rules of Evidence." *Id*. (citing *Simpkins v. United States*, 78 F.2d 594, 597 (4th Cr. 1935)).

Allowing the use of propensity reasoning to establish a proper purpose would thus contravene the deliberate choice of the Rule's drafters to "codif[y] the common law 'propensity rule.'" Morris, *supra*, at 181; *see Old Chief*, 519 U.S. at 181 ("Rule of Evidence 404(b) reflects this common-law tradition" of excluding prior bad acts and propensity due to the risk of unfair prejudice) (citing *Michelson*, 335 U.S. at 475–76). Recognizing that, in practice, prosecutors have been able to show relevance to a proper purpose simply "by employing the 'magic words' vocabulary" of Rule 404(b), some commentators have proposed doing away with the propensity rule and resorting to Rule 403 alone. *See, e.g.*, Reed, The Trouble With Rule 404(b), *supra*, at 250–53. English courts ultimately adopted a similar approach after acknowledging that, despite their propensity prohibition, they had been routinely employing propensity reasoning to admit evidence of prior bad acts. *See* Morris*, supra*, at 205–08.

But that is a major policy decision entrusted to the Rules Committee. Indeed, Rule 404(b)'s prohibition on propensity "reflects the revered and longstanding policy that, under our system of justice, an accused is tried for *what* he did, not for *who* he

is." *Caldwell*, 760 F.3d at 276. As long as Rule 404(b) continues to embody that policy choice, courts should faithfully effectuate it. And using propensity reasoning to admit prior bad acts vitiates, not effectuates, the prohibition on propensity. Scholars have long agreed. *See, e.g.*, Wright & Miller, 22B Fed. Practice & Procedure § 5244 (June 2024 update) ("We suggest that the operation of Federal Rule of Evidence 404(b) admits evidence of other crimes to prove conduct only when the line of inferences from the evidence to a consequential fact does not include any inference of propensity."); Imwinkelried, The Use of Evidence, *supra*, at 578–85 (describing the use of propensity reasoning to establish *mens rea* as "unsound" and "spurious," and arguing that prosecutors must "articulate a tenable noncharacter theory of logical relevance"); Morris, *supra*, at 184–85 (arguing that, where the theory of admissibility "necessarily depend[s] on propensity reasoning," this "violat[es] the plain language of Rule 404(b)"); *id*. at 208 (repeating that, where the "chain necessarily includes an inference from the defendant's earlier behavior to the probable continuance of that behavior," admission "simply cannot be squared with the plain language of Rule 404(b)").

* * *

Where evidence of prior bad acts is relevant to a proper purpose through some non-propensity reasoning, it may be admissible—subject to Rule 403. And that may be true even where its admission has the incidental effect of allowing the jury to infer propensity. But where evidence of prior bad acts is relevant to a proper purpose *only* through the use of propensity reasoning, it should be inadmissible under Rule 404(b). Given the confusion and the stakes, the Court should grant certiorari and so hold.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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