No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2024

STEVEN MICHAEL CENEPHAT,
***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

Under Federal Rule of Evidence 404(b), evidence of someone's prior crime "may be admissible" to prove a separately charged offense if the evidence "bears upon a relevant issue in the case." *Huddleston v. United States*, 485 U.S. 681, 686 (1988); Fed. R. Evid. 404(b)(2). The rule, however, bars evidence "that might adversely reflect on th[at] [person's] character." *Huddleston*, 485 U.S. at 685. *See also* Fed. R. Evid. 404(b)(1). So the "threshold" question each court must decide before admitting prior-crime evidence under Rule 404(b) is "whether that evidence is probative of a material issue other than character." *Huddleston*, 485 U.S. at 686. *See also* Fed. R. Evid. 404(b)(2).

In the decision below, the Eleventh Circuit upheld the admission of the petitioner's prior Florida felon-in-possession convictions, which the government had used to prove the intent element of a federal felon-in-possession charge. In so ruling, the Eleventh Circuit held that the prior convictions satisfied Rule 404(b)'s relevance requirement because the state of mind that needed to be proved to obtain the prior convictions and to convict on the federal charge matched.

The question presented is as follows:

Does a court, in deciding whether a defendant's prior crime is relevant to the non-character issue of intent under Rule 404(b), need only determine whether the prior crime and the pending charge require proof of the same mental state?

PARTIES TO THE PROCEEDINGS

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

RELATED PROCEEDINGS

The following proceedings are directly related to this petition:

- *United States v. Cenephat*, No. 20-cr-20230 (S.D. Fla.) (judgment entered Oct. 25, 2022).
- *United States v. Cenephat*, No. 22-13741 (11th Cir.) (judgment entered Sept. 23, 2024; rehearing denied Oct. 31, 2024).

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Mr. Steven Michael Cenephat respectfully petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The Eleventh Circuit rendered the judgment to be reviewed on September 23, 2024. The supporting opinion is published at 115 F.4th 1359 (2024), and reproduced herein as Appendix ("App.") A-1. The district court did not issue a written opinion in this case.

STATEMENT OF JURISDICTION

Mr. Cenephat brings this petition following the Eleventh Circuit's rendition of a final judgment. This Court therefore has jurisdiction under 28 U.S.C. § 1254(1). This petition is timely. Following the Eleventh Circuit's entry of the judgment, Mr. Cenephat moved for panel rehearing. The Eleventh Circuit denied the motion by order dated October 31, 2024. That denial made any petition for a writ of certiorari due by January 29, 2025.

RULE PROVISION INVOLVED

> **(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 . . . intent . . . .
>
> **(3) Notice in a Criminal Case.** In a criminal case, the prosecutor must:
>
> . . .
>
> **(B)** 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)(1), (2), (3)(B).

INTRODUCTION

This petition explores a Circuit conflict about the most important evidentiary development since the early 2000s. The government routinely seeks to introduce evidence of a defendant's prior crimes to prove he or she committed a federal crime on a separate occasion. Typically, it claims that the evidence does not violate Rule 404(b)'s character prohibition because the evidence would be used for a permitted purpose like proving intent.

That was the case here. But in upholding the admission of Mr. Cenephat's prior convictions under Rule 404(b), the Eleventh Circuit did not closely scrutinize the purpose for which the government actually used the evidence at trial. It instead found that the convictions were admissible because they required proof of the same state of mind that the government had to prove at trial. Such superficial analysis conflicts with the far-more critical approaches that courts in jurisdictions like the Third, Fourth, and Seventh Circuits have, for years now, followed in deciding whether prior-crime evidence satisfies Rule 404(b)'s admissibility test.

Given the frequency with which the government employs Rule 404(b) evidence in criminal cases, the high studied impact of prior-crime evidence on conviction rates, and failed extrajudicial efforts to resolve the conflict, this Court should intervene.

STATEMENT OF THE CASE

Well into nightfall on February 10, 2020, City of Miami Police Officer Ariel Labanino, his partner, and other police officers were conducting a traffic stop when they heard gunshot-like sounds in the distance. *United States v. Cenephat*, No. 20-cr-

20230 (S.D. Fla.) ["S.D. Fla."] ECF No. 163:79-81, 86 102-03. The sounds came from approximately five blocks away. *Id.* at 80-81, 102-03. Reacting "immediately" and without awaiting official confirmation of shots fired, Labanino and his partner abandoned the traffic stop, ran to their vehicle, and began driving towards the area of the sounds. *Id.* at 80-81, 103.

To reach that area, Labanino and his partner headed north on the closest avenue, and then west on a street until reaching 2nd Avenue in the Overtown area and heading south on it. *Id.* at 104. Once there, the officers "kind of s[aw]" a silver Pontiac Grand Prix in the distance traveling northbound towards them. *Id.* at 81, 86. After the patrol car and the Grand Prix crossed paths, the Grand Prix sped off. *Id.* at 81. Suspecting the Grand Prix was connected with the gunshot-like sounds, the officers U-turned and gave chase. *Id.* at 82.

The chase continued through various neighborhoods, across a state road, and up Interstate 95 until the Grand Prix exited the interstate, lost control, and crashed between a fence and a light post near the Model City area. S.D. Fla. ECF No. 136-2; S.D. Fla. ECF No. 163:82-84, 90-91, 113; Gov't Ex. 3). The precise amount of time of these events is unclear from the record; notably, however, part of the interstate chase, alone, was approximately five minutes. *See* S.D. Fla. ECF No. 163:95 (Labanino did not activate his body-worn camera until already "on 95 somewhere"); Gov't Ex. 3 (about four and a half minutes elapsed between the beginning of the video and officers' first contact with the Grand Prix occupants).

Upon approaching the Grand Prix, police found Jean Fritzbert, Jr. (the co-defendant below) in the driver seat, along with Mr. Cenephat. S.D. Fla. ECF No. 163:92-93. Both were removed from the vehicle and arrested. *Id.* at 94, 105. Although the Grand Prix was "trapped" between the fence and light post, police were able to remove the driver through the driver door. S.D. Fla. ECF No. 136-3; S.D Fla. ECF No. 136-4; S.D. Fla. ECF No. 163:91. The Grand Prix's passenger side, however, was "completely jammed up against the fence" and "kind of box in." S.D. Fla. ECF No. 136-3; S.D. Fla. ECF No. 136-4; S.D. Fla. ECF No. 163:91, 93, 124. "[S]o [Labanino] just took [Mr. Cenephat] out the window" on the rear-driver side. S.D. Fla. ECF No. 163:93.

Labanino looked in the back of the Grand Prix and saw a gun barrel and multiple bullet casings. *Id.* at 94. Crime scene investigators searched the vehicle and discovered a .223 Remington American Tactical Omni Hybrid in a backpack, a 9mm Glock 43 pistol, two rifle magazines, and spent bullet casings. S.D. Fla. ECF No. 136-6; S.D. Fla. ECF No. 136-7; S.D. Fla. ECF No. 136-8; S.D. Fla. ECF No. 136-9; S.D. Fla. ECF No. 163:116, 118-21; S.D. Fla. ECF No. 164:16. Public records showed that Mr. Cenephat was a convicted felon at the time. S.D. Fla. ECF No. 136-34.

Accordingly, in November 2020, the government filed an Indictment charging Fritzbert (the driver of the Grand Prix) and Mr. Cenephat each with one count of possession of a firearm and ammunition by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). S.D. Fla. ECF No. 25. Fritzbert pled guilty, and was convicted as charged and sentenced to imprisonment. S.D. Fla. ECF No. 64; S.D. Fla. ECF No. 65; S.D. Fla.

ECF No. 88). Mr. Cenephat proceeded to trial on the possession charge. S.D. Fla. ECF No. 163; S.D. Fla. ECF No. 164).

Before trial, the government filed written notice of intent to introduce two Florida convictions for felon-in-possession offenses previously committed by Mr. Cenephat. S.D. Fla. ECF No. 107:1. One of the prior offenses occurred approximately seven and a half years before the February 10, 2020, events, *see* S.D. Fla. ECF No. 136-34:1; Presentence Investigation Report ["PSI"] ¶ 38; the other offense occurred over nine and a half years before the events, *see* S.D. Fla. ECF No. 136-34:4; PSI ¶ 36. The government—despite not charging either defendant with murder or attempted murder—also noted its intent to introduce evidence purporting to show that, before the Grand Prix crashed and Fritzbert and Mr. Cenephat were arrested, Mr. Cenephat himself had "committed a drive-by shooting [from the Grand Prix] using the same firearms and ammunition as alleged in the Indictment." S.D. Fla. ECF No. 107:1. Mr. Cenephat filed written objections. S.D. Fla. ECF No. 112.

The district court conducted a pre-trial hearing on the matter, and ruled that all of the evidence was admissible. S.D. Fla. ECF No. 162:15. Regarding the prior felon-in-possession offenses, the district court determined that, for purposes of Rule 404(b), there was sufficient proof of the convictions, they were relevant to the issue of intent, and they were "not coming in to prove [Mr. Cenephat's bad] character." S.D. Fla. ECF No. 162:14. Finally, the court determined that the evidence satisfied Federal Rule of Evidence 403's balancing test, while noting that it could give the jury a limiting instruction. S.D. Fla. ECF No. 162:15.

At trial, and over Mr. Cenephat's renewed objection, the government introduced the prior felon-in-possession convictions just before resting. S.D. Fla. ECF No. 164:50. The government then argued to the jury that the convictions supported its constructive possession theory, as they proved Mr. Cenephat's "intent to take control of those firearms." *Id.* at 60. The jury found Mr. Cenephat guilty of the charge, and the district court sentenced him to imprisonment for a term of 120 months. S.D. Fla. ECF No. 130; S.D. Fla. ECF No. 153.

On appeal to the United States Court of Appeals for the Eleventh Circuit, Mr. Cenephat renew his challenge to the admission of his prior Florida convictions. *United States v. Cenephat*, No. 22-13741 (11th Cir.) ["11th Cir."] ECF No. 19. He argued that the convictions served no non-propensity purpose. *Id.* He also argued that the prior-crime evidence flunked the balancing test of Federal Rule of Evidence 403, as the convictions were too old and dissimilar to carry any meaningful probative value but the risk of prejudice was substantial. *Id.* The Eleventh Circuit disagreed, upheld the district courts' ruling, and affirmed the final judgment. *United States v. Cenephat*, 115 F.4th 1359 (11th Cir. 2024). Mr. Cenephat sought panel rehearing, 11th Cir. ECF No. 45, which was denied.

This timely petition follows.

REASONS FOR GRANTING THE PETITION

I. The Eleventh Circuit's test for evaluating Rule 404(b) evidence's relevance to intent conflicts with the Third, Fourth, and Seventh Circuits' Rule 404(b) tests.

A. Eleventh Circuit courts may consider only one of the several factors that Fourth Circuit courts may consider.

In the Fourth Circuit, prior-crime evidence must satisfy a multi-part test to be admissible under Rule 404(b). *United States v. Hall*, 858 F.3d 254, 266 (4th Cir. 2017). Foremost, "[t]he evidence must be relevant to an issue, such as an element of an offense, and must not be offered to establish the general character of the defendant." *Id.* (alteration in original) (citation omitted). The evidence is irrelevant unless it is "sufficiently related to the charged offense." *Id.* at 267 (citation omitted). Generally, "[t]he more closely that the prior act is related to the charged conduct in time, pattern, or state of mind, the greater the potential relevance of the prior act." *Id.* (citation omitted).

Under Eleventh Circuit precedent, a criminal defendant who denies guilt "makes intent a material issue," which the government generally may prove using "qualifying Rule 404(b) evidence." *United States v. Zapata*, 139 F.3d 1355, 1358 (11th Cir. 1998). Evidence of a defendant's prior crime might qualify for admission under Rule 404(b) if the government shows that the evidence is "relevant to an issue other than defendant's character." *United States v. Edouard*, 485 F.3d 1324, 1344 (11th Cir. 2007). Importantly, prior-crime evidence's relevance to any intent-related issue must be "determined by comparing the defendant's state of mind in committing both the extrinsic and charged offenses." *Zapata*, 139 F.3d at 1358. "Where the state of mind

required for both offenses is the same, the extrinsic crime is relevant to the charged offense" and therefore, satisfies the first prong of the Rule 404(b) test. *Id.*; *Edouard*, 485 F.3d at 1345.

This precedent dictated the decision below. The Eleventh Circuit did not expressly hold that Mr. Cenephat's prior Florida convictions satisfied Rule 404(b)'s relevance requirement. But it did so implicitly. The Eleventh Circuit noted that the government had (1) charged Mr. Cenephat with "knowingly possessing a firearm as a felon in violation of 18 U.S.C. § 922(g)(1)," and (2) proffered evidence "of his prior felon-in-possession convictions to prove intent under Rule 404(b)." *United States v. Cenephat*, 115 F.4th 1359, 1363, 1366 (11th Cir. 2024). It then cited the precedent described above. *Id.* at 1366 (first citing *Zapata*, 139 F.3d at 1358; then citing *Edouard*, 485 F.3d at 1345). Next, it emphasized the prior and charged offenses' "common[ality]": they "involved the unlawful possession of weapons that Cenephat *knew* he should not have." *Id.* at 1367 (emphasis in original). And finally, it rejected argument that the district court erred in admitting the prior convictions under Rule 404(b). *Id.* As this analysis indicates, the Eleventh Circuit simply "comparing [Mr. Cenephat's] state of mind in committing both the [Florida] and charged offenses," determined they matched, and concluded that "the [relevance] prong of the Rule 404(b) test [wa]s satisfied." *See Zapata*, 139 F.3d at 1358; *Edouard*, 485 F.3d at 1345.

The decision below therefore conflicts with *Hall*. It establishes (or reaffirms) the rule that where the government claims its Rule 404(b) evidence is relevant to an

intent-related issue, the district court must decide only whether the prior and charged offenses' mental states match. In other words, Eleventh Circuit courts may consider only one of the several factors Fourth Circuit courts may consider when evaluating Rule 404(b) relevance.

B. The Seventh Circuit has rejected the sort of single-factor relevance test that the Eleventh Circuit applied.

Until 2014, Seventh Circuit courts had applied a four-part test when evaluating the admissibility of Rule 404(b) evidence. *United States v. Gomez*, 763 F.3d 845, 852 (7th Cir. 2014) (en banc). The court had to

> evaluate whether (1) the evidence is directed toward establishing a matter in issue other than the defendant's propensity to commit the crime charged, (2) the evidence shows that the other act is similar enough and close enough in time to be relevant to the matter in issue, (3) the evidence is sufficient to support a jury finding that the defendant committed the similar act, and (4) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.

Id. (citation omitted). Thus, the test's relevance prong allowed "inquiry" only "into the similarity and timing of the other act." *Id.* at 854.

In deciding *Gomez*, the Seventh Circuit found that the four-part test "ceased to be useful"—largely because of its relevance prong. *Id.* at 853-55. The court of appeals, sitting en banc, explained that the similarity/timing inquiry did bear some connection to the Federal Rules of Evidence governing admission of relevant evidence. *Id.* at 854. But the need for, and strength of, such an inquiry always depends on the particular purpose for which the other-act evidence is offered and the particular theory of admissibility. *Id.* So while it is "far too tempting to stop at superficial comparisons without meaningfully analyzing how the similarity and recency of the prior bad act

affect its relevance in the unique circumstances of the case," similarity and timing of that act might not "bear on the relevance question at all." *Id.* Consequently, "treating the 'similarity' and 'timing' factors as formal boxes to check in admissibility analysis" could lead to misapplication of the law. *Id.* at 853-54.

This "problem" compelled the en banc court to abandon its four-part test. *Id.* Consequently, the Seventh Circuit now disapproves "rigid application" of the rule that courts must consider only the similarity and timing of a prior act when evaluating its relevance under Rule 404(b). *Id.* at 854; *Burton v. City of Zion*, 901 F.3d 772, 779 (7th Cir. 2018).

The decision below conflicts with *Gomez*. As explained, it establishes a narrower rule for deciding whether a prior crime is relevant to the non-propensity purpose of proving intent: a court must compare only the prior and charged offenses' required mental state. It must "stop" the inquiry upon determining that "the state of mind required for both offenses is the same." *See Gomez*, 763 F.3d at 854; *Zapata*, 139 F.3d at 1358. So it never assesses how that similarity makes the prior crime relevant to intent within the context of the particular case's "unique circumstances." *See Gomez*, 763 F.3d at 854. Without that additional step, the comparison would be "superficial" at best. *See id.*

This decision-making process is precisely the sort of "straightjacket," "checklist" approach that *Gomez* abandoned. *See id.* at 853, 855. Not only does it treat the mental-state factor as a "formal box[]" for Eleventh Circuit courts to "check" when evaluating Rule 404(b) relevance, *see id.* at 854, but that factor alone is dispositive.

Conceivably, then, the Seventh Circuit would disapprove the analysis through which the Eleventh Circuit decided Mr. Cenephat's appeal. *See Burton*, 901 F.3d at 779 (district court erred by applying a legal test that the court of appeals had already rejected and, in turn, "by rigidly applying the similarity and recency rule"); *United States v. Miller*, 673 F.3d 688, 696, 698 (7th Cir. 2012) (quoting *United States v. Beasley*, 809 F.2d 1273, 1279 (7th Cir. 1987)) (interpreting Rule 404(b) as "requir[ing] a case-by-case determination, not a categorical one," while acknowledging that "in every case" where the government proffers Rule 404(b) evidence to prove intent, the district court must "make a 'principled exercise of discretion' to determine . . . whether the evidence is actually probative of intent").

C. The Eleventh Circuit's supporting reasoning is incongruous with the Third, Fourth, and Seventh Circuits' propensity-free-reasoning approach.

In *United States v. Caldwell*, the Third Circuit held that Rule 404(b) evidence is inadmissible unless it is "offered for a proper non-propensity purpose that is at issue in the case," and "relevant to that identified purpose." 760 F.3d 267, 277 (3d Cir. 2014). The second requirement is "crucial." *Id.* at 276. This is because "even when a non-propensity purpose is 'at issue' in a case, the evidence offered may be completely irrelevant to that purpose, or relevant only in an impermissible way." *Id.* at 281. And so "[t]he task is not merely to find a pigeonhole in which the proof might fit, but to actually demonstrate that the evidence prove[s] something other than propensity." *Id.* at 276 (second alteration in original) (citation omitted).

To that end, "'the government must explain how [the proffered 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 (quoting *United States v. Davis*, 726 F.3d 434, 442 (3d Cir. 2013)). Then a court must verify the explanation. Specifically, *Caldwell* "require[s] care and precision by the district court in ruling on the admission of prior act evidence for a non-propensity purpose." *Id.* at 277. "The district court, if it admits the evidence, must in the first instance, rather than the appellate court in retrospect, articulate reasons why the evidence also goes to show something other than character." *Id.* (citation omitted). The proffered evidence must be excluded if the government "neglects or is unable to articulate this chain of inferences." *Id.* at 277. "[A]nd failure to exclude such evidence constitutes reversible error." *Id.*

The Fourth and Seventh Circuits have adopted similar "propensity-free reasoning" approaches. *Gomez*, 763 F.3d at 856, 860. *See also Hall*, 858 F.3d at 266 (quoting *Davis*, 726 F.3d at 442).

The decision below is incongruous with those approaches. To illustrate how simply comparing mental states "goes to show something other than character," *see Caldwell*, 760 F.3d at 277, the Eleventh Circuit relied on *United States v. Jernigan*, 341 F.3d 1273 (11th Cir. 2003), *abrogated in part on other grounds by Rehaif v. United States*, 588 U.S. 225 (2019). There, it noted, a prior panel had already determined "that there is a 'logical connection between a convicted felon's knowing possession of a firearm at one time and his *knowledge that a firearm is present* at a subsequent

time.'" *Cenephat*, 115 F.4th at 1366 (emphasis added) (quoting *Jernigan*, 341 F.3d at 1281-82).

Even if that determination was accurate within *Jernigan*'s context, it is not universally applicable. In *Jernigan*, the government introduced Rule 404(b) evidence to prove a defendant's "*knowledge* that the [alleged] gun was present in th[at] case." 341 F.3d at 1281 (emphasis in original). In this case, however, it introduced Mr. Cenephat's prior Florida convictions to prove his "intent to take control of th[e] [alleged] firearms." S.D. Fla. ECF No. 164:60. Proof of knowledge and proof of intent are distinct "permitted uses" of Rule 404(b) evidence. *See* Fed. R. Evid. 404(b)(2). And unlike the facts in *Jernigan*, neither the government nor Mr. Cenephat asked the jury to decide whether Mr. Cenephat did not know the firearms were present at some point. *See* 341 F.3d at 1281. Given these distinctions, *Jernigan*'s "chain of inferences" has nothing to do with the issue "in this case." *See Caldwell*, 760 F.3d at 276-77; *Hall*, 858 F.3d at 266; *Jernigan*, 341 F.3d at 1281. The decision below therefore creates the risk that courts will introduce Rule 404(b) evidence in cases where it is "completely irrelevant" because, unlike *Jernigan*, some fact other than knowledge is "at issue." *See Caldwell*, 760 F.3d at 281.

II. The Eleventh Circuit, applying its single-factor test, reached a holding that conflicts with other Circuits' holdings in factually analogous cases.

Hall, for example, illustrates this point. There, a district court permitted the government to introduce Hall's prior convictions for possession of marijuana with intent to distribute as proof that he had committed the very same offense (and a

related firearm offense) on a different occasion. 858 F.3d at 264, 276. Law enforcement found the alleged marijuana, with firearms, in the deadbolt-locked bedroom of a house where Hall and other individuals were residing. *Id.* at 259. The government alleged—as it did here—that Hall constructively possessed the marijuana and firearms. *Id.* And the district court —like the one here—determined that the convictions were probative of Hall's intent. *Id.* at 259-60.

Obviously, Hall's prior and charged offenses—being the same—would have required the same state of mind. *See Zapata*, 139 F.3d at 1358. So straightforward application of the decision below compels the conclusion that Hall's prior convictions were relevant to a non-character purpose under Rule 404(b). Indeed, although this case involved the alleged possession of firearms, the decision below rests on drug cases like *Zapata* and *Edouard*. Presumably, then, the Eleventh Circuit would apply its decision to drug cases like *Hall*.

The Fourth Circuit, however, held that the district court committed reversible error in admitting Hall's convictions. In reaching that holding, the court of appeals found nothing showing that Hall's alleged conduct and prior convictions "were related in manner or arose from the same pattern of conduct." 858 F.3d at 272 (citation omitted). More specifically, the evidence showed no "linkage" beyond the fact that the prior convictions involved the same drug (marijuana) and the same conduct as that charged in the indictment (possession with intent to distribute). *Id.* (citation omitted). None of the convictions involved the same residence, or marijuana that was stored in a deadbolt-locked bedroom. *Id.* Meanwhile, the proof of Hall's constructive possession

in the prior cases was materially different. In one case, for example, law enforcement found marijuana in Hall's pocket, a bathtub, and a dresser while executing a warrant search of his residence. *Id.* In another case, Hall did not contest his ownership of marijuana. *Id.*

The court of appeals added that the remoteness of Hall's prior convictions "further undermine[d]" any finding of relevance. *Id.* at 273. Five years separated Hall's most-recent prior conviction and the conduct underlying the later charge. *Id.* The court concluded that this gap was "significant" given its previous determination that a district court erroneously admitted evidence of drug-related activities that had occurred only a year and a half before the conduct at issue. *Id.*

Hall therefore shows that in the Fourth Circuit, prior-crime evidence may be irrelevant even where a defendant's "state of mind in committing both the extrinsic and charged offenses" match. *See Zapata*, 139 F.3d at 1358." As in *Hall*, the government introduced Mr. Cenephat's prior felon-in-possession convictions from Florida court to prove the same offense under federal law. *See Hall*, 858 F.3d at 264, 276. The government specifically used them to establish the intent element of its constructive possession theory. S.D. Fla. ECF No. 164:60. *See Hall*, 858 F.3d at 259-60. But aside from simply showing that the Florida and federal offenses involved the same type of charge, the government established no other "linkage" between the offenses. S.D. Fla. ECF No. 136-34; S.D. Fla. ECF No. 164:50-51. *See Hall*, 858 F.3d at 272.

Indeed, there were "material differences" between the offenses. *See Hall*, 858 F.3d at 272. The prior convictions resulted from guilty pleas, so Mr. Cenephat did not contest his criminal intent. S.D. Fla. ECF No. 136-34; S.D. Fla. ECF No. 164:50-51. *See Hall*, 858 F.3d at 272. In neither Florida case was Mr. Cenephat accused of using or threatening to use a firearm to harm others—let alone to commit a life-threatening act like shooting someone in the head. *See* PSI ¶¶ 36, 38. Unlike the two firearms, two rifle magazines, twenty-three rounds of ammunition, and various spent casings that were collected in this case, Mr. Cenephat's older Florida case involved only ammunition. *Compare* PSI ¶ 36, *with* S.D. Fla. ECF No. 136-12, S.D. Fla. ECF No. 136-13, S.D. Fla. ECF No. 136-15, S.D. Fla. ECF No. 136-26, S.D. Fla. ECF No. 136-27, S.D. Fla. ECF No. 136-30, *and* S.D. Fla. ECF No. 136-31. Relatedly, although the more-recent Florida case involved one firearm, it was a .380 caliber handgun. *See* PSI ¶ 38. In other words, that case did not involve the same "enormous assault rifle" or the Glock 9mm caliber semi-automatic firearm that was presented to this jury. *See* S.D. Fla. ECF No. 136-26; S.D. Fla. ECF No. 136-27; S.D. Fla. ECF No. 164:80. The seven- and nine-year gaps between the prior and charged offenses "further undermine[d]" any finding of relevance. S.D. Fla. ECF No. 136-34:1, 4; PSI ¶¶ 36, 38. *See Hall*, 858 F.3d at 273.

Given these similarities, Mr. Cenephat's prior convictions would not satisfy Rule 404(b)'s relevance requirement under *Hall*. *See* 858 F.3d at 275. *See also Miller*, 673 F.3d at 698-700 (reversing conviction on charge of possessing crack cocaine with intent to distribute where government introduced a prior conviction for the same

crime as proof of intent to distribute; given Miller's "innocent bystander" defense—that someone else intended to distribute the drugs despite the fact that the drugs were found close to Miller within a house where he and others resided—the prior conviction's only purpose was to evoke the impermissible inference that Miller must have been the person who intended to distribute because he "was the one who had intended to distribute before").

III. The question presented is important.

This petition underscores a "growing divide" between Circuits on "probably the most important evidentiary development . . . to one of the most important rules of the Federal Rules of Evidence." Daniel J. Capra & Liesa L. Richter, *Character Assassination: Amending Federal Rule of Evidence 404(b) to Protect Criminal Defendants* [*Character Assassination*], 118 COLUM. L. REV. 769, 802 (2018); Advisory Committee on Rules of Evidence, Fall 2016 Meeting (Oct. 21, 2016) [Advisory Committee Fall 2016 Meeting] 67, www.uscourts.gov/sites/default/files/2016-10-evidence-agenda-book.pdf (last visited Jan. 9, 2025).

As explained, the Third, Fourth, and Seventh Circuits have taken a "fresh look" at Rule 404(b)'s scope and meaning to ensure courts better scrutinize prior-crime evidence's relevance. Advisory Committee Fall 2016 Meeting 67. "Many" other courts, including those of the Eleventh Circuit, "have all but admitted that they do not—and do not want to—carefully scrutinize such evidence." Dorie Klein, *One Step Backward: The Ninth Circuit's Unfortunate Rule 404(b) Decision in United States v. Lague* ["*One Step Backward*"], 55 LOY. L.A. L. REV. 739, 758 (2022). They continue to

analyze the admissibility of prior-crime evidence "at a very high level of generality," without "examin[ing] the specific chain of inferences by which the evidence is relevant to determine whether the relevance is based upon a propensity inference." Dora W. Klein, *The (Mis)application of Rule 404(b) Heuristics*, 72 U. MIAMI L. REV. 706, 746 (2018).

Only the Court can bridge the divide. The Judicial Conference Standing Committee on Rules of Practice and Procedure already attempted to do so—but without meaningful success. Beginning in 2016, the Standing Committee's Advisory Committee on Evidence Rules "consider[ed] whether an amendment to Rule 404(b) could resolve the apparent split among the circuit courts." *Character Assassination*, 118 COLUM. L. REV. at 773. The Advisory Committee did not propose any "substantive amendment" to Rule 404(b), believing that it would only "make the rule more complex without rendering substantial improvement." *2020-2021 Updates to the Federal Rules of Evidence* (Dec. 9, 2020), https://www.rulesofevidence.org/2020-2021-updates-to-the-federal-rules-of-evidence/ (last visited Jan. 29, 2025).

But as the Third, Fourth, and Seventh Circuits had already determined, the Advisory Committee did acknowledge the need for courts to exclude Rule 404(b) evidence that is "probative for a 'proper' purpose only by proceeding through a propensity inference." Advisory Committee on Rules of Evidence, Spring 2017 Meeting [Advisory Committee Spring 2017 Meeting] (Apr. 21, 2017) 307 https://www.uscourts.gov/sites/default/files/advisory_committee_on_rules_of_evidence_-_spring_2017_meeting_materials.pdf. (last visited Jan. 29, 2025). The Advisory

Committee also acknowledged that "at some point the prosecution should have to articulate, and the court should have to find, that the stated proper purpose is shown through non-propensity inferences." *Id.*

The Advisory Committee therefore recommended an amendment that would "expand the prosecutor's notice obligations" under Rule 404(b). *2020-2021 Updates to the Federal Rules of Evidence* (Dec. 9, 2020). And notably, the United States Department of Justice proposed the amendment language, which "would require the prosecutor to describe in the notice 'the non-propensity purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose.'" *Id.* The Standing Committee adopted this recommendation. *Id.* The Court then adopted the proposed rule amendment, which took effect in 2020. *Recent and Proposed Amendments to Federal Rules, Annual Report 2020*, https://www.uscourts.gov/data-news/reports/annual-reports/directors-annual-report/annual-report-2020/recent-and-proposed-amendments-federal-rules-annual-report-2020 (last visited Jan. 29, 2025). *See* Fed. R. Evid. 404(b)(3)(B).

Importantly, the Court accepted the proposal without modification. *Id.* It therefore amended Rule 404(b) without "implement[ing] a more careful procedure" for evaluating Rule 404(b) relevance. Advisory Committee Spring 2017 Meeting 307. And it does not appear that the Court has publicly addressed the attendant "complex[ities]" that the Advisory Committee had anticipated. *2020-2021 Updates to the Federal Rules of Evidence* (Dec. 9, 2020). Meanwhile, since the 2020 amendment,

the Eleventh Circuit has held that none of the rule changes impacted the way courts must analyze Rule 404(b) relevance. *Cenephat*, 115 F.4th 1359.

That said, a conflict at least between the Eleventh Circuit, on the one hand, and the Third, Fourth, and Seventh Circuits, on the other hand, persists. The 2020 amendments failed to harmonize the way these Circuits analyze Rule 404(b) relevance—which "signals that the time is ripe for" Court intervention. *See Character Assassination*, 118 COLUM. L. REV. at 802.

Indeed, the particular question in this petition carries significant implications for criminal cases not just in the Third, Fourth, Seventh, and Eleventh Circuits, but nationwide. Courts, legal commentators, and practitioners agree—and empirical data confirms—that the "odds of conviction skyrocket" once the jury learns of the defendant's criminal past. Paul S. Milich, *The Degrading Character Rule in American Criminal Trials*, 47 GA. L. REV. 775, 780 (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, 295 (2008). *See also Spencer v. Texas*, 385 U.S. 554, 575 (1967) (Warren, C.J., concurring in part and dissenting in part) ("A jury might punish an accused for being guilty of a previous offense, or feel that incarceration is justified because the accused is a 'bad man,' without regard to his guilt of the crime currently charged. Of course it flouts human nature to suppose that a jury would not consider a defendant's previous trouble with the law in deciding whether he has committed the crime currently charged against

him."); *Michigan v. Allen*, 420 N.W.2d 499, 508 (Mich. 1988) (discussing various supporting studies).

For this reason alone, more guilty pleas can reasonably be expected in jurisdictions like the Eleventh Circuit, where the government routinely introduces criminal history with "ease." *Character Assassination*, 118 COLUM. L. REV. at 772. The same would be true even where the government's case is weak; defendants simply will not risk being convicted knowing that exposure of their criminal past to jurors virtually guarantees a guilty verdict. *See One Step Backward*, 55 LOY. L.A. L. REV. at 745-46 (discussing Rule 404(b)'s impact on "several due process rights guaranteed to criminal defendants, including the presumption of innocence of the defendant and the burden of the government to prove every element of the charged offense beyond a reasonable doubt").

What more's, resolving the petition's question could reduce Rule 404(b) disputes. Rule 404(b) is "one of the most cited" Rules of Evidence." Fed. R. Evid. 404 advisory committee note to 1991 amendment. Consequently, Rule 404(b) issues "so inundate[] courts hearing criminal appeals"—which is perhaps why jurisdictions like the Eleventh Circuit have adopted rules that enable their courts to decide the issues "at a very high level of generality." 1 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 4.28 (4th ed. 2013); *The (Mis)application of Rule 404(b) Heuristics*, 72 U. MIAMI L. REV. at 746. But tellingly, "the overwhelming number of cases involve introduction of [Rule 404(b)] evidence by the prosecution." Fed. R. Evid. 404 advisory committee's note to 1991 amendment. Clarifying the standard by which courts must

evaluate Rule 404(b) relevance might temper the frequency at which prosecutors initiate Rule 404(b) disputes.

III. This case is an ideal vehicle for review.

This is so for several reasons. First, Mr. Cenephat preserved his Rule 404(b) objection throughout the entire case. He filed a written objection to the government's pretrial notice of intent to introduce his prior Florida convictions. S.D. Fla. ECF No. 112. He renewed the objection at trial, when the government introduced the convictions. S.D. Fla. ECF No. 164:50. Mr. Cenephat challenged the evidentiary ruling in the Eleventh Circuit. 11th Cir. ECF No. 19:32-41. And he sought panel rehearing on the matter. 11th Cir. ECF No. 45:18-26.

Second, the decision below is wrong. Foremost, it is "simply inconsistent with the legislative history behind Rule 404(b)." *Huddleston v. United States*, 485 U.S. 681, 688 (1988). "The Advisory Committee specifically declined to offer any 'mechanical solution' to the admission of evidence under 404(b)." *Id.* But that is precisely what the decision below establishes, particularly for cases where the government proffers prior-crime evidence to prove intent. The decision permits the government to introduce the evidence upon merely showing that the mental states required for the prior and charged crimes match.

For the same reason, the decision below renders Rule 404(b)'s notice provision somewhat superfluous. Under the rule, the government must provide notice "articulat[ing] . . . 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). According to the Advisory Committee, the emphasized language serves two purposes. It makes "clear" that the government, in the first instance, must specify "the basis for concluding that the evidence is relevant in light of th[e] [non-propensity purpose for which the evidence is offered]." Fed. R. Evid. 404 advisory committee note to 2020 amendment. It also "clarifi[es]" the previous misunderstanding "by some courts t[hat] permit[ted] the government to satisfy the notice obligation . . . without explaining the relevance of the evidence for a non-propensity purpose." *Id.*

In its decision below, the Eleventh Circuit essentially "articulate[d]" that "reasoning" for all future cases involving knowingly illegal possession. *See* Fed. R. Evid. 404(b)(3)(B). Namely, "there is a 'logical connection between a convicted felon's knowing possession of [certain contraband] at one time and his knowledge that [the same kind of contraband] is present at a subsequent time." *Cenephat*, 115 F.4th at 1366. Defendants in the Eleventh Circuit are now presumed to know that reasoning. *See United States Fid. & Guar. Co. v. Bass*, 619 F.2d 1057, 1077 (5th Cir. 1980)[1] ("It is elementary that everyone, including the defendants here, is presumed to know the law."). Consequently, the decision below obviates any need for the government to provide formal notice under Rule 404(b)(3)(B).

[1] "Decisions of the Fifth Circuit rendered on or before September 30, 1981," like *Bass*, "are binding precedent in the Eleventh Circuit." *United States v. Brown*, 364 F.3d 1266, 1271 (11th Cir. 2004).

Moreover, the same reasoning often will fail to "support[] the purpose" "for which the prosecutor intends to offer the evidence." *See* Fed. R. Evid. 404(b)(3)(B). Any connection between prior-crime evidence and a defendant's "knowledge" that something is "present at a subsequent time," *Cenephat*, 115 F.4th at 1366, would be "completely irrelevant" where facts other than knowledge are "at issue." *See Caldwell*, 760 F.3d at 281.

Third, the district court's evidentiary ruling constituted reversible error. At trial, the government relied on Mr. Cenephat's prior convictions to establish his constructive possession of the alleged firearms. Alternatively, it introduced evidence of a drive-by-shooting that had occurred before Mr. Cenephat's arrest to persuade the jury that Mr. Cenephat committed the shooting using those certain firearms and, in doing so, exercised actual possession over guns and ammunition as a convicted felon, in violation of 18 U.S.C. § 922(g)(1). *See* S.D. Fla. ECF No. 163:69; S.D. Fla. ECF No. 164:58-60, 80.

The government relied on ballistics evidence showing that bullet casings that were found at the drive-by-shooting scene matched two guns and additional casings that were found in the car involved in the shooting. Neither the guns nor the casings had Mr. Cenephat's DNA or fingerprints on them. S.D. Fla. ECF No. 163:177-83; S.D. Fla. ECF No. 164:42. Without such DNA or prints, the ballistics evidence itself could not have helped the prosecution in persuading the jury that Mr. Cenephat touched the guns at some point—let alone that he was the person who fired them.

The government also relied on evidence of gunshot-residue analysis that was found on Mr. Cenephat's left hand after his arrest. But the same evidence showed how the left hand would have had residue even if Mr. Cenephat himself did not discharge either of the alleged guns. The government's gunshot-residue-analysis expert testified that the left hand might have been near *a* gun when it was fired and ejected residue. S.D. Fla. ECF No. 163:147, 150-52. Otherwise, the left hand might have come into contact with another person or object already covered in residue, at which point some of the residue would have transferred to the hand. *Id.*

Meanwhile, the record contains no other forensic evidence that might have corroborated the theory that Mr. Cenephat got gunshot residue on his left hand as a result of his firing the alleged guns. There was no dispute that Mr. Cenephat's *right* hand would have been covered in gunshot residue had he actually fired *a* gun—given that Mr. Cenephat is right-handed, a right-handed person would use his or her right hand to squeeze a gun's trigger, and gunshot residue is ejected through a gun's trigger guard when the gun is fired. 11th Cir. ECF No. 19:45; 11th Cir. ECF No. 41:16-17. Nor was there any dispute that law enforcement found no residue on Mr. Cenephat's right hand. S.D. Fla. ECF No. 163:150. And, as noted, law enforcement also found none of Mr. Cenephat's DNA or fingerprints on the alleged guns and bullet casings. Without additional forensic evidence of this sort, the jury had no more reason to accept that Mr. Cenephat got residue on his left hand by firing the alleged guns, than it did to accept the gunshot-residue-analysis expert's alternative theories about the residue's presence.

Next, the government emphasized the fact that the shooting occurred with gunfire coming from the back driver's side window of a car, and that Mr. Cenephat was arrested while sitting in the back driver's side seat of the car.

Importantly, it was undisputed that the following events preceded Mr. Cenephat's arrest: City of Miami police (1) heard gunshots from a distance, approximately five blocks away; (2) traveled down several streets toward the sounds; (3) encountered a suspicious car; and (4) chased it through multiple neighborhoods and cities, including up a state road and the interstate, until the car crashed. 11th Cir. ECF No. 19:22-23, 76-77. The government admitted that the car chase, alone, lasted for seven minutes. 11th Cir. ECF No. 29:62-63. Also undisputed was the fact that no one testified as to Mr. Cenephat's location in the car at any point before the car crashed and police removed Mr. Cenephat from the car. S.D. Fla. ECF No. 163:93.

So although Mr. Cenephat had been found approximately where the government believed the shooter might have been sitting, there was no evidentiary basis from which the jury could have reasonably inferred that Mr. Cenephat was in that particular location seven minutes earlier. The jury, instead, would have needed to speculate about Mr. Cenephat's location throughout those seven minutes—including at the moment gunshot sounds first alerted police to a potential shooting somewhere nearby. And because, ultimately, the jury would not have been allowed to rely on speculation to identify the shooter, the evidence of Mr. Cenephat's and the shooter's locations would not have aided the prosecution in persuading the jury that Mr. Cenephat knowingly possessed the firearms at issue. *See United States v. Lopez-*

Ramirez, 68 F.3d 438, 440 (11th Cir. 1995) (mere speculation cannot "support the jury's verdict").

Finally, the government could not account for all of the car occupants before the police encounter. City of Miami Police Officer Ariel Labanino—the only witness who observed the car chase—testified that he never saw anyone exit the car "between the time [he] first saw the car . . . and the time that the car crashed." S.D. Fla. ECF No. 163:91. In explaining when he "first saw the car" (*id.*), Labanino testified that he and his partner heard gunshots from blocks away and had to run to their patrol vehicle and navigate through several streets before reaching the approximate area of the sounds. *Id.* at 79-81, 86, 102-02. Only then could the officers "kind of see" the car approaching them "from a distance" (*id.* at 86)—meaning that initially, the car and Labanino's vehicle were not close to one another. And tellingly, the government presented no evidence that police immediately canvassed the area of the encounter to confirm that no other suspect was nearby. At most, then, Labanino's testimony showed only that no one exited the car *after* the point he reached the street where he first encountered the car.

Moreover, law enforcement lifted a four-time offender's fingerprint from the alleged gun magazines. S.D. Fla. ECF No. 136-37; S.D. Fla. ECF No. 164:42. And at least some evidence indicates that Mr. Cenephat *was* in the front-passenger seat before the car crashed, but was forced to the back because of the crash. Labanino confirmed that the front-passenger seat was reclined at the time of the arrest S.D. Fla. ECF No. 163:101—as if someone (*i.e.*, Mr. Cenephat) had been sitting there.

Labanino also confirmed that when the car crashed: (1) it was "trapped" between a light post and a fence; (2) its passenger side was "completely jammed up against the fence"—thereby preventing anyone from entering or exiting the vehicle through that side; and so (3) the officer pulled Mr. Cenephat through the rear driver-side window because they "were kind of boxed in." *Id.* at 84, 91-94, 113, 124.

So the record not only dispels the notion that police were able to account for all of the car's occupants at the time of the shooting, but reasonably supports the inference that a third suspect was involved in the shooting and had time to exit the car and flee before police "first saw the car" "from a distance." *See id.* at 86, 91.

In short, the government's alternate theory of guilt contained significant gaps or was contradicted by the government's own evidence. So the erroneous admission of Mr. Cenephat's prior felon-in-possession convictions created significant "risk the [the] jury w[ould] convict for crimes other than those charged—or that, uncertain of guilt, it w[ould] convict anyway because [Mr. Cenephat, being] a bad person[,] deserve[d] punishment." *Old Chief v. United States*, 519 U.S. 172, 181 (1997) (citation omitted).

CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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January 29, 2025