Closing Pandora's Box: Limiting the Use of 404(b) to Introduce Prior Convictions in Drug Prosecutions

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INTRODUCTION

In 2002, Rick Vo and his wife Brenda were indicted for "conspiring . . . and aiding and abetting each other" to possess, with the intent to distribute, "more than 50 grams of methamphetamine."[1] The Federal Bureau of Investigation arrested the Vos after a Mail Boxes Etc. employee discovered a package that said it contained cosmetics but actually contained four gallon-sized bags of methamphetamine.[2] Brenda pleaded guilty to conspiracy, but Rick chose to go to trial.[3] Before Rick's trial, the government filed its intent to introduce a prior drug conviction at trial under Federal Rule of Evidence

* J.D. Candidate, Harvard Law School, 2015. The Author would like to thank Professors Adriaan Lanni and Emily Schulman, for their help identifying this topic and providing invaluable guidance along the way; Dina Chaitowitz, for her helpful feedback and suggestions; and the Editors of the *Harvard Civil Rights–Civil Liberties Law Review* for all of their direction, substantive comments, and editing.

[1] United States v. Vo, 413 F.3d 1010, 1012 (9th Cir. 2005). *See also* Indictment, United States v. Vo, No. 02-cr-00411 (D. Haw. Oct. 9, 2002), 2002 WL 34387302.

[2] *Vo*, 413 F.3d at 1012–13; Answering Brief of the United States of America to Defendant-Appellant Rick K. Vo at 3–4, United States v. Vo, 413 F.3d 1010 (9th Cir. 2005) (No. 03-10699), 2004 WL 1636275, at *3–4.

[3] *Vo*, 413 F.3d at 1013. At trial, Rick's defense was that Brenda was the offender and was blaming Rick to get a favorable plea deal. *See* Trial Transcript Vol. 2 at 20–28, United States v. Vo, No. 02-00411 (D. Haw. May 15, 2003) (defendant's opening statement); Trial Transcript Vol. 5 at 117–29, United States v. Vo, No. 02-00411 (D. Haw. May 20, 2003) (defendant's closing statement). Additionally, Rick argued that the government had not proven guilt beyond a reasonable doubt. *Id.*

404(b) to prove Rick's knowledge, intent, motive, plan, and absence of mistake.[4]

In general, propensity evidence — evidence suggesting that because someone committed a crime or wrong in the past, he or she is more likely to have committed a crime in the current situation — is prohibited under the Federal Rules of Evidence.[5] Rule 404(b) provides limited exceptions to this general prohibition by allowing prior convictions and evidence of bad acts for certain purposes, including to prove the defendant's knowledge of possession, intent to distribute, absence of mistake, or lack of accident.[6] The prior conviction that the government sought to introduce in Rick's case was a state conviction from thirteen years earlier for "selling thirty dollars worth of cocaine" to an undercover police officer.[7] The district court allowed the introduction of the conviction, instructing the jury that it could consider the conviction "only as it bears on [Rick's] intent, knowledge, [and] absence of mistake."[8]

Rick was convicted of aiding and abetting possession with intent to distribute methamphetamine.[9] On appeal, he argued that the fact that in 1988 — thirteen years earlier — he was, acting alone, willing to sell $30 of cocaine had no relevance as to whether he conspired with or aided and abetted Brenda to distribute large amounts of methamphetamine.[10] Rick contended, moreover, that any minimal relevance was substantially outweighed by the danger that the jury would use the fact that he had previously been involved with drugs to conclude he was involved with drugs in the current case.[11] While there is no way to know the extent to which the prior conviction affected the jury's verdict, the jury deliberated for five days[12] and during deliberation asked to see a copy of Rick's stipulation to the 1988 conviction.[13]

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[4] Criminal Docket at 10, entry no. 61, United States v. Vo, No. 02-00411 (D. Haw. Oct. 9, 2002); Defendant-Appellant Rick K. Vo's Opening Brief at 16, United States v. Vo, 413 F.3d 1010 (9th Cir. 2005) (No. 03-10699), 2004 WL 1080071, at *16.

[5] FED. R. EVID. 404(b)(1). For an overview of 404(b)'s permissible and impermissible uses, see 3 MICHAEL H. GRAHAM, HANDBOOK OF FED. EVID. § 404:5 (7th ed. 2014).

[6] *See* FED. R. EVID. 404(b)(2) ("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.").

[7] Defendant-Appellant Rick K. Vo's Opening Brief, *supra* note 4, at 17 (quoting Response by Plaintiff USA to Defendant's Motion in Limine to Exclude Evidence at 3, United States v. Vo, No. 02-00411 (D. Haw. May 20, 2003)), 55–56 (citing Trial Transcript Vol. 4 at 24–25, United States v. Vo, No. 02-00411 (D. Haw. May 19, 2003); Trial Transcript Vol. 5, *supra* note 3, at 80–81.

[8] Defendant-Appellant Rick K. Vo's Opening Brief, *supra* note 4, at 18 (citing Trial Transcript Vol. 5, *supra* note 3, at 81).

[9] *Vo*, 413 F.3d at 1013.

[10] Defendant-Appellant Rick K. Vo's Opening Brief, *supra* note 4, at 58.

[11] *Id.* at 59.

[12] Criminal Docket, *supra* note 4, at 13–14, entry nos. 86, 90, 92, 94, 97.

[13] Defendant-Appellant Rick K. Vo's Opening Brief, *supra* note 4, at 18 (citing Trial Transcript Vol. 6 at 2, United States v. Vo, No. 02-00411 (D. Haw. May 21, 2003)).

Rick Vo's case is not unique. Across the country, prosecutors use Rule 404(b) to introduce prior convictions in a variety of criminal cases. And 404(b)'s use has been expanding.[14] The introduction of prior convictions has a significant effect on whether a defendant is convicted.[15] This effect is particularly notable in drug prosecutions. In an "age of mass incarceration,"[16] drug crimes are a leading source of federal incarceration,[17] with almost half of the 215,000 inmates in federal prison incarcerated for drug crimes.[18] Drug offenses constituted nearly 30% of federal cases completed between October 2009 and September 2010.[19] Ninety-three percent of these drug cases ended in a conviction,[20] and more than 90% of defendants were incarcerated,[21] with an average sentence of six to seven years.[22] Furthermore, the number of drug offense cases completed in federal district courts more than tripled between 1980 and 2006.[23]

The introduction of prior convictions raises additional concerns when considering how convictions through guilty pleas are procured. Guilty pleas represent 97% of federal drug convictions and 90% of all federal drug cases.[24] A recent Human Rights Watch report detailed the pressure on federal drug defendants to plead guilty: defendants incur significantly more severe sentences if they go to trial.[25] In 2012, the average prison sentence for federal drug defendants who went to trial (sixteen years) was three times

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[14] *See* David A. Sonenshein, *The Misuse of Rule 404(b) on the Issue of Intent in the Federal Courts*, 45 CREIGHTON L. REV. 215, 242 (2011).

[15] *See infra* notes 245–251 and accompanying text.

[16] Heather Ann Thompson, *Inner-City Violence in the Age of Mass Incarceration*, THE ATLANTIC (Oct. 30, 2014), http://www.theatlantic.com/national/archive/2014/10/inner-city-violence-in-the-age-of-mass-incarceration/382154, *archived at* http://perma.cc/2B54-68MX.

[17] In the fiscal year 2012, drug offenders comprised 30.2% of offenders sentenced, falling behind only immigration, which accounted for 32.2% of offenders. GLENN R. SCHMITT & JENNIFER DUKES, OVERVIEW OF FEDERAL CASES, UNITED STATES SENTENCING COMMISSION (2013), *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2013/FY12_Overview_Federal_Criminal_Cases.pdf, *archived at* http://perma.cc/SVJ5-BEW9.

[18] The Editorial Board, Editorial, *A Rare Opportunity on Criminal Justice*, N.Y. TIMES (Mar. 15, 2014), http://www.nytimes.com/2014/03/16/opinion/sunday/a-rare-opportunity-on-criminal-justice.html, *archived at* http://perma.cc/867A-UFTX.

[19] MARK MOTIVANS, U.S. DEP'T OF JUSTICE, FEDERAL JUSTICE STATISTICS 2010 — STATISTICAL TABLES 17, tbl.4.2 (2013), *available at* http://www.bjs.gov/content/pub/pdf/fjs10st.pdf, *archived at* http://perma.cc/8GPJ-MJVC.

[20] *Id.*

[21] *Id.* at 21, tbl.5.1 (90.6% of drug offenders were convicted and sentenced to incarceration).

[22] *Id.* at 22, tbl.5.2 (average incarceration length is 79.9 months).

[23] TINA L. DORSEY & PRISCILLA MIDDLETON, U.S. DEP'T OF JUSTICE, DRUGS AND CRIME FACTS 29 (2009), *available at* http://www.bjs.gov/content/pub/pdf/dcf.pdf, *archived at* http://perma.cc/DC3D-MZVS.

[24] MOTIVANS, *supra* note 19, at 17, tbl.4.2. This data is for cases completed between October 2009 and September 2010.

[25] HUMAN RIGHTS WATCH, AN OFFER YOU CAN'T REFUSE: HOW US FEDERAL PROSECUTORS FORCE DRUG DEFENDANTS TO PLEAD GUILTY 2 (2013), *available at* http://www.hrw.org/sites/default/files/reports/us1213_ForUpload_0_0_0.pdf, *archived at* http://perma.cc/9HXV-XWK6.

greater than the average sentence for those drug defendants who pleaded guilty (five years and four months).[26] Prosecutors can employ mandatory minimum sentences and sentencing enhancements to increase the potential sentence if a defendant initially rejects a plea deal.[27] The report thus argues that the threat of incurring a higher sentence for going to trial has created so much pressure on defendants that "plea agreements, once a choice to consider, have for all intents and purposes become an offer drug defendants cannot afford to refuse."[28] Accordingly, even people who could not necessarily be convicted at trial or who did not commit the crime may plead guilty.[29] To be sure, this is not to say that most, or even many, guilty pleas are unreliable.[30] Rather, the problems inherent in those convictions that are unreliable multiply when the conviction is used to help prove a subsequent crime.

Although 97% of drug convictions are procured through guilty pleas,[31] the possibility of introducing a prior conviction at trial informs the content of a plea bargain.[32] Specifically, the strength of the evidence against the defendant is the most important factor when negotiating a plea.[33] Thus, a

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[26] *Id.*

[27] *Id.* at 3–6.

[28] *Id.* at 2.

[29] Numerous articles discuss and offer explanations for why the innocent plead guilty. *See, e.g.*, Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 81 (2005) (arguing pressure to accept a plea causes the innocent to plead guilty) (citing Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1342 (1997)); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L. J. 1979, 1987–91 (1992) (discussing structural problems in the criminal justice system leading to guilty pleas of innocent people); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L. J. 1909, 1942–43 (1992) (arguing innocent defendants are less risk averse and more likely to plead guilty).

[30] *Cf.* Samuel R. Gross, *Convicting the Innocent*, 4 ANN. REV. OF L. & SOC. SCI. 173, 181 (2008) (citing a study of exonerations from 1989 through 2003 where twenty (or 6%) of the 340 exonerations were based on convictions by guilty pleas).

[31] Plea bargains account for approximately 97% of convictions in drug offense cases between October 2009 and 2010. MOTIVANS, *supra* note 19, at 17.

[32] *See, e.g.*, Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225, 237 (1982); *see also* Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2135 (1998) ("Negotiated dispositions are hardly divorced from the merits of the case. . . . In that process, the prosecutor acts as the administrative decision-maker . . . . Defendants influence the decision by submitting their arguments and evidence to the decision-maker, who can give these arguments such weight as she thinks they deserve. In this system, the formal adversarial jury trial serves as a kind of judicial review."). *But see* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2466 (2004) (citing literature about plea bargaining in the shadow of trial and arguing it is oversimplified); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2549–50 (2004) (arguing that in the criminal justice system plea bargains do not occur in the shadow of the law, but rather "plea bargains take place in the shadow of prosecutors' preferences, voters' preferences, budget constraints, and other forces").

[33] Bibas, *supra* note 32, at 2470.

prior conviction plays a significant role not only in the cases that go to trial, but also those that end with a plea.

Furthermore, introducing prior convictions in drug prosecutions has an especially significant impact on defendants from low-income communities.[34] As Black and Hispanic people are more likely to live in these communities, they also are disproportionately affected.[35] This disparate impact of the introduction of prior convictions on low-income communities has three major causes:

First, drug enforcement disproportionately focuses on low-income communities.[36] In many cases, however, the disparate enforcement is not commensurate with the actual level of drug-related criminal activity.[37] Drug crime in low-income communities is more likely to take place on the street, thereby making enforcement less expensive and less likely to implicate the Fourth Amendment or require search warrants.[38] Additionally, in many cases, prosecutors charge defendants from low-income communities with drug crimes as a proxy for violent crimes.[39] Increased enforcement leads to more arrests in these communities, which leads to more convictions.[40] Therefore, employing prior convictions in a subsequent case not only makes another conviction more likely, but also exacerbates the disproportionately high rates of incarceration in low-income communities.

Second, the lack of effective representation for many indigent defendants leads to guilty pleas notwithstanding the availability of a viable defense, thereby increasing the likelihood of convictions for these defendants. Indeed, indigent defendants are often represented by underfunded and overburdened public defenders who lack the time and resources to litigate

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[34] *See infra* notes 35–46 and accompanying text.

[35] *See* William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1810 (1998); *see also Poverty Areas*, U.S. CENSUS BUREAU (June 1995), https://www.census.gov/population/socdemo/statbriefs/povarea.html, *archived at* https://perma.cc/9D59-TSXA (showing "[f]our times as many Blacks and three times as many Hispanics lived in poverty areas than lived outside them"); *Poverty by Race/Ethnicity*, THE HENRY J. KAISER FAMILY FOUND., http://kff.org/other/state-indicator/poverty-rate-by-raceethnicity/, *archived at* https://perma.cc/Z8SM-WBRH?type=image (showing the 2013 poverty rate for Blacks and Hispanics was 27% and 24%, respectively, compared with 15% overall across ethnicities). *See also* Chris Chambers Goodman, *The Color of Our Character: Confronting the Racial Character of Rule 404(b) Evidence*, 25 L. & INEQUALITY 1 (2007) (discussing the "racial implications" of using 404(b) evidence).

[36] *See* Stuntz, *supra* note 35, at 1809–10, 1820–21.

[37] *Id.* at 1803–09, 1820.

[38] *Id.* at 1820–24.

[39] William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1971, 2020 (2008).

[40] *See generally* Stuntz, *Race, Class, and Drugs*, *supra* note 35 (discussing and explaining increased drug enforcement in low-income communities); *see also* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 294–95 (2011) (noting that Black people are disproportionately in prison for drug offenses compared to white people despite similar rates of offense); Stuntz, *supra* note 39, at 1971, 2023 (explaining that while similar percentages of the Black and white populations use drugs, 359 out of every 100,000 Black Americans are "imprisoned on drug charges" compared to twenty-eight out of every 100,000 white Americans). Stuntz notes, however, that we do not know the statistics of Black and white drug dealers, which account for a large percentage of the prison population. Stuntz, *supra* note 39, at 1976.

cases effectively.[41] In some cases, defendants plead guilty to misdemeanors — sometimes with judicial encouragement — without ever consulting with an attorney.[42] For those defendants who do receive an attorney before pleading guilty, representation may last for only a few minutes.[43]

Third, indigent defendants who cannot afford bail must sit in jail awaiting trial.[44] In some cases they remain in jail for longer than the sentence they could receive if convicted.[45] For these defendants, a guilty plea may represent an attempt to escape pretrial detention rather than an admission of a particular act.[46]

The federal circuit courts diverge in the approach they take in deciding when to admit prior drug convictions, particularly in possession with intent to distribute ("PWID") cases.[47] Federal Rule of Evidence 609 permits the introduction of prior convictions to impeach a witness's credibility,[48] and therefore prior convictions can be introduced under Rule 609 only if the defendant chooses to testify. Even if the defendant does not testify, however, prior convictions can be used against her through Rule 404, which allows the introduction of prior acts to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."[49] Currently, six circuits presumptively allow the introduction of at least some prior convictions under 404(b) in PWID cases without identifying non-propensity reasoning.[50] The First, Second, Third, Fourth, Seventh, and Tenth Circuits, however, have demanded a "case-by-case" analysis in which they require the prior conviction to have a probative, non-propensity purpose.[51]

This Note identifies five lines of reasoning employed by courts following the former approach — the presumptive admission of prior convictions in PWID cases. It argues that such reasoning not only eliminates desirable protections placed on the defendant elsewhere in the Federal Rules of Evidence but also often introduces propensity evidence, which is specifically

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[41] Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After* Gideon v. Wainright, 122 YALE L.J. 2150, 2152–54, 2162–63 (2013).

[42] *Id.* at 2152, 2162.

[43] *Id.* at 2152, 2164–65.

[44] Bibas, *supra* note 32, at 2491–92; Bright & Sanneh, *supra* note 41, at 2161.

[45] Bright & Sanneh, *supra* note 41, at 2152, 2162.

[46] Bibas, *supra* note 32, at 2491–93.

[47] *See* 3 CLIFFORD S. FISHMAN & ANNE T. MCKENNA, JONES ON EVIDENCE § 17:71.30 (7th ed. 2003 & Supp. 2012). Fishman and McKenna provide a short overview of the different approaches (categorical versus fact-specific) that courts take in drug cases. This Note differs from and substantially expands on their overview. Fishman and McKenna use the terms "categorical" and "factually specific application." In this Note, as explained in Part II, *infra*, the Author employs the term "presumptive" rather than "categorical." The terms "factually specific" and "case-by-case analysis" are used interchangeably.

[48] FED. R. EVID. 609.

[49] FED. R. EVID. 404(b).

[50] These include the Fifth, Sixth, Eighth, Ninth, Eleventh, and D.C. Circuits. *See infra* Part II.

[51] *See infra* Part II.

prohibited by Federal Rule of Evidence 404. Instead, this Note advocates an approach in line with the reasoning followed by courts adopting a "case-by-case" analysis: that 404(b) evidence of prior convictions can be introduced only when it is a disputed element of the crime and only when it has probative, non-propensity purposes specific to the facts of that case. Such an approach is preferable because it comports with both the safeguards provided in Rule 609 and the purposes of Rule 404(b). Furthermore, for those prior convictions that are admitted, courts must determine under Federal Rule of Evidence 403 whether the probative value of the conviction is substantially outweighed by "unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[52] This Note argues that an exacting 403 analysis in which courts seriously consider the prejudicial impact of prior convictions would prevent the admission of highly prejudicial prior convictions with minimal probative value.

I. THE FEDERAL RULES OF EVIDENCE AND RULE 404(b)

The Federal Rules of Evidence provide two circumstances under which a defendant's prior conviction can be introduced: (1) for impeachment; and (2) certain non-propensity purposes under Rule 404(b). If prior convictions are introduced to impeach the defendant, Federal Rule of Evidence 609 requires certain conditions to be met.[53] First, the defendant must testify.[54] Second, "the probative value [must] outweigh[ ] its prejudicial effect to [the] defendant"[55] or the elements of the conviction must "require[ ] proving — or the witness's admitting — a dishonest act or false statement."[56] Third, evidence introduced under Rule 609 is subject to a ten-year time limit, after which its probative value must "substantially outweigh[ ] its prejudicial effects" and the defendant must receive written notice that the prior conviction will be used.[57] These limitations on the introduction of prior convictions are intended to protect the defendant.[58]

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[52] FED. R. EVID. 403.

[53] FED. R. EVID. 609; Robert D. Dodson, *What Went Wrong with Federal Rule of Evidence 609: A Look at How Jurors Really Misuse Prior Conviction Evidence*, 48 DRAKE L. REV. 1, 2 (1999).

[54] FED. R. EVID. 609.

[55] FED. R. EVID. 609(a)(1)(B).

[56] FED. R. EVID. 609(a)(2).

[57] FED. R. EVID. 609(b).

[58] *See* FED. R. EVID. 609 advisory committee's note to 1972 proposed rules ("As a means of impeachment, evidence of conviction of crime is significant only because it stands as proof of the commission of the underlying criminal act. There is little dissent from the general proposition that at least some crimes are relevant to credibility, but much disagreement among the cases and commentators about which crimes are usable for this purpose. . . . The proposed rule incorporates certain basic safeguards, in terms applicable to all witnesses but of particular significance to an accused who elects to testify. These protections include the imposition of definite time limitations, giving effect to demonstrated rehabilitation, and generally excluding juvenile adjudications.").

As the Judiciary Committee Notes on Rule 609 explain, however, "[n]otwithstanding this provision, proof of any prior offense otherwise admissible under rule 404 could still be offered for the purposes sanctioned by that rule."[59] Thus, even though Rule 609 limits when prior convictions can be introduced against a defendant who testifies, prior convictions can still be introduced against a defendant — regardless of whether she testifies — under Rule 404(b).[60] Rule 404 prohibits the introduction of prior bad acts for "propensity" purposes:[61] "to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character."[62] Yet despite this prohibition, Rule 404(b) allows the introduction of prior bad acts to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."[63] Moreover, unlike Rule 609, which contains a presumptive ten-year time limit, Rule 404(b) provides no time after which prior convictions must satisfy a higher threshold.[64]

Prior convictions found relevant under Rule 404(b) must still withstand a balancing test under Rule 403.[65] Under Rule 403, the probative value of the evidence must not be substantially outweighed by "unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[66] Therefore, even if a court determines a prior conviction has a relevant use, the probative value of the conviction must not be substantially outweighed by these other considerations.

Numerous scholars have critiqued the introduction of prior convictions under Rule 404(b).[67] For example, Thomas DiBiagio argues that the intro-

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[59] FED. R. EVID. 609(b) advisory committee's note to 1974 enactment.

[60] FED. R. EVID. 404(b). *Cf.* Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 883 n.64 (1982) ("Under FED. R. EVID. 404(b) . . . evidence inadmissible on the issue of credibility would be admissible to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.").

[61] Gavin M. Bowie, *Rule 404(b)'s Other Acts' Character Flaw*, 54 S.C. L. REV. 495, 497 (2002) (citing Glen Weissenberger, *Making Sense of Extrinsic Act Evidence: Federal Rule of Evidence 404(b)*, 70 IOWA L. REV. 579, 592 (1985)).

[62] FED. R. EVID. 404(b)(1).

[63] FED. R. EVID. 404(b)(2).

[64] Indeed, at least some circuit courts have allowed very old convictions or explicitly held that there is no time limit. *See, e.g.*, United States v. Arnold, 467 F.3d 880, 885 (5th Cir. 2006) ("[T]he amount of time that has passed since the previous conviction is not determinative. We have upheld the admission of Rule 404(b) evidence where the time period in between was as long as 15 and 18 years.") (citing cases); United States v. Broussard, 80 F.3d 1025, 1040 (5th Cir. 1996) ("[T]he age of a prior conviction does not bar its use under Rule 404.") (citing cases); *see also* United States v. Vo, 413 F.3d 101, 1018–19 (9th Cir. 2005) (citing cases); United States v. Green, 151 F.3d 1111, 1113–14 (8th Cir. 1998) (citing cases).

[65] *See* FED. R. EVID. 404 advisory committee's notes to the 1972 proposed rules and 1974 enactments.

[66] FED. R. EVID. 403.

[67] For example, see generally, Sonenshein, *supra* note 14; Thomas J. Reed, *Admitting the Accused's Criminal History: The Trouble With Rule 404(b)*, 78 TEMP. L. REV. 201 (2005); Andrew J. Morris, *Federal Rule of Evidence 404(b): The Fictitious Ban on Character Reason-*

duction of unrelated prior convictions under 404(b) can impinge on a defendant's right to a fair trial.[68] David Sonenshein explains that while "Federal Rule 609 takes an exclusionary approach to the impeachment of criminal defendants with prior convictions," "Rule 404(b) provides seemingly conflicting polices":[69] "On one hand, the rulemakers were extremely concerned about the enormously prejudicial impact" of introducing prior convictions.[70] "On the other hand . . . Rule 404(b) does provide that certain extrinsic acts may be offered to prove elements of a charged crime, despite the danger that the jury may misuse the evidence."[71] Sonenshein also describes the minimal — if not harmful — effect of limiting instructions commending jurors to consider the prior conviction only for its intended purpose.[72] Furthermore,

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ing from Other Crime Evidence, 17 REV. LITIG. 181 (1998); Thomas M. DiBiagio, *Intrinsic and Extrinsic Evidence in Federal Criminal Trials: Is the Admission of Collateral Other-Crimes Evidence Disconnected to the Fundamental Right to a Fair Trial*, 47 SYRACUSE L. REV. 1229 (1997); Vivian M. Rodriguez, *Admissibility of Other Crimes, Wrongs or Acts Under the Intent Provision of Federal Rule of Evidence 404(b): The Weighing of Incremental Probity and Unfair Prejudice*, 48 U. MIAMI L. REV. 451 (1993); Abraham P. Ordover, *Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b) and 609(a)*, 38 EMORY L.J. 135 (1989); Edward J. Imwinkelried, *The Need to Amend Federal Rule of Evidence 404(b): The Threat to the Future of the Federal Rules of Evidence*, 30 VILL. L. REV. 1465 (1985); Thomas J. Reed, *Admission of Other Criminal Act Evidence After Adoption of the Federal Rules of Evidence*, 53 U. CIN. L. REV. 113 (1984); Richard B. Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence*, 66 IOWA L. REV. 777 (1981). *But see generally* Michael H. Graham, *Other Crimes, Wrongs, or Culpable Acts Evidence: The Waning Penchant Toward Admissibility as the Wars Against Crime Stagger On; Part I. The War on Drugs — The Seventh Circuit Crosses Over to the Dark Side*, 49 CRIM. L. BULL., no. 4, 2013, at 875 (explaining different circuits' approaches to admitting 404(b) evidence in drug cases and acknowledging that in many cases the evidence is propensity evidence but arguing that character evidence should still be admitted in certain situations); Michael H. Graham, *Reconciling Inextricably Intertwined/Intricately Related Other Crimes, Wrongs, or Culpable Acts Evidence with Fed. R. Evid. 404(b): Don't Throw the Baby Out with the Bath Water*, 47 CRIM. L. BULL., no. 6, 2011, at 1258 (discussing "inextricably intertwined" evidence and arguing that it should not be subject to many of the 404(b) requirements, as it should focus on scope of the actions rather than just purpose); Michael H. Graham, *Other Crimes, Wrongs, or Culpable Acts, Fed. R. Evid. 404(b): "Defining" A New Paradigm*, 47 CRIM. L. BULL., no. 5, 2011, at 998 (advocating a different approach to prior convictions and acts under which propensity evidence is admitted in certain situations). A recent student note discusses the federal circuit split over introducing possession convictions under 404(b) and advocates following the Seventh Circuit's approach. *See* Daniel P. Ranaldo, *Is Every Drug User a Drug Dealer? Federal Circuit Courts are Split in Applying Fed. R. Evid. 404(B)*, 8 FED. CTS. L. REV. 147 (2014). Ranaldo's note was published after substantive edits on this Note were complete and was not relied on by the Author.

[68] *See* DiBiagio, *supra* note 67, at 1233–41.

[69] Sonenshein, *supra* note 14, at 229 (citing United States v. Beechum, 582 F.2d 898, 919 (5th Cir. 1978) (en banc) (Goldberg, J., dissenting)); *see also* Ordover, *supra* note 67, at 135 ("The first sentence provides for the exclusion of evidence of a defendant's other bad acts and crimes when that evidence is offered by the prosecution to prove that the defendant has a criminal disposition or a propensity for committing crime. The second sentence creates an exception for evidence offered not to prove character but some relevant issue in the case, such as intent, identity, lack of accident, motive or some other noncharacter issue.").

[70] Sonenshein, *supra* note 14, at 229.

[71] *Id.* at 230.

[72] *Id.* at 270–71 (explaining that the limiting instruction itself may actually increase attention to the prior conviction); *see also* United States v. Michelson, 335 U.S. 469, 485 (1948) ("[S]urely jurors in the hurried and unfamiliar movement of a trial must find [limiting in-

Andrew Morris contends that despite 404(b)'s ban on propensity evidence, "courts routinely admit bad acts evidence precisely for its relevance to defendant propensity."[73]

Moreover, as the Third Circuit observed, "Rule 404(b) has become the most cited evidentiary rule on appeal,"[74] perhaps indicating the "confusion surrounding [its] technicalities"[75] as well as the many objections defendants take to its use. By 2003, eighteen years after its adoption, the rule had been cited in more than 5,000 federal trial and appellate cases.[76] By 2014, that number had almost doubled to 10,000.[77] Defendants' challenges range from whether a defendant can stipulate to a prior conviction[78] to the level of proof required to submit a prior act.[79] The question of when prior acts, and specifically prior convictions, can be introduced is particularly pronounced in cases involving possession with intent to distribute, where the circuits are divided as to when a prior conviction can be admitted.[80]

II. CURRENT APPROACHES

Three years ago, in *United States v. Miller*,[81] the Seventh Circuit proclaimed, "Rule 404(b) requires a case-by-case determination, not a categorical one."[82] The court acknowledged that many of its other cases have "approve[d] the admission of prior drug-dealing crimes to show intent in drug prosecutions" such that "the admission of prior drug convictions may have come to seem almost automatic."[83] The court explained, however, that

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structions] almost unintelligible . . . ."); United States v. Ince, 21 F.3d 576, 581 (4th Cir. 1993) (acknowledging a jury is unlikely to follow limiting instructions); United States v. Hardy, 643 F.3d 143, 161 (6th Cir. 2011) (Cole, J., dissenting) ("This view of 404(b) evidence is grounded in more than the musings of appeals court judges, empirical studies confirm that 'juries treat prior bad acts evidence as highly probative of the charged crime.'" (quoting United States v. Amaya-Manzanares, 377 F.3d 39, 49 (1st Cir. 2004) (Torruella, J., dissenting) (citing HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 160 (1966); Ordover, *supra* note 67; Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence To Decide on Guilt*, 9 L. & HUM. BEHAV. 37 (1985))); FED. R. EVID. 403 advisory committee's note ("[C]onsideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction.").

[73] Morris, *supra* note 67, at 184.

[74] United States v. Davis, 726 F.3d 434, 441 (3d Cir. 2013) (citing Reed, *Admitting the Accused's Criminal History*, *supra* note 67, at 211). *See also* FED. R. EVID. 404 advisory committee's note to 1991 amendment ("Rule 404(b) has emerged as one of the most cited rules in the Rules of Evidence.").

[75] Bowie, *supra* note 61, at 499.

[76] Reed, *Admitting the Accused's Criminal History*, *supra* note 67, at 211.

[77] Westlaw search conducted May 26, 2014.

[78] *See generally* Old Chief v. United States, 519 U.S. 172 (1997).

[79] *See generally* Huddleston v. United States, 485 U.S. 681 (1988).

[80] *See supra* note 47 and *infra* Part II.

[81] 673 F.3d 688 (7th Cir. 2012).

[82] *Id.* at 697.

[83] *Id.* at 698.

each admission of 404(b) evidence requires a fact-specific determination employing propensity-free reasoning.[84]

Accordingly, commentators have described courts' approaches as falling into one of two camps: "categorical" or "factually specific."[85] And indeed, half of the circuits have admitted at least certain prior convictions in possession with intent to distribute cases "without a showing of specific factual relevance."[86] This approach is more accurately described as "presumptive" rather than "categorical," however, because no court will categorically admit any prior conviction without conducting a Rule 402 relevance and Rule 403 prejudice analysis[87] — even if these analyses appear only formal or nominal in practice.[88] Courts that have presumptively admitted prior convictions absent a demonstration of "specific factual relevance"[89] have employed five lines of reasoning. This Note argues that these lines of reasoning are legally problematic.[90] First, the prior convictions have been admitted without demonstrating that the element of the crime they are being used to prove is in dispute.[91] Second, courts have admitted possession convictions to prove intent in PWID cases.[92] Third, courts have used prior convictions to demonstrate general knowledge of drugs or the drug trade, rather than of a certain drug.[93] Fourth, courts have allowed a prior conviction with an intent element to be introduced to prove intent in the current case without identifying non-propensity reasoning connecting the two acts.[94] Finally, the Rule 403 analysis — balancing probative value against prejudice — tends to be either nominal or nonexistent.[95] These courts generally find that the presence of a limiting instruction is sufficient to eliminate the risk of unfair prejudice.[96]

In contrast, the First, Second, Third, Fourth, Seventh, and Tenth Circuits have taken a "case-by-case" approach, which looks at the relevance of the prior conviction as applied to the specific facts of the case.[97] In their analy-

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[84] *Id.* at 698–99.

[85] FISHMAN & MCKENNA, *supra* note 47. Fishman and McKenna provide a summary of the two approaches and place most of the Courts of Appeals into one of the two categories. While this Note agrees with and follows most of their categorizations, it also differs from and substantially adds to their analysis.

[86] *Id.* These circuits include the Fifth, Sixth, Eighth, Ninth, Eleventh, and D.C. Circuits. *See supra* note 50 and *infra* section II.A.

[87] *See* Morris, *supra* note 67, at 187.

[88] *See infra* notes 145–149 and accompanying text.

[89] FISHMAN & MCKENNA, *supra* note 47.

[90] As will be discussed below, not every court that "presumptively" admits prior convictions has used each of these approaches. Rather, these are approaches that have been used in cases where the court admits the prior conviction without examining its specific factual relevance.

[91] *See infra* notes 103–116 and accompanying text.

[92] *See infra* notes 119–129 and accompanying text.

[93] *See infra* notes 131–135 and accompanying text.

[94] *See infra* notes 136–144 and accompanying text.

[95] *See infra* notes 145–149 and accompanying text.

[96] *See infra* notes 149 and 253 and accompanying text.

[97] *See infra* section II.B.

ses, several of these circuits have affirmatively rejected a categorical approach and acknowledged the dangers inherent in admitting prior convictions.[98] In examining these approaches, it is important to note that there are some circuits that have presumptively admitted prior convictions and others — such as the Seventh Circuit — that have explicitly rejected this approach. There are, however, circuits that do not clearly and consistently fall into either camp. Jurisdictions that take a "presumptive" approach in one case may take an approach that looks more "factually specific" in another.[99] As David Sonenshein explains in the context of using 404(b) to prove intent, "[b]etween the[ ] two extremes, [there is] wide variance and vagueness in treatment by the courts."[100] This "variance and vagueness," he argues, "leads to unpredictability and a lack of fairness."[101]

Section II.A identifies and describes the legally problematic approaches courts "presumptively" admitting prior convictions have employed. Section II.B describes "factually specific" approaches that have been used by certain circuits. Part III explains the legal problems inherent in the "presumptive" approaches and the merits of "factually specific" analyses. As circuit courts can, and have, moved between these two approaches — creating variance even within a circuit — there is thus room to argue, across the circuits, for a "case-by-case" approach.

A. Characteristics of the "Presumptive" Approach

The Fifth, Sixth, Eighth, Ninth, Eleventh, and D.C. Circuits have admitted prior drug convictions under 404(b) in at least some cases without analyzing whether the prior conviction is relevant to the specific facts of the case.[102] Courts that presumptively admit prior convictions have employed at least one of the following lines of reasoning.

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[98] *Id.*

[99] *Compare, e.g.*, United States v. Sanchez, 118 F.3d 192, 196 (4th Cir. 1997) (holding "[a] not-guilty plea puts one's intent at issue and thereby makes relevant evidence of similar prior crimes when that evidence proves criminal intent") *with* United States v. McBride, 676 F.3d 385, 398 (4th Cir. 2012) ("Although a defendant's plea of not guilty places at issue all elements of the charged crimes . . . 'this does not throw open the door to any sort of other crimes evidence.'") (citations omitted). Similarly, the Fifth Circuit has taken what appears to be a "categorical" approach in some cases. *See, e.g.*, United States v. Arnold, 467 F.3d 880, 882, 885–86 (5th Cir. 2006) (admitting prior conviction of possession of four grams of cocaine base (crack) to prove intent when defendant charged with possession with intent to distribute more than fifty grams of crack). In *United States v. Carrillo*, 660 F.3d 914, 929 (5th Cir. 2011), the Fifth Circuit appeared to take a more fact-specific approach, finding that "Carrillo's conviction for delivery of cocaine in 2005 arguably had no legitimate relevance to either his knowledge of methamphetamine or his intent to distribute methamphetamine in 2009." The Sixth Circuit's approach has also varied between cases. *See infra* notes 231–236 and accompanying text.

[100] Sonenshein, *supra* note 14, at 221.

[101] *Id.*

[102] *See infra* notes 104–151 and accompanying text.

First, prior convictions have been admitted without demonstrating that the element of the crime they are being used to prove is in dispute.[103] For example, in *United States v. Thomas*,[104] the Fifth Circuit held that "[t]he mere entry of a not guilty plea . . . raises the issue of intent sufficiently to justify the admissibility of extrinsic offense evidence."[105] The Eleventh Circuit has reached a similar holding, though it suggested that a defendant entering a not guilty plea could potentially "remove intent as an issue."[106] The D.C. Circuit goes even further, however, allowing the introduction of prior convictions to prove knowledge and intent, even if the defendant stipulates to these elements.[107] In *United States v. Crowder*,[108] one of the defendants,

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[103] *See* Sonenshein, *supra* note 14, at 219–20 (discussing prior convictions admitted to prove intent based on a not-guilty plea); Richard M. Thompson II, *The Perfect Storm: Rule 404(b), Unequivocal Stipulations, and Old Chief's Dicta on Narrative Integrity and Evidentiary Richness*, 37 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 55, 64–68 (2011) (dividing the circuits into "three loose camps" based on their approach to stipulations and discussing their approaches).

[104] 294 F. App'x 124 (5th Cir. 2008).

[105] *Id.* at 129 (quoting United States v. Broussard, 80 F.3d 1025, 1040 (5th Cir. 1996), and applying it to a possession with intent to distribute case) (internal quotations omitted); *see also* United States v. Pompa, 434 F.3d 800, 805 (5th Cir. 2005) ("Since [the defendant] plead not guilty the issue of intent was sufficiently raised to permit the admission of Rule 404(b) evidence."); United States v. Carrillo, 660 F.3d 914, 929 (5th Cir. 2011) ("By pleading not guilty to possession with intent to distribute methamphetamine, Carrillo put his intent and knowledge at issue."). For a discussion of *Carillo*, see Editor's Blog, *When Is Intent an Issue for FRE 404(b) Purposes?*, FED. EVIDENCE REV. (Oct. 19, 2011), http://federalevidence.com/blog/2011/october/when-intent-issue-fre-404b-purposes, *archived at* http://perma.cc/NZA3-5DZH. See Rodriguez, *supra* note 67, at 471–72, for a criticism of circuits allowing 404(b) evidence to prove intent based on a not-guilty plea.

[106] United States v. Delgado, 56 F.3d 1357, 1365 (11th Cir. 1995) ("A defendant who enters a not guilty plea makes intent a material issue, imposing a substantial burden on the government to prove intent; the government may meet this burden with qualifying 404(b) evidence *absent affirmative steps by the defendant to remove intent as an issue.*") (emphasis added).

[107] *See* United States v. Crowder, 141 F.3d 1202, 1205–09 (D.C. Cir. 1998) (en banc). *But see* United States v. Linares, 367 F.3d 941, 951–53 (D.C. Cir. 2004) (distinguishing *Crowder* in a felon-in-possession case). *See also* United States v. Hardy, 643 F.3d 143, 151 (6th Cir. 2011) ("This court has specifically held that 'where the crime charged is one requiring specific intent, the prosecutor may use 404(b) evidence to prove that the defendant acted with the specific intent notwithstanding any defense the defendant might raise.' . . . Intent is in issue because Hardy denied possessing the cocaine altogether.") (citations omitted). For a discussion of *Crowder* and stipulating to an element of the offense, see Sonenshein, *supra* note 14, at 219, 251–54. Sonenshein has argued that under the reasoning of *Old Chief v. United States*, 519 U.S. 172 (1997), "where the defendant stipulates to intent, there is no possible justification for the admission of other similar acts on the issue of intent." *Id.* at 249. *See also, e.g.*, Thompson, *supra* note 103, at 64–68 (criticizing *Crowder* and other courts' approaches to admitting 404(b) evidence after stipulations); Daniel J. Buzzetta, *Balancing the Scales: Limiting the Prejudicial Effect of Evidence Rule 404(B) through Stipulation*, 21 FORDHAM URB. L.J. 389, 393, 404–11 (1994) (arguing that as a "*per se* rule," 404(b) evidence should be excluded to prove intent if the defendant "clear[ly] and unambiguous[ly] stipulates she had the "requisite intent"); Rodriguez, *supra* note 67, at 478 ("[T]he judicial inquiry of Rule 403 can be improved by establishing a formula that considers the defendant's attempt to remove the issue of intent from the case."); David Robinson, Jr., *Old Chief, Crowder, and Trials by Stipulation*, 6 WM. & MARY BILL RTS. J. 311, 319–22 (1998) (discussing *Old Chief* following the Supreme Court's remand of *Crowder* and *Davis* but before the D.C. Circuit's decision).

[108] 141 F.3d 1202 (D.C. Cir. 1998) (en banc).

Davis, was arrested for selling crack to an undercover officer.[109] The undercover officer left the scene after the transaction and gave the police a description of Davis.[110] The police stopped Davis shortly after, and the undercover officer positively identified him.[111] Davis stipulated that whoever sold the crack had knowledge of the drugs and intent to distribute, but that this was a case of mistaken identity.[112] The trial court rejected Davis's stipulation, and allowed the introduction of evidence of three of Davis's prior cocaine sales to prove his knowledge and intent.[113] The D.C. Circuit affirmed, describing Rule 404(b) as "quite permissive,"[114] noting that the prior sales were relevant to Davis's knowledge and intent.[115] Accordingly, the D.C. Circuit held that prior convictions may be admissible, subject to a Rule 403 analysis, "even if the defendant's proposed stipulation [to an element of the offense] is unequivocal."[116] As the *Crowder* dissent explained, however, the question under Rule 404(b) is not whether the evidence is probative but whether it has a *non-propensity* based purpose — which the *Crowder* majority failed to consider.[117] Yet finding such a non-propensity purpose in the face of an unequivocal stipulation is highly unlikely.[118]

Second, courts following the presumptive approach have used possession convictions to prove intent in PWID cases.[119] For example, in *United States v. Logan*,[120] Logan was charged with "conspiracy to distribute, and to possess with the intent to distribute," heroin and methamphetamine.[121] At trial, the district court admitted evidence of Logan's prior arrest for possession of a "personal amount" of methamphetamine to prove his knowledge and intent.[122] The Eight Circuit affirmed, explaining, "[o]ur court has held

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[109] *Id.* at 1204.

[110] *Id.*

[111] *Id.*

[112] *Id.* at 1204–05.

[113] *Id.* at 1204.

[114] *Id.* at 1206 (citing United States v. Jenkins, 928 F.2d 1175, 1180 (D.C. Cir. 1991)) (internal quotations omitted).

[115] *Id.* at 1206–09.

[116] *Id.* at 1209. The Eighth Circuit has taken a similar approach at least in some circumstances. *See* United States v. Dorsey, 523 F.3d 878, 880–81 (8th Cir. 2008).

[117] *Crowder*, 141 F.3d at 1212. The dissent also distinguishes evidence intrinsic to the crime, which would be presumptively admissible. *Id.* at 1214.

[118] *See id.* at 1215; Sonenshein, *supra* note 14, at 249.

[119] *See* Editor's blog, *Circuit Split: On Using Prior Possession Convictions under FRE 404(b)*, FED. EVIDENCE REV. (Sept. 6, 2013), http://federalevidence.com/blog/2013/september/circuit-split-using-prior-possession-convictions-under-fre-404b, *archived at* http://perma.cc/4X85-VU6N (citing United States v. Gadison, 8 F.3d 186, 192 (5th Cir. 1993), United States v. Logan, 121 F.3d 1172, 1178 (8th Cir. 1997), and United States v. Butler, 102 F.3d 1191, 1196 (11th Cir. 1997)).

[120] 121 F.3d 1172 (8th Cir. 1997).

[121] *Id.* at 1173.

[122] *Id.* at 1177–78. While here prior arrests were introduced rather than prior convictions, the holding would apply with equal force to prior convictions. Indeed, the cases that the Eighth Circuit relies on involve the introduction of prior convictions. *See id.* at 1178 (citing United States v. Powell, 39 F.3d 894, 896 (8th Cir. 1994) and United States v. Brown, 956 F.2d 782, 786–87 (8th Cir. 1992)).

that evidence of prior possession of drugs, even in an amount consistent only with personal use, is admissible to show such things as knowledge and intent of a defendant charged with a crime in which intent to distribute drugs is an element."[123] The Fifth and Eleventh Circuits have reached similar holdings.[124] Notably, in *Logan*, the Eighth Circuit did not articulate a non-propensity based chain of reasoning to justify the introduction of evidence of prior possession to prove intent under 404(b).[125] Instead, it cited three other cases to support its holding.[126] Of these three cases, however, one provides no explanation for why the prior convictions should be admitted and only cites the court's earlier holdings;[127] one explains why evidence of prior drug *purchases* may be admitted to show knowledge and intent to participate in a *conspiracy*;[128] and one explains how prior possession may be admitted to prove *motive* and *opportunity* (not knowledge or intent).[129] Indeed, it would be difficult (if not impossible) to explain how a possession conviction is probative of intent absent character-based reasoning.[130]

Third, courts have used prior convictions to prove general knowledge of the drug trade, rather than of a certain drug. For example, in Rick Vo's case, involving charges of aiding and abetting possession with intent to distribute *methamphetamine*, the Ninth Circuit affirmed its approach of allowing prior convictions for *cocaine* sales to establish Vo's "intent, knowledge, motive, opportunity, and absence of mistake or accident."[131] The Ninth Circuit held that the "[w]hen offered to prove knowledge . . . the prior act need not be similar to the charged act as long as the prior act was one which would tend to make the existence of the defendant's knowledge

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[123] *See* Editor's blog, *Circuit Split*, *supra* note 119 (quoting *Logan*, 121 F.3d at 1178).

[124] *See id.* (citing United States v. Gadison, 8 F.3d 186, 192 (5th Cir. 1993) and United States v. Butler, 102 F.3d 1191, 1196 (11th Cir. 1997)); *see also* United States v. Arnold, 467 F.3d 880, 882, 885 (5th Cir. 2006) (prior conviction of possession of four grams of cocaine base (crack) admitted to prove intent when defendant charged with possession with intent to distribute more than fifty grams of crack).

[125] *Logan*, 121 F.3d at 1178.

[126] *Id.* (citing *Powell*, 39 F.3d at 896; *Brown*, 956 F.2d at 786–87; and United States v. Templeman, 965 F.2d 617, 619 (8th Cir. 1992)).

[127] *Powell*, 39 F.3d at 896. *Powell* cites two other cases, neither of which directly support its holding. The first, *Templeman*, is discussed in note 129, *infra*, and accompanying text. The second, *United States v. Wesley*, 880 F.2d 360 (8th Cir. 1993), involved the introduction of a prior conviction of possession of crack cocaine and a weapon to show that a gun may have been involved in a drug crime and that the defendant may have owned the gun. *Id.* at 366. Notably, even here the Eighth Circuit does not articulate how the conviction is relevant absent propensity-based reasoning.

[128] *See Brown*, 956 F.2d at 786–87.

[129] *Templeman*, 965 F.2d at 619.

[130] *Cf.* Sonenshein, *supra* note 14, at 260; Morris, *supra* note 67, at 191.

[131] United States v. Vo, 413 F.3d 1010, 1018 (9th Cir. 2005) (citations omitted) (internal quotation marks omitted); *see also* United States v. Pedregon, 520 F. App'x 605, 607 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 497 (2013) ("Defendant's knowledge of drug distribution and intent to distribute the methamphetamine, both of which are permissible reasons for which evidence of prior drug transactions may be used. The law in this Circuit has long been established that evidence of a prior conviction of a similar crime is admissible under Rule 404(b) to prove knowledge and intent.").

more probable than it would be without the evidence."[132] Similarly, in *Crowder*, the D.C. Circuit held that prior drug convictions were relevant to show general knowledge of the "drug trade" rather than specific knowledge of a given drug.[133] Again here, as the *Crowder* dissent explained, the question is not whether the prior conviction is relevant or probative, but rather whether there is a non-propensity purpose for admitting it.[134] The reasoning implicit behind the argument that a defendant who has previously sold one drug is more likely to know about the drug trade of a different drug is that the defendant is the type of person who deals drugs. This is the precise propensity reasoning prohibited in Rule 404(b)(1).[135]

Fourth, courts will admit prior convictions with an intent element in order to show intent in the current case without requiring non-propensity reasoning connecting the two cases. At least the Fifth and Eleventh Circuits have followed a Fifth Circuit holding in *United States v. Beechum*,[136] which stated, without explicating non-propensity reasoning, that "because the defendant had unlawful intent in the extrinsic offense, it is less likely that he had lawful intent in the present offense."[137]

A particularly extreme application of this holding occurred in *United States v. Delgado*.[138] In *Delgado*, the Eleventh Circuit affirmed the admission of convictions that occurred *after* the crime for which the defendant was on trial.[139] Though both crimes involved the same drug, the defendant argued that the convictions occurring after the event for which he was arrested should not be admitted under 404(b).[140] The Eleventh Circuit disagreed, holding that "the principles . . . are the same whether the conduct occurs

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[132] *Vo*, 413 F.3d at 1018 (quoting United States v. Ramirez-Jiminez, 967 F.2d 1321, 1326 (9th Cir. 1992)).

[133] United States v. Crowder, 141 F.3d 1202, 1208 n.5 (D.C. Cir. 1998) (en banc) ("A defendant's hands-on experience in the drug trade . . . can show that he knew how to get drugs, what they looked like, where to sell them, and so forth.").

[134] *Crowder*, 141 F.3d at 1212.

[135] FED. R. EVID. 404(b)(1). Sections II.B and III.A.1, *infra*, describe theoretically permissible uses of prior convictions to prove knowledge under 404(b)(2).

[136] 582 F.2d 898, 911 (5th Cir. 1978).

[137] *Id.* at 912; *see, e.g.*, United States v. Arnold, 467 F.3d 880, 885 (5th Cir. 2006); United States v. Delgado, 56 F.3d 1357, 1365 (11th Cir. 1995). As discussed in section III.A.2, *infra*, such statements likely do not have propensity-free reasoning. *See also* Lee E. Teitelbaum & Nancy Augustus Hertz, *Evidence II: Evidence of Other Crimes as Proof of Intent*, 13 N.M. L. Rev. 423, 430 (1983) ("[T]he *[Beechum]* court omitted a critical step in the analysis. Evidence of unlawful intent in a prior offense is relevant to unlawful intent in the present offense only on the assumption that people are likely to repeat past behavior because of a character trait or a propensity to act in a certain way."). For a discussion of the *Beechum* case and courts' problematic use of 404(b) to prove intent, see Sonenshein, *supra* note 14, at 221–42; *Ordover*, *supra* note 67, at 163–68; Kuhns, *supra* note 67, at 800–03. *See also* Rodriguez, *supra* note 67, at 465 (arguing that at least as of 1993, the "Fifth, Sixth, and Eleventh Circuits are in accord with the view that other acts evidence is relevant and admissible to prove intent whether or not the crime charged requires proof of general or specific intent").

[138] 56 F.3d 1357, 1365 (11th Cir. 1995).

[139] *Id.* at 1365.

[140] *Id.*

before or after the offense charged."[141] Accordingly, the Eleventh Circuit reasoned, "[t]he state of mind required for both offenses is the same, making the extrinsic crime relevant to the charged crime."[142] The Fifth Circuit has similarly held that for Rule 404(b), "intent . . . concerns whether the defendant had the requisite state of mind to commit the charged crime."[143] Other circuit courts have also suggested that prior convictions are probative of intent in a future case without articulating a non-propensity chain of reasoning.[144]

Fifth and finally, courts' Rule 403 analysis — balancing probative value against prejudice — can be either nonexistent or minimal. Rule 404's Advisory Committee's Notes specifically explain that the decision to admit evidence under 404(b) includes a 403 analysis.[145] Rule 403 allows courts to exclude convictions if their probative value is substantially outweighed by "unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[146] In some cases, however, circuit courts did not even reach the 403 analysis.[147] In other cases, Rule 403 is mentioned, but the courts provide little analysis explaining why admitting the prior conviction satisfies the rule's balancing test.[148] Even those courts conducting a 403 analysis have given great deference to trial courts and the effectiveness of their limiting instructions.[149] As discussed in section III.A.3, *infra*, these limiting instructions are likely to prove

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[141] *Id.*

[142] *Id.*

[143] United States v. Arnold, 467 F.3d 880, 885 (5th Cir. 2006) (internal quotation marks omitted).

[144] *See, e.g.*, 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. Logan, 121 F.3d 1172, 1178 (8th Cir. 1997) ("Our court has held that evidence of prior possession of drugs, even in an amount consistent only with personal use, is admissible to show . . . intent of a defendant charged with a crime in which intent to distribute drugs is an element. . . . This is so even if the defendant has not raised a defense based on lack of knowledge or lack of intent.") (citations omitted).

[145] "The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403." FED. R. EVID. 404(b) advisory committee's note. *See also* United States v. Miller, 673 F.3d 688, 695 (6th Cir. 2012) (citing FED. R. EVID. 404 advisory committee's note).

[146] *See* FED. R. EVID. 403.

[147] *See, e.g.*, United States v. Arnold, 467 F.3d 880 (5th Cir. 2006) (no 403 analysis); United States v. Carpenter, 30 F. App'x 654 (8th Cir. 2002) (same).

[148] *See, e.g.*, United States v. Vo, 413 F.3d 1010, 1017–18 (9th Cir. 2005) (acknowledging Rule 403 but not conducting an actual analysis using it); United States v. Hardy, 224 F.3d 752, 756–57 (8th Cir. 2000) (same); United States v. Hawthorne, 235 F.3d 400, 404 (8th Cir. 2000) (same).

[149] *See, e.g.*, United States v. Thomas, 294 F. App'x 124, 131 (5th Cir. 2008) ("[L]imiting instructions by the trial court mitigate the possibility of unfair prejudice, particularly when given immediately after the extrinsic offense evidence is admitted."); United States v. Franklin, 250 F.3d 653, 659 (8th Cir. 2001) ("[T]he presence of a limiting instruction diminishes the danger of any unfair prejudice arising from the admission of other acts."); United States v. Herrera-Osornio, 521 F. App'x 582, 586 (9th Cir. 2013) ("[T]he district court's limiting instruction reduced any risk of undue prejudice under Rule 403.").

ineffective. In at least certain cases, however, the Sixth Circuit has found that while prior convictions may be admissible under 404(b), they should be excluded under 403 because the danger of unfair prejudice substantially outweighed their probative value.[150] Similarly, the Eighth Circuit has found it was not an abuse of discretion to exclude 404(b) evidence because of Rule 403.[151] Yet, in courts that presumptively admit prior convictions to prove knowledge or intent, such a searching 403 analysis seems to be the exception rather than the rule.

B. "Case-by-Case" Analyses

In *United States v. Miller*,[152] the Seventh Circuit explicitly rejected what it termed "categorical" approaches in favor of "a case-by-case determination."[153] Miller was charged with, among other crimes, possession of cocaine with intent to distribute.[154] The trial court admitted evidence of an eight-year-old conviction of felony possession of cocaine with intent to distribute to prove Miller's intent to distribute.[155] Miller argued that the prior convictions could be used only as propensity evidence: his defense was that the drugs found did not belong to him, not that the "drugs — some of which had price tags attached — were not intended for distribution."[156] The Seventh Circuit agreed, noting that "admission of prior drug crimes to prove intent . . . has become too routine."[157] The Seventh Circuit rejected the idea that Rule 404(b) allows the admission of evidence "whenever bad acts evidence can be plausibly linked to [a purpose] . . . listed in the rule."[158] The court explained that "the list of exceptions in Rule 404(b), if applied mechanically, would overwhelm the central principle."[159]

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[150] *See* United States v. Jenkins, 593 F.3d 480, 485–86 (6th Cir. 2010) ("Even if we assume for purposes of argument that evidence of Jenkins's prior conviction had some probative value, that value is microscopic at best. . . . And meanwhile there looms, Kong-like, the prejudicial effect of the prior conviction. . . . Even when properly instructed to consider the evidence only for some legitimate purpose — as the jury was instructed here — the danger is obvious that the jury will treat it as propensity evidence instead.").

[151] *See* United States v. Cook, 454 F.3d 938, 942–43 (8th Cir. 2006) (finding that trial court did not abuse its discretion in excluding 404(b) evidence under Rule 403 when "the government's expansive Rule 404(b) evidence" involving "three prior convictions for five relatively remote drug transactions, all for the purpose of bolstering *background* evidence . . . posed a substantial risk of distracting the jury from its central task of determining whether it was [the defendant] who possessed the distribution quantity of crack cocaine").

[152] 673 F.3d 688 (7th Cir. 2012); *see also* United States v. Reed, 744 F.3d 519, 525 (7th Cir. 2014).

[153] *Miller*, 673 F.3d at 696–97.

[154] *Id.* at 692.

[155] *Id.* at 692, 695–96.

[156] *Id.* at 696.

[157] *Id.*

[158] *Id.*

[159] *Id.* (citations omitted) (internal quotation marks omitted).

In espousing a "case-by-case determination,"[160] the Seventh Circuit demanded that courts "ask[ ] the prosecution exactly how the proffered evidence should work in the mind of a juror to establish the fact the government claims to be trying to prove."[161] In Miller's case, the prior conviction's relevance "boil[ed] down to the prohibited 'once a drug dealer, always a drug dealer' argument," which Rule 404(b) prohibits.[162]

The Seventh Circuit is not alone in demanding a case-by-case analysis. In at least certain cases, the First, Second, Third, Fourth, and Tenth Circuits have also employed "factually specific" approaches.[163] The approach taken by these courts stands in distinct contrast to those that presumptively admit prior convictions.

First, the element of the crime that the prior convictions are being used to prove must actually be in dispute — a not-guilty plea alone does not render the prior conviction relevant.[164] In *Miller*, the Seventh Circuit explained that "if a mere claim of innocence were enough to automatically put intent at issue, the resulting exception would swallow the general rule against admission of prior acts."[165] Under the facts of *Miller*, where "the drugs in question were clearly a distribution quantity, the packages had price tags, and the defendant did not deny they were intended for distribution by someone, intent was 'at issue' only in the most attenuated sense."[166] Similarly, the Second Circuit has held that defendants can prevent the introduction of prior convictions by not disputing certain elements of the crime.[167] The court specifically explained that the prosecution should *not* offer prior convictions to prove knowledge or intent until the defendant's case is concluded and "should be aimed at a specifically identified issue. This enables the trial judge to determine whether the issue sought to be proved by the evidence is really in dispute and, if so, to assess the probative worth of the evidence on this issue against its prejudicial effect."[168] Accordingly, the Second Circuit has explicitly rejected the notion that intent is placed in issue

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[160] *Id.* at 697.

[161] *Id.* at 699.

[162] *Id.* at 700 (citations omitted).

[163] *See infra* notes 164–198 and accompanying text.

[164] *See* Ordover, *supra* note 67, at 151–52 (citing cases from 1989 and earlier for the proposition that a not-guilty plea alone "does not place the question of intent at issue" because "the defendant is content by this plea that he did not commit the crime, not that the act was done without the requisite criminal intent").

[165] *Miller*, 673 F.3d at 697.

[166] *Id.*

[167] United States v. Ortiz, 857 F.2d 900, 903–04 (2d Cir. 1988) ("This Court has held, however, that a defendant may completely forestall the admission of other act evidence on the issue of intent by 'express[ing] a decision not to dispute that issue with sufficient clarity . . . .'") (citing United States v. Figueroa, 618 F.2d 934, 942 (2d Cir. 1980)). For a discussion of the Second Circuit's approach to stipulations, see Buzzetta, *supra* note 107, at 393–97, and Rodriguez, *supra* note 67, at 473.

[168] *Figueroa*, 618 F.2d at 939.

"by a defense that the defendant did not do the charged act at all,"[169] and the circuit has allowed a defendant to prevent the introduction of a prior conviction by stipulating to the intent or knowledge elements.[170] Notably, even the Sixth Circuit, which in other cases has taken what looks like a presumptive approach,[171] has required that the defendant actually disputes knowledge for prior convictions to be admitted for this purpose.[172]

Second, courts employing "case-by-case" determinations have rejected the introduction of possession convictions to prove intent in PWID cases.[173] In *United States v. Lee*,[174] the Seventh Circuit held that the trial court improperly admitted Lee's prior cocaine possession conviction in his trial for possession with intent to distribute cocaine base.[175] The court reasoned that given that "Lee's prior conviction was for straight possession of crack cocaine, not possession with the intent to distribute . . . it is not obvious how the prior conviction would shed light on Lee's intent."[176] Eight days later,

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[169] United States v. Sampson, 385 F.3d 183, 193 (2d Cir. 2004) (quoting United States v. Ortiz, 857 F.2d 900, 904 (2d Cir. 1988)).

[170] *See* United States v. Mohel, 604 F.2d 748, 753 (2d Cir. 1979) (citing cases).

[171] *See* United States v. Hardy, 643 F.3d 143, 151 (6th Cir. 2011).

[172] *See, e.g.*, United States v. Johnson, 27 F.3d 1186, 1194 (6th Cir. 1994) (finding knowledge was not at issue because "[the defendant] did not argue, for example, that he possessed the drugs by mistake or inadvertence, or that he was so intoxicated as to be unaware of what he was doing. Rather, he denied possessing the drugs at all"). Other circuits have also required factually specific justifications beyond a not-guilty plea. For example, in *United States v. Pelletier*, 666 F.3d 1, 5–6 (1st Cir. 2011), the First Circuit considered the facts of the case when determining whether the 404(b) evidence had "special relevance." Rather than finding the not-guilty plea placed knowledge and intent in dispute, the First Circuit looked at the specific defense raised, which was that Pelletier had "legitimate sources of income, and [he did] not tak[e] part in the delivery of marijuana, which 'mysteriously appeared' in the buyer's car." *Id.* Accordingly, the court concluded, the issues of Pelletier's "knowledge of the presence of contraband and intent to distribute it . . . were squarely — even if only implicitly — placed before the jury." *Id.* at 6. Moreover, the First Circuit suggested that stipulating to knowledge or intent may be sufficient to prevent the introduction of prior convictions under 404(b) to prove these elements. *Id.* ("Where, as here, the defendant did not stipulate to the court that he would not dispute those issues such that the trial court would have been justified in preventing the very cross-examination conducted below, the court was well within its discretion in admitting the evidence under Rule 404(b).").

[173] *See* 3 CLIFFORD S. FISHMAN & ANNE T. MCKENNA, JONES ON EVIDENCE § 17:71:70 (7th ed. 2014); John T. Scannell, Case Comment, *Evidence — Admitting Prior Convictions for Drug Possession in Later Prosecution for Drug Distribution is Reversible Error — United State v. Lee, 724 F.3d 968 (7th Cir. 2013)*, 47 SUFFOLK U. L. REV. 945 (2014); Editor's blog, *Circuit Split*, *supra* note 119 (citing United States v. Lee, 724 F.3d 968 (7th Cir. 2013) and United States v. Davis, 726 F.3d 434 (3d Cir. 2013)). The Sixth Circuit took a similar approach finding that evidence of *subsequent* "possession [of drugs] for personal use on one occasion . . . sheds no light on whether he intended to distribute crack cocaine in his possession on another occasion nearly five months earlier." United States v. Haywood, 280 F.3d 715, 721 (6th Cir. 2002). See *'Use' Amount Inadmissible to Show Prior Intent to Distribute*, 16 No. 6 CRIM. PRAC. REP. 12 (2002), for a summary of *Haywood*. See also Barry Tarlow, *The Past as a Predictor: Is Prior Drug Use Probative of Future Distribution*, 27 CHAMPION 66 (2003), for a discussion of the circuit split on using possession convictions in PWID cases and the Sixth Circuit's approach in *Haywood*.

[174] 724 F.3d 968 (7th Cir. 2013).

[175] *Id.* at 970, 977.

[176] *Id.* at 979. For a discussion on *Lee*, see generally Scannell, *supra* note 173.

the Third Circuit held that a defendant's prior possession convictions were inadmissible to prove knowledge or intent in a trial for possession with intent to distribute.[177] In *Davis*, the Third Circuit explained that "[p]ossession and distribution are distinct acts . . . . A prior conviction for possessing drugs by no means suggest that the defendant intends to distribute them in the future."[178] Other circuits have also employed this reasoning.[179]

Third, in a "case-by-case" analysis, courts have required that the prior conviction demonstrates knowledge of a specific drug — rather than general knowledge of the drug trade — or be "exceedingly similar" to the charged act.[180] In *United States v. Becker*,[181] for example, the Tenth Circuit held that the trial court abused its discretion in admitting prior convictions for conspiracy to possess methamphetamine in Becker's trial for possession with intent to distribute marijuana.[182] Similarly, in *United States v. McBride*,[183] the Fourth Circuit found that evidence that the defendant attempted to manufacture and sell crack cocaine 18 months earlier[184] in a prosecution for possession with intent to distribute cocaine could not be admitted because it was entirely unrelated to the present case, was distant in time, and involved a different drug.[185] The First Circuit has also demanded such a factually specific analysis. In *United States v. Moccia*,[186] for example, the defendant was charged with possession with intent to distribute marijuana and diethylpropion.[187] In admitting prior convictions for marijuana possession, the First Circuit looked to Moccia's defense that he was unaware marijuana was in his farmhouse's freezer room and chicken coop.[188] Then-Judge Breyer[189] explained that the prior marijuana convictions were relevant, as a defendant

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[177] United States v. Davis, 726 F.3d 434, 442 (3d Cir. 2013).

[178] *Id.* at 444.

[179] *See, e.g.*, United States v. Edwards, 540 F.3d 1156, 1164 (10th Cir. 2005) (finding that the defendant's prior convictions for possessing a small amount of cocaine and marijuana did "little to support an inference that [he] either possessed, knew he possessed, or intended to distribute" cocaine, marijuana, and ecstasy).

[180] *See* United States v. McBride, 676 F.3d 385, 397 (4th Cir. 2012).

[181] 230 F.3d 1224 (10th Cir. 2000).

[182] *Id.* at 1232–33.

[183] 676 F.3d 385 (4th Cir. 2012).

[184] *Id.* at 396. Notably, this case did not involve the use of a prior conviction but rather testimony from a confidential informant. *Id.* at 390. Based on the court's reasoning, it is likely the same outcome would have been reached had the case involved a prior conviction because the court never questioned the reliability of the evidence of the prior act. It is nevertheless important to acknowledge this distinction.

[185] *Id.* at 395–98. The Fourth Circuit noted that "[a]lthough this difference in type of narcotic, standing alone, would not merit exclusion of the evidence, it is yet another distinction separating the events of January 14, 2008 from the events of August 12, 2009," but explaining that to admit 404(b) evidence, "linkage" is required. *Id.* at 397.

[186] 681 F.2d 61 (1st Cir. 1982).

[187] *Id.* at 62.

[188] *Id.* at 63.

[189] At the time, Justice Breyer was a First Circuit judge.

with a prior conviction "is more likely to know about the presence of marijuana."[190]

Fourth, courts taking a factually specific approach have demanded an articulation of non-propensity reasoning. In two recent decisions, the Seventh Circuit affirmed the approach it articulated in *Miller*.[191] In one of these cases decided en banc, the court explained that Rule 404(b) does not necessarily bar "other-act evidence . . . whenever a propensity inference can be drawn."[192] The rule does prohibit such evidence, however, "if its relevance to 'another purpose' is established *only* through the forbidden propensity inference."[193] The Third Circuit, noting the danger that prior convictions could be used for impermissible propensity purposes, has also required "the government [to] explain how [the prior conviction] 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."[194]

Finally, "case-by-case" courts have employed a searching 403 analysis that weighs probative value against the danger of unfair prejudice under the facts of the individual case.[195] Accordingly, even those courts that decide to admit a prior conviction will "balanc[e] relevance and risk."[196] Furthermore, in *Miller*, the Seventh Circuit did not assume that limiting instructions eliminated the risk of unfair prejudice.[197] Rather, the court considered that "[t]he danger that the jury would unfairly rely on Miller's prior drug dealing to suggest his current guilt was not cured in this case by the court's limiting instruction to the jury."[198]

III. Why the "Case-by-Case" Approach is Preferable

As the Seventh Circuit explained, admitting prior convictions poses a serious risk of introducing impermissible propensity evidence.[199] Moreover, limiting instructions — the solution at least some circuits provide to eliminate the risk of such convictions being used for impermissible purposes — are unlikely to prove effective.[200] To ensure that prior convictions are being

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[190] *Id.*

[191] United States v. Chapman, 765 F.3d 720, 727 (7th Cir. 2014); United States v. Gomez, 763 F.3d 845, 856 (7th Cir. 2014) (en banc).

[192] *Gomez*, 763 F.3d at 856.

[193] *Id.*

[194] United States v. Davis, 726 F.3d 434, 442 (3d Cir. 2013). *But see* United States v. Moffit, No. 14-1399, 2015 WL 670297, at *2 (3d Cir. Feb. 18, 2015) (citing *Davis* in a conspiracy and attempt to possess with intent to distribute case, but explaining only the prior convictions' relevance without articulating non-propensity reasoning).

[195] *See, e.g.*, United States v. Becker, 230 F.3d 1224, 1237 (10th Cir. 2000); United States v. McBride, 676 F.3d 385, 402 (4th Cir. 2012).

[196] United States v. Moccia, 681 F.2d 61, 63 (1st Cir. 1982).

[197] United States v. Miller, 673 F.3d 688, 701 (6th Cir. 2012).

[198] *Id.*

[199] *Id.* at 698.

[200] *See infra* notes 254–259 and accompanying text.

used only for the purposes allowed under 404(b) and to prevent the danger that these crimes will bias juries against defendants, courts must adopt a fact-specific approach that admits only prior convictions that are probative of a disputed element and have a non-propensity purpose. Furthermore, after finding that these convictions are relevant, courts should conduct a meaningful 403 analysis that accounts for the difficulty juries have following limiting instructions. Only those convictions that are relevant and whose probative value is not substantially outweighed by the risk of unfair prejudice should be admitted. For many of the circuits, this would mean admitting far fewer prior convictions.

A. Problems with the "Presumptive" Approach

Circuits presumptively admitting prior convictions generally admit the convictions to prove knowledge or intent to distribute.[201] Both uses can run into significant problems when prior convictions are admitted without fact-specific analyses. Problems inhere in admitting prior convictions to prove knowledge when the convictions are offered to prove general knowledge of the drug trade rather than to prove the defendant had knowledge of a specific drug when the defendant disputes she was aware of the drug's existence. The intent justification almost always collapses into impermissible propensity reasoning.

1. Knowledge.

If a defendant argues that she did not know that a substance in her possession was a certain drug or that "she just happened to be present in a premises where the police found drugs, but had no knowledge of them,"[202] then a prior conviction involving that drug would likely be relevant to show knowledge or absence of mistake.[203] In such a case, the conviction would be relevant under 404(b), would have a non-propensity purpose — that the defendant knew that she was in possession of or at a location containing an

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[201] While knowledge and intent are the more common purposes for admitting 404(b) evidence, courts have admitted prior convictions to prove other purposes. *See, e.g.*, United States v. Templeman, 965 F.2d 617, 619 (8th Cir. 1992) (prior convictions introduced to prove motive and opportunity).

[202] FISHMAN & MCKENNA, *supra* note 173 (discussing the "mere presence" defense).

[203] *See, e.g.*, United States v. Moccia, 681 F.2d 61, 63 (1st Cir. 1982); *see also* Ordover, *supra* note 67, at 157 ("[W]here the defense is lack of knowledge and the prior crime demonstrates that the defendant has particular knowledge relevant to the charge, the evidence should be admitted."). See cases cited in 1 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 4:34, n.43 (4th ed. 2009) and FISHMAN & MCKENNA, *supra* note 173 (asserting that in such cases, "evidence of the defendant's prior drug dealings . . . has special relevance, beyond mere propensity, because there is a strong basis to infer that their presence together in a location where drugs were found is too coincidental to be mere happenstance"). Similarly, Fishman and McKenna argue that when a defendant denies knowledge of a substance, the evidence "has special relevance to refute his denial." FISHMAN & MCKENNA, *supra* note 173.

illegal substance — and, subject to a Rule 403 analysis, could be admitted.[204] In many cases where courts have admitted prior convictions to show knowledge, however, the defendant is not arguing that she did not know she possessed a substance and did not know it was a drug. Rather, courts have allowed the prior conviction to show general knowledge of the drug trade,[205] to "help . . . rule out the possibility that [the defendant] was unfamiliar with [a particular drug],"[206] to "make the existence of the defendant's knowledge more probable than it would be without the evidence,"[207] or to make it "more probable that [the defendant] knew the substance he was charged with possessing was indeed [a particular drug]."[208]

Such uses of prior convictions to prove knowledge may be relevant in a technical reading of Rule 401 because they have a "tendency to make a fact more or less probable than it would be without the evidence."[209] The fact that a defendant has been involved with a given drug in the past makes it more likely that she knows the substance she is dealing with is a drug. Rule 404(b) demands more than just technical relevance, however.[210] To admit a prior conviction, the government must prove knowledge, intent, or another purpose in a way that does not use propensity reasoning — i.e., that does not rely on the inference that because someone committed a crime in the past, she is more likely to have done so in the instant case.[211]

Another problem arises when comparing the *probative* value of this evidence to its potential for creating unfair prejudice under Rule 403. This problem becomes particularly pronounced when a defendant does not dispute knowledge, giving the prior convictions little probative value. Nevertheless, as noted above, at least the Fifth,[212] Eighth,[213] Ninth,[214] and D.C.[215] Circuits have admitted prior convictions even when the defendant does not raise a defense based on lack of knowledge.[216] For these circuits, even if the defendant does not dispute an element, the government must still prove each element beyond a reasonable doubt, and thus prior convictions can be admitted.[217] At least one judge in the Ninth Circuit has critiqued that circuit's

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[204] *See* FISHMAN & MCKENNA, *supra* note 173. *See also* Sonenshein, *supra* note 14, at 260.

[205] *See* United States v. White, 307 F. App'x 764, 765 (4th Cir. 2009).

[206] *See* United States v. Thomas, 294 F. App'x 124, 130 (5th Cir. 2008).

[207] *See* United States v. Vo, 413 F.3d 1010, 1018 (2005) (quoting United States v. Ramirez-Jiminez, 967 F.2d 1321, 1326 (9th Cir. 1992)).

[208] United States v. Douglas, 482 F.3d 591, 599 (D.C. Cir. 2007) (involving a prior arrest rather than conviction, but the reasoning would apply to prior convictions as well).

[209] FED. R. EVID. 401(a).

[210] *See supra* Part I.

[211] FED. R. EVID. 404(b).

[212] *See* United States v. Carrillo, 660 F.3d 914, 929 (5th Cir. 2011).

[213] *See* United States v. Logan, 121 F.3d 1172, 1178 (8th Cir. 1997).

[214] *See* United States v. Vo, 413 F.3d 1010, 1018 (9th Cir. 2005).

[215] *See* United States v. McCarson, 527 F.3d 170, 173 (D.C. Cir. 2008).

[216] *See supra* notes 103–118 and accompanying text.

[217] *See, e.g.*, United States v. Douglas, 482 F.3d 591, 599 (D.C. Cir. 2007).

approach and instead relied on dicta in *United States v. Vavages*[218] — which diverges from the Ninth Circuit's approach — to argue that "evidence of a prior conviction offered to prove knowledge is of 'minimal probative value' when lack of knowledge is not raised as a defense."[219]

2. Intent.

Circuit courts have also admitted prior convictions to prove intent in PWID cases. To be admissible, prior convictions must be offered to prove specific intent, which is the intent to commit the crime in question.[220] Courts' justification for admitting prior convictions to prove intent, however, often collapses into *only* general propensity reasoning, which is explicitly forbidden under 404(b).[221] For example, the Fifth Circuit's reasoning in *United States v. Beechum*,[222] that "because the defendant had unlawful intent in the extrinsic offense, it is less likely that he had lawful intent in the present offense"[223] is exactly what Rule 404(b) sought to prohibit when it provided that "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character."[224] The Sixth,[225] Eighth,[226] Ninth,[227] and D.C.[228] Circuits have employed similar reasoning. As Andrew Morris explains, "[w]hat chain of reasoning can link the prior drug history . . . to the charged crime other than one that infers that the defendant has a drug-related propensity, and that based on this propensity the jury can disbelieve him when he denies criminal intent as to the latest drug incident? There is no propensity-free chain."[229] Underlying the explanation that someone who previously had intent currently has the intent to distribute, Morris contends, is the assumption "that the defendant's character remains constant across time."[230]

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[218] 151 F.3d 1185 (9th Cir. 1998).

[219] *See* United States v. Pedregon, 520 F. App'x 605, 608–09 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 497 (2013) (Watford, J., dissenting) (citing *Vavages*, 151 F.3d at 1193) ("Although a defendant's knowledge is always material . . . evidence of a prior conviction offered to prove knowledge is of 'minimal probative value' when lack of knowledge is not raised as a defense. The same can be said for a prior conviction offered to prove intent and 'absence of mistake' when neither of those issues is contested at trial.").

[220] Ordover, *supra* note 67, at 150; Reed, *Admitting the Accused's Criminal History*, *supra* note 67, at 222; Rodriguez, *supra* note 67, at 477.

[221] Ordover, *supra* note 67, at 150–51. See Sonenshein, *supra* note 14, for a discussion on the problematic use of 404(b) to prove intent.

[222] 582 F.2d 898 (5th Cir. 1978).

[223] *Id.* at 912.

[224] FED. R. EVID. 404(b)(1).

[225] *See, e.g.*, United States v. Hardy, 643 F.3d 143, 151–52 (6th Cir. 2011).

[226] *See, e.g.*, United States v. Logan, 121 F.3d 1172, 1178 (8th Cir. 1997).

[227] *See, e.g.*, United States v. Herrera-Osornio, 521 F. App'x 582, 586 (9th Cir. 2013).

[228] *See, e.g.*, United States v. Douglas, 482 F.3d 591, 597 (D.C. Cir. 2007).

[229] Morris, *supra* note 67, at 191. *See also* Teitelbaum & Hertz, *supra* note 137, at 430.

[230] *Id.* at 194. For Morris's mathematical explanation that propensity reasoning underlies the "doctrine of chances," see *id.* at 201–04.

At least one Sixth Circuit judge has rejected the circuit's approach to admitting prior convictions to prove specific intent,[231] instead relying on an earlier Sixth Circuit case[232] that limited the use of prior convictions used to prove intent.[233] In that case, *United States v. Bell*,[234] the Sixth Circuit held that "[u]nless the past and present crime are related by being part of the same scheme of drug distribution or by having the same modus operandi, the fact that a defendant has intended to possess and distribute drugs in the past does not logically compel the conclusion that he presently intends to possess and distribute drugs."[235] Recent Sixth Circuit cases have suggested that the Sixth Circuit is returning to *Bell*'s approach.[236]

Using similar reasoning as *Bell*, Abraham Ordover has explained that only certain defenses — such as "entrapment, coercion, and mistake or accident" — place intent at issue.[237] Furthermore, Ordover contends, "evidence of an unconnected prior crime is always evidence of propensity and never evidence of a specific intent to commit the crime charged."[238] While unconnected prior crimes could help prove general intent, "such an inference is based upon propensity, which is precisely the reasoning that is condemned by the statute and its philosophical underpinnings."[239]

David Sonenshein has gone so far as to argue for amending Rule 404(b) "to exclude intent from its list of permissible offers."[240] He explains that "where intent is not actively contested there is essentially no arguable, legitimate rationale for admitting other similar acts" to prove intent.[241] "Assuming this seemingly radical proposal is unacceptable," Sonenshein contends, however, he would limit the introduction of 404(b) evidence to a narrow set of cases: "situations where the government is required to independently prove intent[,] . . . [situations where] intent is contested, and [those where]

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[231] *See* United States v. Hardy, 643 F.3d 143, 151–52 (6th Cir. 2011).

[232] United States v. Bell, 516 F.3d 432 (6th Cir. 2008). In *Hardy*, the Sixth Circuit asserted that *Bell* no longer controls. *See Hardy*, 643 F.3d at 152. Subsequent cases suggest, however, that *Bell* remains relevant. *See, e.g.*, United States v. Miller, 562 F. App'x 272, 284 (6th Cir. 2014) (citing *Bell* and finding the district court erred in admitting 404(b) evidence to prove intent); United States v. Richardson, No. 13-2287, 2015 WL 480356, at *4–*5 (6th Cir. Feb. 6, 2015) (citing *Bell* and quoting it for the proposition that the "present crime was part of the same scheme or utilized the same *modus operandi*").

[233] *See Hardy*, 643 F.3d at 159–60 (Cole, J., dissenting).

[234] 516 F.3d 432 (6th Cir. 2008).

[235] *Id.* at 443–44. For a summary and discussion of *Bell*, see, for example, Stephen A. Saltzburg, *Rule 404(b) and Reversal on Appeal*, 23 CRIM. JUST. 47 (2008) and Stephen A. Saltzburg, *Four priors for intent to distribute — way too prejudicial*, 22 No. 6 CRIM. PRAC. REP. 4 (Mar. 10, 2008).

[236] *See supra* note 232.

[237] Ordover, *supra* note 67, at 152 (citing cases).

[238] *Id.* at 157.

[239] *Id.*

[240] Sonenshein, *supra* note 14, at 275.

[241] *Id.* at 249; *see also* Ordover, *supra* note 67, at 157 ("[E]vidence of an unconnected prior crime is always evidence of propensity and never evidence of a specific intent to commit the crime charged.").

there is an absence of alternative and less prejudicial evidence of intent."[242] Following Sonenshein's proposed limitation of using prior convictions to prove intent to these specific cases would help ensure that prior convictions used to prove intent have a non-propensity purpose.

3. Unfair Prejudice.

The risk of unfair prejudice is significant, particularly when measured against the "minimal,"[243] if any, probative value of prior convictions.[244] The introduction of a prior conviction can be extremely damaging for a defendant and has a significant effect on whether a defendant is convicted.[245] Paul Milich explains that jurors "bring with them to trial a natural fear of wrongfully convicting a person as well as a fear of wrongful acquittal."[246] Once jurors learn of a defendant's prior conviction, however, "the jurors' fear of wrongful conviction shrinks" both because they are more likely to infer the defendant has the propensity to commit crimes and because "there is simply less fear that getting it wrong would be a great injustice."[247] One study found that introducing a criminal record had a significant effect on how subjects perceived the defendant's likelihood of guilt, even when the judge gave instructions that the prior convictions should be used only to evaluate the defendant's credibility.[248] Another study involving simulated juries revealed that when given identical evidence, groups presented with evidence of a

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[242] Sonenshein, *supra* note 14, at 275.

[243] United States v. Pedregon, 520 F. App'x 605, 608–09 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 497 (2013) (Watford, J., dissenting).

[244] *See, e.g.*, United States v. Davis, 726 F.3d 434, 444 (3d Cir. 2013) ("In cases such as this, there is an ever-present danger that jurors will infer that the defendant's character made him more likely to sell the drugs in his possession. But that is precisely the type of inference that Rule 404(b) forbids. Any other conclusion would run the risk of unraveling the prior-acts rule."). For a full discussion on prejudice, see Sonenshein, *supra* note 14, at 264–76.

[245] *See* Larry Laudan & Ronald J. Allen, *The Devastating Impact of Prior Crimes Evidence and Other Myths of the Criminal Justice Process*, 101 J. CRIM. L. & CRIMINOLOGY 493, 494–511 (2011) (summarizing studies using mock juries and actual jury data); *see also* Ordover, *supra* note 67, at 149 (citing HARRY KALVEN & HANS ZEISEL, THE AMERICAN JURY (1966)); Michelson v. United States, 335 U.S. 469, 475–76 (1948) ("The inquiry 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 prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge."); *supra* Part I.

[246] Paul S. Milich, *The Degrading Character Rule in American Criminal Trials*, 47 GA. L. REV. 775, 792 (2013) (arguing the current use of Rule 404(b) undermines the presumption of innocence).

[247] *Id.* at 793.

[248] Anthony N. Doob & Hershi M. Kirshenbaum, *Some Empirical Evidence on the Effect of s. 12 of the Canada Evidence Act Upon an Accused*, 15 CRIM. L.Q. 88, 92–95 (1972–73). As explained in Part I, *supra*, when a prior conviction is introduced under Rule 404(b) it is not to challenge the defendant's credibility, but to show intent, identity, absence of mistake, or one of the other purposes described in 404(b). That jurors are more likely to believe someone is guilty if they have a prior offense, even when the offense is purportedly used for questioning a defendant's credibility, illustrates the extent to which jurors consider prior convictions regardless of the reason for their introduction. This section explains that the effect on jurors is particularly significant when the prior conviction is a similar crime to the crime charged.

prior conviction believed the evidence against the defendant was stronger than groups not informed of a prior conviction.[249] These effects of introducing prior convictions are even more pronounced when the prior conviction involves the same or a similar crime as the one in question.[250] Moreover, studies have suggested that the introduction of a prior conviction, particularly for a similar crime, leads jurors to believe that the defendant has the disposition or "propensity" to commit crimes.[251] This is the inference that Rule 404(b)(1) seeks to avoid by prohibiting introduction of prior acts for that purpose.[252]

Although appellate courts cite limiting instructions as a means to eliminate unfair prejudice,[253] even the Advisory Committee's Note to Rule 404(b) recognize that these instructions may not be effective.[254] Almost seventy years ago, in *United States v. Michelson*,[255] the Supreme Court acknowledged that "surely jurors in the hurried and unfamiliar movement of a trial must find [limiting instructions] almost unintelligible."[256] Since then, numerous studies have demonstrated that juries are generally incapable of following limiting instructions.[257] These studies have suggested that in some cases juries disregard the instructions altogether, while in other cases the limiting instruction causes jurors to focus on the evidence they are instructed to disregard.[258] Thus, not only are limiting instructions "probably futile in

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[249] Valerie P. Hans & Anthony N. Doob, *Section 12 of the Canada Evidence Act and the Deliberations of Simulated Juries*, 18 CRIM. L.Q. 235, 244–46 (1975–76).

[250] Wissler & Sacks, *supra* note 72, at 43–46.

[251] *See id.*; Lawrence J. Breen et al., *Causal Attributions, Attitude Similarity, and the Punishment of Drug Offenders*, 72 BRITISH J. OF ADDICTION 357, 362 (1977).

[252] FED. R. EVID. 404(b)(1).

[253] *See, e.g.*, United States v. Franklin, 250 F.3d 653, 659 (8th Cir. 2001) ("[T]he presence of a limiting instruction diminishes the danger of any unfair prejudice arising from the admission of other acts."); United States v. Herrera-Osornio, 521 F. App'x 582, 586 (9th Cir. 2013) ("[T]he district court's limiting instruction reduced any risk of undue prejudice under Rule 403.").

[254] *See* FED. R. EVID. 403 advisory committee's note ("[C]onsideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction.").

[255] 335 U.S. 469 (1948).

[256] *Id.* at 485.

[257] *See, e.g.*, Wissler & Saks, *supra* note 72; *see also* Ordover, *supra* note 67, at 175–78 (citing studies).

[258] *See* Sonenshein, *supra* note 14, at 270–71 (citing Hans & Doob, *supra* note 249, at 251; Ewart A.C. Thomas & Anthony Hogue, *Apparent Weight of Evidence, Decision Criteria, and Confidence Ratings in Juror Decision Making*, 83 PSYCHOL. REV. 442, 442–44 (1976); Rachel K. Cush & Jane Goodman Delahunty, *The Influence of Limiting Instructions on Processing and Judgments of Emotionally Evocative Evidence*, 13 PSYCHIATRY, PSYCHOL. & L. 110, 192 (2006); Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 PSYCHOL. PUB. POL'Y & L. 677, 677–79 (2000); Sharon Wolf & David Montgomery, *Effects of Inadmissible Evidence and Level of Judicial Admonishment to Disregard the Judgments of Mock Jurors*, 7 J. APPLIED SOC. PSYCHOL. 205 (1977)).

mitigating the prejudicial effect of prior conviction evidence," they may actually exacerbate it.[259]

B. Merits of a "Case-by-Case" Approach

When explaining how to implement Rule 404(b), the Advisory Committee's Note explains that when a prior act is relevant, "[n]o mechanical solution is offered."[260] Courts must determine "whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403."[261] The reasoning of the circuits that adopt a fact-specific analysis comports with the Advisory Committee's directive.[262] This approach has several advantages.

First, by requiring the element of the offense to be in dispute, courts ensure that the introduction of the prior conviction has high probative value.[263] If a defendant stipulates that she had knowledge or intent, it is unlikely that a prior conviction offered to prove one of these elements would have high probative value, particularly compared with the risk of unfair prejudice.[264] The Seventh Circuit has articulated the problems inherent in the alternative approach: "[I]f a mere claim of innocence were enough to automatically put intent at issue, the resulting exception would swallow the general rule against admission of prior bad acts."[265]

Second, a "case-by-case" analysis is more likely to prevent the introduction of propensity evidence disguised as 404(b) evidence. Again here, the Seventh Circuit's guidance is instructive: "Confusion and misuse of Rule 404(b) can be avoided by asking the prosecution exactly how the proffered evidence should work in the mind of a juror to establish the fact the government claims to be trying to prove."[266] When the answer is that because someone committed a crime in the past, she is more likely to be guilty now, "[t]hat is precisely the forbidden propensity inference."[267]

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[259] *See* Sonenshein, *supra* note 14, at 271.

[260] FED. R. EVID. 404(b) advisory committee's note. See Ordover, *supra* note 67, at 186–88 for an argument that the Advisory Committee's Note suggests a "defendant-oriented standard of Rule 609(a)(1)." Ordover proposes a Rule 403 amendment, which "places the burden of persuasion on . . . the government" and "if the court finds either the jury will use the evidence for purposes other than those offered by the prosecution or that the jury will draw improper inferences from the evidence it will be excluded," which he argues better comports with Rule 404(b) and the Advisory Committee's Note.

[261] FED. R. EVID. 404(b) advisory committee's note.

[262] Courts accord weight to the Advisory Committee's Notes. *See, e.g.*, United States v. Miller, 673 F.3d 688, 695 (7th Cir. 2012) (citing the Advisory Committee's Note).

[263] *Cf.* Rodriguez, *supra* note 67, at 456 (arguing that "[a]n accused's offer to stipulate to the requisite intent or admission as to its existence has a direct impact on the court's calculation of the necessity for collateral acts evidencing intent").

[264] *See supra* note 107.

[265] *Miller*, 673 F.3d at 697.

[266] *Id.* at 699.

[267] *Id.*

Finally, a case-specific analysis provides a space for courts to conduct a 403 analysis that actually weighs the relevance of the conviction against the very real danger that the defendant will suffer unfair prejudice.[268] As discussed above, a prior conviction can have very damaging effects that are unlikely to be mitigated by limiting instructions.[269] A "case-by-case" approach is more likely to balance the probative value against the real risk of substantial unfair prejudice prior convictions pose.[270] The Advisory Committee, academics, and some courts have acknowledged such a risk.[271] Other courts considering whether to admit evidence under Rule 404(b) should as well.

CONCLUSION

Whether introducing Rick Vo's thirteen-year old marijuana conviction in his trial for conspiring and aiding and abetting to possess with the intent to distribute more than 50 grams of methamphetamine would have changed the outcome of his trial is a question perhaps only the jury can answer. What we do know, however, is that introducing the marijuana conviction presented a serious danger — a danger that the jury would believe that the fact that Vo had been involved with drugs in the past made it more likely that he was involved in the current instance. Although the Federal Rules of Evidence prohibit evidence being introduced for such an inference, limiting instructions ultimately provide little use in preventing juries from making it. Because of this danger, it is critical for courts to consider when to introduce prior convictions under Rule 404(b) and to ensure, when it is introduced, that it has a non-propensity purpose.

The effect of introducing prior convictions is particularly profound in prosecutions involving possession with intent to distribute and has a disparate impact on indigent defendants and defendants of color. The introduction of prior convictions through 404(b) undermines many of Rule 609's safeguards aimed at protecting defendants. Therefore, it is important for courts, and practitioners trying cases, to discern between prior convictions that actually support a permissible usage and those that are just propensity in

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[268] *Cf.* Ordover, *supra* note 67, at 148 (arguing that Rule 403 should be amended to "exclude all evidence unless the probative value on some relevant issue exceeds the impact of the evidence on proving the defendant's propensity to commit [a] crime"); *id.* at 187–88 (explaining his proposed amendment to Rule 403); Edward J. Imwinkelried, *The Need to Amend Federal Rule of Evidence 404(b): The Threat to the Future of the Federal Rules of Evidence*, 30 VILL. L. REV. 1465, 1497 (1985) (arguing that Rule 404(b) should be amended to include that "[b]efore the judge admits evidence for such a purpose, the proponent of the evidence must persuade the judge that the probative value of the evidence outweighs the danger of unfair prejudice").

[269] *See supra* notes 243–259 and accompanying text.

[270] *Cf. supra* notes 195–198 and accompanying text; Kuhn, *supra* note 67, at 807 (advocating a 403 balancing test which "would permit the admission of specific acts evidence only if its probative value outweighs the countervailing factors").

[271] *See supra* notes 195–198 and 243–259 and accompanying text.

disguise. Furthermore, the Rule 403 analysis should better account for the very real danger that the defendant will suffer undue prejudice. Such a fact-specific approach ensures that defendants are convicted based on the strength of the evidence at trial — not based on their convictions from the past.