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## The (Mis)Application of Rule 404(b) Heuristics

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# The (Mis)application of Rule 404(b) Heuristics

DORA W. KLEIN\*

*In all of the federal circuit courts of appeals, application of Rule 404(b) of the Federal Rules of Evidence has been distorted by judicially-created “tests” that, while intended to assist trial courts in properly admitting or excluding evidence, do not actually test for the kind of evidence prohibited by this rule. Rule 404(b) prohibits evidence of “crimes, wrongs, or other acts” if the purpose for admitting the evidence is to prove action in accordance with a character trait. This evidence is commonly referred to as “propensity” evidence, or “once a drug dealer, always a drug dealer” evidence.*

*This Article examines three counter-productive heuristics that the federal circuit courts of appeals have created: (1) multi-factor tests based on a paragraph of dicta from the Supreme Court’s opinion in *Huddleston v. United States*; (2) a set of “exceptions” based on a misreading of the list of permitted purposes for admitting other-acts evidence found in Rule 404(b)(2); and (3) a set of additional “exceptions” extrapolated from an advisory committee note’s reference to “intrinsic” evidence. Recently, the U.S. Court of Appeals for the Seventh Circuit, in an *en banc* decision, recognized that its approach to Rule 404(b) had become so distorted that a new approach was required. This Article concludes that the other federal circuit courts of appeals should follow this example and proposes that such a reframing of a circuit’s approach to Rule 404(b) should not require a decision of the court *en banc*.*

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## INTRODUCTION

A heuristic is a cognitive shortcut.<sup>1</sup> Although some heuristics are helpful, the particular heuristics that the federal circuit courts of appeals have created for applying Rule 404(b) of the Federal Rules of Evidence have caused more confusion than clarity. This Article proposes that the courts should abandon these heuristics in favor of an approach that is more closely connected to the rule itself.

Rule 404(b) is perhaps the most controversial of the Federal Rules of Evidence. Not only is this rule the subject of more appellate court opinions than any other rule of evidence,<sup>2</sup> it has inspired extended debate about whether the rule excludes too much or too little relevant evidence.<sup>3</sup> Additionally, as this Article explains, all of the federal courts of appeals have created elaborate, multi-factor “tests” of and “exceptions” to Rule 404(b) that add layers of complexity and confusion to the rule.<sup>4</sup>

Rule 404(b)(1) is intended to prohibit “propensity reasoning,” in the language of the common-law cases, or as the rule currently reads: “Evidence of a crime, wrong, or other act is not admissible to

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<sup>1</sup> In the realm of the law, heuristics have been defined as “simplistic, rule-like tests developed by the courts to deal with otherwise complex cases in a more efficient manner.” Nancy Gertner, *Losers’ Rules*, 122 YALE L.J. ONLINE 109, 116 (2012) (quoting Hillary A. Sale, *Judging Heuristics*, 35 U.C. DAVIS L. REV. 903, 906 (2002)) (internal quotation marks omitted).

<sup>2</sup> *United States v. Davis*, 726 F.3d 434, 441 (3d Cir. 2013) (“Rule 404(b) has become the most cited evidentiary rule on appeal.”) (citation omitted); *cf.* 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.”).

<sup>3</sup> Compare Deena Greenberg, Note, *Closing Pandora’s Box: Limiting the Use of 404(b) to Introduce Prior Convictions in Drug Prosecutions*, 50 HARV. C.R.-C.L. L. REV. 519, 526–27 (2015) (arguing that the rule excludes too little), with 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 (2011) (arguing that the rule excludes too much evidence).

<sup>4</sup> See discussion *infra* Sections II.D.1–12.

prove a person's character in order to show that on a particular occasion the person acted in accordance with the character."<sup>5</sup> This is a fairly straightforward rule, as the Federal Rules of Evidence go, that prohibits one thing: the admission of evidence of "a crime, wrong, or other act" for the purpose of proving "a person's character in order to show that on a particular occasion the person acted in accordance with the character."<sup>6</sup> Despite this rule's relative straightforwardness, the federal circuit courts of appeals have created several heuristics that, although intended to simplify application of the rule, instead have distorted it so that the test of admissibility of "other acts" evidence has little if anything to do with whether the evidence is offered to prove action in accordance with character. Like law students who acquire armfuls of outlines and supplements that purport to do the work of understanding a case for them, rather than just reading the case, these "Rule 404(b) tests" that the federal circuit courts of appeals have amassed are a poor substitute for simply applying the rule itself.

The Rule 404(b) heuristics can be grouped into three types.<sup>7</sup> One type of Rule 404(b) heuristic is a multi-factor test based on a paragraph of dicta from the Supreme Court's opinion in *Huddleston v. United States*, a case that did not directly concern the task of identifying and excluding propensity evidence.<sup>8</sup> In *Huddleston*, the defendant conceded that the government's evidence was not offered to prove propensity, and so the Rule 404(b) tests that are based on this case are not especially helpful when a defendant argues that the government's evidence is offered to prove propensity.<sup>9</sup> Two additional types of Rule 404(b) heuristics ask whether the proffered evidence satisfies one of the 404(b) "exceptions." Rule 404(b) itself does not include any exceptions; these 404(b) "exceptions" exist only because the courts have created them.<sup>10</sup> One source of these "exceptions" is the list of examples of non-propensity purposes included in

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<sup>5</sup> FED. R. EVID. 404(b)(1).

<sup>6</sup> *Id.*

<sup>7</sup> These heuristics are discussed in detail *infra* Part II.

<sup>8</sup> 485 U.S. 681, 682 (1988).

<sup>9</sup> *Id.* at 686.

<sup>10</sup> Some other rules (specifically, Rules 413, 414, and 415) do establish exceptions to Rule 404(b), but Rule 404(b) itself does not establish any exceptions. FED. R. EVID. 404(b), 413–15.

Rule 404(b)(2).<sup>11</sup> The second source of these “exceptions” is the reference, in an advisory committee note, to evidence that is “intrinsic” to the charged offense and thus is evidence of the same act rather than an “other” act.<sup>12</sup>

The purpose of this Article is not to argue that the use of these Rule 404(b) heuristics necessarily results in erroneous decisions regarding other-acts evidence. The claim of this Article is more limited: that the use of these Rule 404(b) heuristics results in erroneous reasoning by the courts. Courts might (or might not) reach the correct result to admit (or exclude) evidence by applying these heuristics, but applying these heuristics produces opinions—and as discussed in Part II.B, exchanges at oral argument—that at best are unnecessarily confusing and at worst are objectively incorrect statements of the rule.

Recently, the Seventh Circuit reformed its approach to Rule 404(b).<sup>13</sup> Specifically, this court recognized that Rule 404(b) prohibits one kind of evidence—evidence offered to prove propensity.<sup>14</sup> This Article proposes that the other circuits should similarly abandon their Rule 404(b) heuristics and simply apply Rule 404(b) to exclude other-acts evidence when offered for the purpose of proving action in accordance with character.

Part I of this Article presents a brief overview of how Rule 404(b) was intended to operate. Part II examines how Rule 404(b) actually operates under the heuristics, focusing on cases decided within the last three years. Overall, courts’ application of Rule 404(b) is woefully confused because, under the Rule 404(b) heuristics, the admissibility of other-acts evidence has come to depend on several factors, none of which are the single factor—propensity—that is provided for in Rule 404(b). Part III briefly reviews each circuit court of appeals’ approach to Rule 404(b), including the Seventh Circuit’s recent abandonment of the *Huddleston* and “exceptions” heuristics in favor of a more straightforward, rule-based test

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<sup>11</sup> FED. R. EVID. 404(b)(2).

<sup>12</sup> FED. R. EVID. 404(b) advisory committee’s note to 1991 amendment (stating that the rule “does not extend to evidence of acts which are ‘intrinsic’ to the charged offense”).

<sup>13</sup> *United States v. Gomez*, 763 F.3d 845, 853 (7th Cir. 2014) (en banc). This case is discussed *infra* Part III.

<sup>14</sup> *Id.* at 855–56.

of admissibility under Rule 404(b). Additionally, this Part explains why other circuit courts likely do not need to decide a case en banc to adopt the Seventh Circuit's approach.

### I. THE PURPOSE OF RULE 404(B)

Rule 404(b) exists because common-law judges feared that juries would over-value character evidence.<sup>15</sup> Character evidence is acknowledged to often be relevant; someone who robbed a bank in the past is more likely, as compared to someone who has never robbed a bank, to be the person who robbed the bank in the present.<sup>16</sup> However, the fact that someone robbed a bank in the past is not conclusive proof that this person also robbed a bank in the present, yet juries might interpret the prior conduct as proof of present conduct. Although it is true that people do often act in accordance with particular character traits, it is also true that people often act "out-of-character." Additionally, a jury might conclude that someone who robbed a bank in the past has a bad kind of character and deserves to be punished even if she did not commit the present bank robbery. It is best, the common-law judges reasoned, to simply remove the issue of character from juries' consideration. As Professor Wigmore stated:

The natural and inevitable tendency of the tribunal—whether judge or jury—is to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present

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<sup>15</sup> *Old Chief v. United States*, 519 U.S. 172, 181 (1997).

<sup>16</sup> As the Supreme Court stated in *Old Chief*:

Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. . . . 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 prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

*Id.* at 181 (quoting *Michelson v. United States*, 335 U.S. 469, 475–76 (1948)).



charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge.<sup>17</sup>

Rule 404(b) of the Federal Rules of Evidence reflects this understanding of the perils of character evidence. According to the Advisory Committee's Note, the problem with evidence of crimes, wrongs, or other acts is that this evidence "subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened."<sup>18</sup>

## II. THE UNITED STATES COURTS OF APPEALS' RULE 404(B) HEURISTICS

There are several problems with most federal circuit court of appeals' approach to Rule 404(b). The first is the crafting of multi-factor tests that have read the propensity ban on "other acts" evidence out of the rule, on the basis of a paragraph of dicta from the Supreme Court's opinion in *Huddleston v. United States*. The second is a fixation on fictitious "exceptions" to Rule 404(b). Some of these "exceptions" are based on the permitted purposes listed in 404(b) and some are based on a reference to "intrinsic" evidence in the Advisory Committee's Note to the 1991 amendment. The result is an extensive and confusing assortment of Rule 404(b) "tests" that do not in fact test for propensity reasoning.

### A. *Huddleston was Not About Propensity*

One wrong turn that federal courts have taken in applying Rule 404(b) is to create multi-factor tests of admissibility. The Ninth Circuit's test, as stated by one recent case, is typical:

The government must show that (1) the evidence tends to prove a material point; (2) the other act is not too remote in time; (3) the evidence is sufficient to support a finding that defendant committed the other

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<sup>17</sup> 1 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 194, at 646 (3d ed. 1940).

<sup>18</sup> FED. R. EVID. 404 advisory committee's note on proposed rules (citation omitted).

act; and (4) (in certain cases) the act is similar to the offense charged.<sup>19</sup>

This test essentially rewrites Rule 404(b) to allow other-acts evidence so long as it is relevant. Nowhere in this test is there any consideration of whether the evidence is relevant because it proves propensity. This four-factor test might exclude irrelevant evidence, or remote evidence, or dissimilar evidence, but it does not necessarily or intentionally exclude propensity evidence.

Almost all of the other U.S. Circuit Courts of Appeals have adopted *n*-factor tests similar to the Ninth Circuit's.<sup>20</sup> The similarity of these tests stems from their common origin: a paragraph of dicta in the opinion of the Supreme Court in *Huddleston v. United States*.<sup>21</sup> The Second,<sup>22</sup> Third,<sup>23</sup> and Tenth<sup>24</sup> Circuits even refer to the elements of their tests as "*Huddleston* factors."

While *Huddleston* did concern Rule 404(b), *Huddleston* himself conceded that the government was offering the evidence at issue—television sets that the government alleged were stolen—for a proper purpose.<sup>25</sup> As the Court stated, "Petitioner acknowledges that this evidence was admitted for the proper purpose of showing his

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<sup>19</sup> *United States v. Lloyd*, 807 F.3d 1128, 1157–58 (9th Cir. 2015) (citations and internal quotation marks omitted). This same formulation is recited in numerous recent Ninth Circuit opinions. *See, e.g.*, *United States v. Iturbe-Gonzalez*, 679 F. App'x 531, 533 (9th Cir. 2017), *amended and superseded*, 705 F. App'x 486 (9th Cir. 2017); *United States v. Foster*, 664 F. App'x 644, 646 (9th Cir. 2016); *United States v. Tam Quang Do*, 617 F. App'x 786, 787 n. 1 (9th Cir. 2015); *United States v. Martin*, 796 F.3d 1101, 1106 (9th Cir. 2015).

<sup>20</sup> The other U.S. circuits' approaches are examined *infra* Part III.

<sup>21</sup> 485 U.S. 681, 691 (1988).

<sup>22</sup> *United States v. Samlal*, 415 F. App'x 280, 281 (2d Cir. 2011) ("The *Huddleston* factors were satisfied. . . . Accordingly, we find that the district court did not abuse its discretion in admitting the prior act evidence and thus affirm the judgment of conviction.").

<sup>23</sup> *United States v. Maurizio*, 701 F. App'x 129, 137 (3d Cir. 2017) ("After conducting an analysis of the *Huddleston* factors, the District Court found that the evidence was admissible under Rule 404(b).").

<sup>24</sup> *United States v. Mares*, 441 F.3d 1152, 1159 (10th Cir. 2006) ("In sum, the district court properly found the evidence satisfied all four *Huddleston* factors. The evidence was thus properly admitted under Rule 404(b).").

<sup>25</sup> *Huddleston*, 485 U.S. at 686.

knowledge that the Memorex tapes were stolen.”<sup>26</sup> Huddleston argued that the trial court should have held a pretrial hearing to determine whether the television sets were in fact stolen,<sup>27</sup> and he argued that the government should have to prove that the television sets were stolen by clear and convincing evidence,<sup>28</sup> but he did not argue that evidence of the television sets was offered for the purpose of proving character or action in accordance with character.<sup>29</sup> Rather, Huddleston conceded that the television sets were admitted for the proper purpose of proving his knowledge that the cases of VCR tapes were stolen.<sup>30</sup> Because the Supreme Court was not deciding whether evidence of the television sets was offered for a proper non-character purpose, the Court’s opinion should not be taken as a thorough examination of how a trial court should go about determining whether evidence of crimes, wrongs, or other acts is admissible under Rule 404(b). Nevertheless, almost all of the U.S. Circuit Courts of Appeals have adopted a “Rule 404(b) test” that essentially repeats one summative paragraph of the Supreme Court’s opinion in *Huddleston*:

We share petitioner’s concern that unduly prejudicial evidence might be introduced under Rule 404(b). We think, however, that the protection against such unfair prejudice emanates not from a requirement of a preliminary finding by the trial court, but rather from four other sources: first, from the requirement of Rule 404(b) that the evidence be offered for a proper purpose; second, from the relevancy requirement of Rule 402—as enforced through Rule 104(b); third, from the assessment the trial court must make under Rule 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice, and fourth, from

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<sup>26</sup> *Id.*

<sup>27</sup> This was the issue that the Supreme Court agreed to decide. *Id.* at 685 (“We granted certiorari to resolve a conflict among the Courts of Appeals as to whether the trial court must make a preliminary finding before ‘similar act’ and other Rule 404(b) evidence is submitted to the jury.”) (citation omitted).

<sup>28</sup> *Id.* at 684.

<sup>29</sup> *Id.* at 686.

<sup>30</sup> *Id.*

Federal Rule of Evidence 105, which provides that the trial court shall, upon request, instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted.<sup>31</sup>

In this paragraph, the Supreme Court was not articulating a test for determining when evidence of crimes, wrongs, or other acts is admissible for a non-character or non-propensity purpose. The Court's only acknowledgement of the heart of Rule 404(b)—propensity—is the cursory reference to the requirement that “the evidence be offered for a proper purpose.”<sup>32</sup> The Court did not explain how a trial court should determine whether evidence is being offered for a proper purpose. In using this dicta as a basis for a general test of Rule 404(b) admissibility, federal courts have sidestepped the question that must be asked before turning to the factors that the Court listed. Because the factors the Court listed do not instruct trial courts how to determine whether evidence is offered for a non-character purpose, the tests based on these factors do not clearly or necessarily protect against the admission of evidence for the purpose of proving action in accordance with character.

#### B. *Examples are Not Exceptions*

Rule 404(b)(1) states: “Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.”<sup>33</sup> This straightforward prohibition of propensity evidence has been confused, however, by Rule 404(b)(2), which provides a long list of examples of “permitted uses,” including “proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.”<sup>34</sup> Many federal courts have interpreted this list not as examples of permitted purposes but as specifically enumerated exceptions, with the result that trial courts undertake to determine the admissibility of other-acts evidence by asking whether the evidence “fits” an “exception,” not whether the evidence is offered for the purpose of proving propensity.

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<sup>31</sup> *Id.* at 691–92 (footnote and citations omitted).

<sup>32</sup> *Id.* at 691.

<sup>33</sup> FED. R. EVID. 404(b)(1).

<sup>34</sup> FED. R. EVID. 404(b)(2).

The Ninth Circuit is a particularly egregious transgressor. An examination of cases decided in that circuit in the past three years reveals that the examples of permitted purposes listed in Rule 404(b)(2) are routinely described as “exceptions.” For example, the court has stated that “Rule 404(b)(2) functions as an exception to 404(b)(1)”<sup>35</sup> and that “[w]hen the Government offers evidence of prior or subsequent crimes or bad acts as part of its case-in-chief, it has the burden of first establishing relevance of the evidence to prove a fact within one of the exceptions to the general exclusionary rule of Rule 404(b).”<sup>36</sup>

The Ninth Circuit has also taken to naming various exceptions, such as the “plan exception,”<sup>37</sup> the “identity exception,”<sup>38</sup> and “the inextricably intertwined exception.”<sup>39</sup> In one recent case, the judges spent several minutes of oral argument attempting to determine whether appellant’s counsel had waived by failing to argue on appeal “one of the exceptions” because she had not specifically named it in her brief.<sup>40</sup> The very first question, asked by Judge Nelson, involved “the 404(b) exceptions”: “Trial counsel focused on the plan exception, and appeal counsel focused on a mistaken identity. What are you focusing on?” Appellate counsel responded that it didn’t matter which label was applied to the evidence.<sup>41</sup> Judge Wardlaw disagreed with this response, stating, “Well, they are two different exceptions,” and “No, it’s two different things.”<sup>42</sup> Continuing this attraction to if not fixation on the “exceptions,” the court’s opinion begins with the statement: “In his opening brief, Firemong argues only that Dr. Owens’ testimony was admissible under Federal Rule of Evidence 404(b)(2)’s ‘identity’ exception. Thus, to the extent that

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<sup>35</sup> United States v. McElmurry, 776 F.3d 1061, 1067 (9th Cir. 2015).

<sup>36</sup> United States v. Wolverine, 584 F. App’x 646, 647 (9th Cir. 2014) (quoting United States v. Hernandez–Miranda, 601 F.2d 1104, 1108 (9th Cir. 1979)).

<sup>37</sup> United States v. Firemong, 624 F. App’x 497, 499 (9th Cir. 2015).

<sup>38</sup> *Id.*

<sup>39</sup> United States v. Sangalang, 580 F. App’x 597, 600 (9th Cir. 2014).

<sup>40</sup> *Firemong*, 624 F. App’x at 499. The video of the oral argument in this case is available on the court’s website. *Watch Recording for Case: USA v. Owusu Firemong*, No. 14-50118, U.S. COURTS FOR THE NINTH CIRCUIT, [http://www.ca9.uscourts.gov/media/view\\_video.php?pk\\_vid=0000008048](http://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000008048) (last visited Mar. 12, 2018) [hereinafter *Firemong Oral Argument*].

<sup>41</sup> *Firemong Oral Argument*, *supra* note 40, at 0:33.

<sup>42</sup> *Id.* at 1:37.

Owens' testimony may have been admissible under Rule 404(b)(2)'s 'plan' exception, this argument is waived."<sup>43</sup>

The problem with this approach is that whether the purpose for admitting the evidence is or is not listed in Rule 404(b)(2) is irrelevant; what matters is whether the purpose for offering the evidence is to prove propensity. It is confusing and potentially misleading to focus on whether the evidence is "plan evidence" or "identity evidence" when what matters is whether the evidence is propensity evidence.

In sum, the essential flaw in the Ninth Circuit's approach to Rule 404(b)<sup>44</sup> is that the permitted purposes listed in 404(b)(2) are not a list of exceptions; they are a list of examples. Misinterpreting the examples as exceptions has caused the court to ask whether evidence of crimes wrongs, or other acts "fits" one of the listed "exceptions," not whether it is propensity evidence, with the result that the court's test for admissibility is not the test provided by the rule.

### C. *Evidence Not Covered by a Rule Is Not Admissible as an Exception to the Rule*

The third distorting Rule 404(b) heuristic that the federal courts have created is based on the Advisory Committee's Note to the 1991 amendment, which states: "The amendment does not extend to evidence of acts which are 'intrinsic' to the charged offense."<sup>45</sup> While there is nothing inherently objectionable about this commentary, the problem is that federal courts have used this language to identify several additional "exceptions" to Rule 404(b), including not only an "intrinsic evidence exception" but also a "*res gestae* exception," an "intertwined (or in some cases "inextricably intertwined") exception," a "background exception," and a "completing the story exception."

Most of the circuit courts of appeals have created some "exception" based on the advisory committee's reference to "intrinsic" evidence. The most common is perhaps the "inextricably intertwined exception." For example, the Fifth Circuit recently stated:

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<sup>43</sup> *Firempong*, 624 F. App'x at 499 (citation omitted).

<sup>44</sup> The Ninth Circuit might be the worst transgressor, but it is not the only one; the other U.S. circuits' "exceptions" heuristics are discussed *infra* Part III.

<sup>45</sup> FED. R. EVID. 404(b) advisory committee's note to 1991 amendment (citation omitted).

Here, we conclude that the evidence of Judge Cobos's bribe was intrinsic because it was "inextricably intertwined" with the conspiracy to defraud the United States in that it completed the story of the crime by proving the immediate context of events in time and place, allowing the jury to assess all of the circumstances under which Madrid and Garcia acted.<sup>46</sup>

Similarly, according to the Ninth Circuit: "The uncharged transactions were 'intrinsic' to the charged counts of wire fraud as they were all part of a single scheme; therefore, evidence of the uncharged transactions was also admissible under the 'inextricably intertwined' exception to Rule 404(b)."<sup>47</sup>

Another "exception" related to "intrinsic" evidence is the "*res gestae* exception." As the Sixth Circuit recently stated: "*Res gestae* evidence, also described as 'background' or 'intrinsic' evidence, is 'an exception' to the Rule 404(b) bar on propensity evidence."<sup>48</sup> Some federal courts recognize a related "complete-the-story exception." For example, according to the Fourth Circuit:

The intrinsic act doctrine allows evidence of bad acts to be admitted if the acts arose out of the same series of transactions as the charged offense, or if the evidence is necessary to complete the story of the crime on trial. Other criminal acts are intrinsic when they are inextricably intertwined or both acts are part of a

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<sup>46</sup> United States v. Madrid, 610 F. App'x 359, 385 (5th Cir. 2015) (citation and alterations omitted); accord United States v. Ebert, 178 F.3d 1287, 1999 WL 261590, at \*25 (4th Cir. 1999) (unpublished table decision) (discussing the "inextricably intertwined exception to Rule 404(b)").

<sup>47</sup> United States v. Cuenca, 692 F. App'x 857, 858 (9th Cir. 2017).

<sup>48</sup> United States v. Gibbs, 797 F.3d 416, 423 (6th Cir. 2015) (citation omitted); accord United States v. Hughes, 562 F. App'x 393, 396 (6th Cir. 2014) ("The district court did not abuse its discretion in determining that this other-acts evidence was intrinsic to the charged offenses and therefore came within the background or *res gestae* evidence exception to Rule 404(b)."); United States v. Adams, 722 F.3d 788, 810 (6th Cir. 2013) ("Background or *res gestae* evidence is an exception to Rule 404(b).") (citation omitted).

single criminal episode or the other acts were necessary preliminaries to the crime charged.<sup>49</sup>

The Eleventh Circuit similarly stated:

Evidence of uncharged criminal activities is inadmissible unless the uncharged acts arose from the same transaction, are necessary to complete the story of the crime, or are inextricably intertwined with the evidence regarding the charged offense. Even if the evidence meets one of these exceptions, it may still be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.<sup>50</sup>

These various “exceptions” that federal courts have spun out of the Advisory Committee’s reference to “intrinsic” evidence are problematic for two reasons. First, it is conceptually wrong to say that evidence is admissible pursuant to an exception if the evidence is truly intrinsic evidence—if the rule does not extend to the evidence, then the evidence is not an exception to the rule; the rule simply does not apply to the evidence.

Additionally, not only do these “exceptions” confuse the question whether evidence is admissible for a non-propensity purpose, the “exceptions” also confuse the question whether evidence is subject to the notice requirement of Rule 404(b).<sup>51</sup> If the evidence is truly intrinsic, then it is not other-act evidence and should not be subject to the notice requirement. Federal courts, however, disagree about whether this “*res gestae*” or “inextricably intertwined” or “completes the story” evidence is intrinsic or extrinsic. For example, the Eighth Circuit has called it intrinsic: “Evidence of other wrongful conduct is considered intrinsic when it is offered for the purpose of providing the context in which the charged crime occurred. Such evidence is admitted because the other crime evidence ‘completes

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<sup>49</sup> *United States v. Francis*, 329 F. App’x 421, 427 (4th Cir. 2009) (citations, alterations, and internal quotation marks omitted).

<sup>50</sup> *United States v. Daniel*, 173 F. App’x 766, 769 (11th Cir. 2006) (citations and internal quotation marks omitted).

<sup>51</sup> FED. R. EVID. 404(b)(2) (“On request by a defendant in a criminal case, the prosecutor must: (A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and (B) do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.”).



the story’ or provides a ‘total picture’ of the charged crime.”<sup>52</sup> The Fifth Circuit, however, has said that it is extrinsic: “The Government contends that the evidence regarding Torres’ involvement in the robberies and Guerrero’s connection to him was admissible because it completes the story of the crime. Pursuant to Rule 404(b), our court has approved such extrinsic evidence.”<sup>53</sup>

These “exceptions” have shifted the federal courts’ focus from determining whether evidence is offered for a propensity purpose to determining whether one of the “exceptions” applies. Several courts have acknowledged that “inextricably intertwined,” “*res gestae*,” “background,” and “completes the story” are concepts without clear boundaries. For example, the D.C. Circuit has stated: “The ‘complete the story’ definition of ‘inextricably intertwined’ threatens to override Rule 404(b).”<sup>54</sup> The Third Circuit similarly has observed: “Like its predecessor *res gestae*, the inextricably intertwined test is vague, overbroad, and prone to abuse, and we cannot ignore the danger it poses to the vitality of Rule 404(b).”<sup>55</sup> The Seventh Circuit also recognized the confusion created by the “inextricably intertwined exception”; however, its solution was simply to shift the confusion to another “exception,” stating that “[b]ecause motive is an express exception to the Rule 404(b) bar, there is no need to spread the fog of inextricably intertwined over it.”<sup>56</sup> Courts should abandon the “fog” inherent in all of the “exceptions” and return to the test set forth in Rule 404(b) itself.

#### D. *Current Approaches to Rule 404(b) in the Circuit Courts of Appeals*

The following subsections summarize each circuit court of appeals’ (mis)use of three Rule 404(b) heuristics: the *n*-factor *Huddle-*

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<sup>52</sup> United States v. Johnson, 463 F.3d 803, 808 (8th Cir. 2006) (citation and internal quotation marks omitted).

<sup>53</sup> United States v. Guerrero, 169 F.3d 933, 943 (5th Cir. 1999) (citations omitted).

<sup>54</sup> United States v. Bowie, 232 F.3d 923, 928 (D.C. Cir. 2000).

<sup>55</sup> United States v. Green, 617 F.3d 233, 248 (3d Cir. 2010).

<sup>56</sup> United States v. Schmitt, 770 F.3d 524, 533 (7th Cir. 2014) (citations, alterations, and internal quotation marks omitted).

ston heuristic; the “enumerated exceptions” heuristic; and the “intrinsic acts exceptions” heuristic. The analysis focuses on cases decided within the past three years.

## 1. THE FIRST CIRCUIT

### a. The n-Factor *Huddleston* Heuristic

The First Circuit presently has one of the more abbreviated Rule 404(b) tests, consisting only of two factors, one of which is not even about Rule 404(b) but instead is about Rule 403. According to the court: “We utilize a two-part test in evaluating admissibility under Rule 404(b). First, we ask whether the evidence has ‘special relevance’; then, we apply Rule 403 and consider whether its probative value is substantially outweighed by the danger of unfair prejudice.”<sup>57</sup>

The first part of this test is based on *Huddleston*. As the court recently stated:

The Supreme Court has explained that, in evaluating the admissibility of Rule 404(b) evidence, a court initially must decide whether the evidence submitted is probative of a material issue other than character. *Huddleston v. United States*, 485 U.S. 681, 686 (1988). To implement this directive, we have required that Rule 404(b) evidence be shown to have special relevance to an issue in the case such as intent or knowledge.<sup>58</sup>

### b. The “Enumerated Exceptions” Heuristic

It might be thought that asking whether evidence has “special relevance” would entail a determination whether evidence is offered for a non-character purpose. Although this might have been the goal, in practice it amounts to asking whether the proponent of the evidence has said that the evidence is being offered for one of the examples of permitted purposes included in Rule 404(b)(2). For example, the First Circuit recently stated: “Rule 404(b)(2) specifically

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<sup>57</sup> *United States v. Ford*, 839 F.3d 94, 109 (1st Cir. 2016) (citation omitted).

<sup>58</sup> *United States v. Raymond*, 697 F.3d 32, 38 (1st Cir. 2012) (citation and internal quotation marks omitted).

permits the admission of a prior conviction to prove intent, and we have repeatedly upheld the admission of prior drug dealing by a defendant to prove a present intent to distribute.”<sup>59</sup> More generally, the court views Rule 404(b)(2)’s list of permitted purposes to be an “exception” to 404(b)(1):

Rule 404(b)(1) states 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.” However, Rule 404(b)(2) provides for an exception, stating that such “evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.”<sup>60</sup>

Adding insult to injury, the First Circuit has stated that these “exceptions” are applied “broadly.” For example, the court recently explained that “when the other-acts evidence is introduced to show knowledge, motive, or intent, the Rule 404(b) exceptions to the prohibition against character evidence have been construed broadly.”<sup>61</sup>

c. The “Intrinsic Evidence Exceptions” Heuristic

Although it relies heavily on the “enumerated exceptions” heuristic, the First Circuit has largely avoided the “intrinsic acts exception” heuristic. In numerous recent cases, the court has properly defined “intrinsic evidence” as evidence of the charged offense, as opposed to evidence of “other acts,” and has avoided referring to this “same act” evidence as an “exception” to Rule 404(b). For example, it recently stated:

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<sup>59</sup> *United States v. Henry*, 848 F.3d 1, 8 (1st Cir. 2017) (citations omitted); *accord id.* at 9 (stating that “the district court did not abuse its discretion in ruling that the prior-conviction evidence qualified under the intent exception to Rule 404(b)”).

<sup>60</sup> *United States v. Monteiro*, 871 F.3d 99, 110 n.7 (1st Cir. 2017), *petition for cert. filed*, No. 17-8041 (U.S. Mar. 7, 2018).

<sup>61</sup> *United States v. Rodríguez-Soler*, 773 F.3d 289, 298 (1st Cir. 2014) (internal quotation marks omitted) (quoting *United States v. Flores Perez*, 849 F.2d 1, 4 (1st Cir. 1988)).

Rule 404(b)'s prohibition of evidence of prior bad acts applies to evidence that is extrinsic to the crime charged, and is introduced for the purpose of showing villainous propensity. But when the evidence presented is intrinsic to the crime charged in the indictment Rule 404(b) is really not implicated at all.<sup>62</sup>

## 2. THE SECOND CIRCUIT

### a. The n-Factor *Huddleston* Heuristic

The Second Circuit currently follows a *Huddleston*-inspired four-factor test that is nearly identical to the Ninth Circuit's test:<sup>63</sup>

This Court applies the inquiry in *Huddleston v. United States* in order to determine whether a district court properly admitted other act evidence. Under that inquiry, the reviewing court considers whether (1) it was offered for a proper purpose; (2) it was relevant to a material issue in dispute; (3) its probative value is substantially outweighed by its prejudicial effect; and (4) the trial court gave an appropriate limiting instruction to the jury if so requested by the defendant.<sup>64</sup>

As with most circuits' tests, this test provides no guidance concerning the key Rule 404(b) question—how to determine whether the evidence is offered for a proper purpose. Under this test, the trial court must determine that the evidence is “offered for a proper purpose,” but the test does not further state that a proper purpose exists only when the relevance of the evidence does not depend upon a propensity inference.

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<sup>62</sup> *Monteiro*, 871 F.3d at 110 (citations, alterations, and internal quotation marks omitted); *accord* *United States v. DeSimone*, 699 F.3d 113, 124 (1st Cir. 2012) (“Evidence intrinsic to the crime for which the defendant is charged and is on trial is not governed by Rule 404(b).”) (citation omitted).

<sup>63</sup> *See supra* Section II.A.

<sup>64</sup> *United States v. Alcantara*, 674 F. App'x 27, 30 (2d Cir. 2016) (citations and internal quotation marks omitted); *accord* *United States v. Barret*, 677 F. App'x 21, 23–24 (2d Cir. 2017).

b. The “Enumerated Exceptions” Heuristic

Generally, the Second Circuit properly states that all evidence that is not propensity evidence is admissible under Rule 404(b). For example, the court recently stated that “prior act evidence is admissible if offered for any purpose other than to show a defendant’s criminal propensity.”<sup>65</sup> On occasion, however, the Second Circuit has referred to one of the listed examples of permitted purposes as a particular kind of exception. For example, the court has referred to “the proof of motive exception”<sup>66</sup> and “the opportunity exception.”<sup>67</sup>

c. The “Intrinsic Evidence Exceptions” Heuristic

The Second Circuit often states that evidence intrinsic to the charged offense is not “other act” evidence and therefore is not governed by Rule 404(b). The court has repeated in numerous cases:

Evidence of uncharged criminal activity is not considered other crimes evidence if it arose out of the same transaction or series of transactions as the charged offense, if it is inextricably intertwined with the evidence regarding the charged offense, or if it is necessary to complete the story of the crime on trial.<sup>68</sup>

While this definition of “other crimes” evidence avoids the improper “exceptions” conception of some other circuits’ approaches, the Second Circuit’s test does—like the circuits that use the “exceptions” approach—broaden the scope of intrinsic evidence to include not just evidence of the charged act but also evidence that is “inextricably intertwined” with or needed to “complete the story” of that act. For example, the court recently stated:

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<sup>65</sup> *United States v. Dupree*, 870 F.3d 62, 76 (2d Cir. 2017) (citation and internal quotation marks omitted), *petition for cert. filed sub nom. Gill v. United States*, No. 17-7828 (U.S. Feb. 20, 2018).

<sup>66</sup> *Sims v. Blot*, 354 F. App’x 504, 507 (2d Cir. 2009).

<sup>67</sup> *United States v. Slaughter*, 248 F. App’x 210, 212 (2d Cir. 2007).

<sup>68</sup> *United States v. Lyle*, 856 F.3d 191, 206 (2d Cir. 2017) (citations, alterations, and internal quotation marks omitted), *petition for cert. filed*, No. 17-5992 (U.S. Sept. 14, 2017); *accord United States v. Fama*, 636 F. App’x 45, 47–48 (2d Cir. 2016); *United States v. Morillo-Vidal*, 547 F. App’x 29, 31 (2d Cir. 2013); *United States v. Alvarez*, 541 F. App’x 80, 85 (2d Cir. 2013).

We have explained that evidence of uncharged criminal conduct, if it is “inextricably intertwined with the evidence regarding the charged offense,” is not evidence of “other crimes, wrongs, or acts” under Rule 404(b). Rather, if it “completes the story of the crime on trial,” then the evidence of the uncharged act is properly treated as part of the very act charged, or, at least, as proof of that act.<sup>69</sup>

### 3. THE THIRD CIRCUIT

#### a. The n-Factor *Huddleston* Heuristic

Many Third Circuit opinions recite that the court applies a *Huddleston* four-factor test. One recent example states:

Admissibility under Rule 404(b) requires the satisfaction of four distinct steps: (1) the other-acts evidence must be proffered for a non-propensity purpose; (2) that evidence must be relevant to the identified non-propensity purpose; (3) its probative value must not be substantially outweighed by its potential for causing unfair prejudice to the defendant; and (4) if requested, the other-acts evidence must be accompanied by a limiting instruction. *See Huddleston v. United States*, 485 U.S. 681, 691 (1988).<sup>70</sup>

However, several other recent decisions have focused specifically on whether evidence is relevant for a non-character purpose and whether that relevance exists independent of any propensity reasoning. One case that acknowledges the inadequacy of the four-factor test and advocates a closer examination of whether other-acts evidence is offered for a propensity purpose is *United States v. Caldwell*.<sup>71</sup> In this case, the Third Circuit stated:

In proffering prior act evidence, the government must explain how the evidence fits into a chain of

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<sup>69</sup> *Fama*, 636 F. App'x at 47–48 (citations, alterations, and internal quotation marks omitted).

<sup>70</sup> *United States v. Repak*, 852 F.3d 230, 241 (3d Cir. 2017).

<sup>71</sup> 760 F.3d 267 (3d Cir. 2014).

inferences—a chain that connects the evidence to a proper purpose, no link of which is a forbidden propensity inference. We require that this chain be articulated with careful precision because, even when a non-propensity purpose is “at issue” in a case, the evidence offered may be completely irrelevant to that purpose, or relevant only in an impermissible way.

The Government argues that Caldwell’s prior convictions are relevant to show his knowledge, yet it has failed to satisfactorily explain why this is so. There is in the record no articulation by the Government of a logical chain of inferences showing *how* Caldwell’s prior convictions are relevant to show his knowledge. Nor does the Government present such a chain of logical inferences in its argument on appeal. Instead, the Government repeatedly returns to its baseline position that the evidence is generally relevant to show Caldwell’s knowledge that he possessed the gun. This tells us nothing about how the evidence accomplishes this task, and is insufficient to secure admission under Rule 404(b).<sup>72</sup>

The court concluded:

In sum, we conclude that the admission under Rule 404(b) of Caldwell’s prior convictions for unlawful firearm possession was erroneous and that the error was not harmless. While it may be that this opinion breaks no new ground, we believe it necessary to reiterate the importance of a methodical approach by the proponent of prior act evidence and a carefully reasoned ruling by the trial judge who must decide the question of admissibility.<sup>73</sup>

The Third Circuit has reaffirmed this more rule-based approach in additional recent cases. For example:

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<sup>72</sup> *Id.* at 281 (citations and internal quotation marks omitted).

<sup>73</sup> *Id.* at 290.

We have recently reiterated the importance of concretely connecting the proffered evidence to a non-propensity purpose. . . . [T]he Government failed to articulate a chain of inferences supporting the admission of Repak's uncharged solicitations. Instead, the Government stated only that a logical chain connecting the evidence to a non-propensity purpose exists. That statement is not enough to demonstrate the admissibility of Rule 404(b) evidence. The District Court should have asked the Government to explain how the proffered evidence should work in the mind of a juror to establish Repak's knowledge and intent related to the roof and excavation services.<sup>74</sup>

Aside from the Seventh Circuit's 2014 en banc decision in *United States v. Gomez*, which explicitly acknowledged the inadequacies of the *n*-factor *Huddleston* test and adopted a more rule-based test,<sup>75</sup> the Third Circuit's opinion in *Caldwell* is perhaps the clearest statement of how trial judges should decide whether to admit other-acts evidence under Rule 404(b).

b. The "Enumerated Exceptions" Heuristic

Despite the *Caldwell* Court's recognition that Rule 404(b) requires a propensity-free chain of reasoning, the court also explicitly embraced the idea that the examples of permitted uses function like exceptions, stating: "The 'permitted uses' of prior act evidence set forth in Rule 404(b)(2) are treated like exceptions to this rule of exclusion."<sup>76</sup> Similarly, the court has stated: "'Knowledge' and 'intent' are also both exceptions under Federal Rule of Evidence 404(b) permitting the use of the defendant's prior 'Crimes, Wrongs, or Other Acts.'"<sup>77</sup>

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<sup>74</sup> *Repak*, 852 F.3d at 243–44 (citations and internal quotation marks omitted).

<sup>75</sup> The *Gomez* case is discussed *infra* Part III.

<sup>76</sup> *Caldwell*, 760 F.3d at 276.

<sup>77</sup> *United States v. Sussman*, 709 F.3d 155, 174–75 n. 21 (3d Cir. 2013); *accord* *United States v. Ushery*, 400 F. App'x 674, 677 (3d Cir. 2010) ("[W]e do not begin to balance the evidence's probative value under Rule 401 against Rule 403 considerations unless the evidence is offered under one of the Rule 404(b) exceptions.") (citation omitted).



Despite these statements, the Third Circuit does not use the “enumerated exceptions heuristic” as a means to determine the admissibility of evidence nearly so much as some other circuits. Additionally, the court is not generally using the “enumerated exceptions” as a fast-track to admitting evidence. For example, after the *Caldwell* Court observed that the enumerated examples of permitted purposes “are treated like exceptions,” the court then stated:

Our opinions have repeatedly and consistently emphasized that the burden of identifying a proper purpose rests with the proponent of the evidence, usually the government. This hurdle is not insurmountable, but it must be satisfied before the exception can be invoked . . . . Once the proponent identifies a non-propensity purpose that is “at issue” in the case, the proponent must next explain how the evidence is relevant to that purpose. This step is crucial. The task is not merely to find a pigeonhole in which the proof might fit, but to actually demonstrate that the evidence proves something other than propensity.<sup>78</sup>

Given this proper statement regarding the need to exercise care in applying the “exceptions,” it is not clear why the court does not take the next logical step and reject the “exceptions” heuristic altogether.

c. The “Intrinsic Evidence Exceptions” Heuristic

The Third Circuit has specifically rejected the “intrinsically intertwined” heuristic. In the 2010 case *United States v. Green*, the court undertook an extensive analysis of the “inextricably intertwined” test.<sup>79</sup> The court observed:

There are at least three problems with the “inextricably intertwined” test and its subsidiary formulations. The first is that the test creates confusion because, quite simply, no one knows what it means. Such an impediment stands as an obstacle to helpful analysis.

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<sup>78</sup> *Caldwell*, 760 F.3d at 276 (citations, alterations, and internal quotation marks omitted).

<sup>79</sup> 617 F.3d 233, 246–48 (3d Cir. 2010).

Indeed, we have criticized the “inextricably intertwined” standard as “a definition that elucidates little.” . . .

The second problem with the inextricably intertwined test is that resort to it is unnecessary. . . . [T]he same evidence would also be admissible *within the framework* of that rule because allowing the jury to understand the circumstances surrounding the charged crime—completing the story—is a proper, non-propensity purpose under Rule 404(b). All that is accomplished by labeling evidence “intrinsic” is relieving the Government from providing a defendant with the procedural protections of Rule 404(b).

The third problem with the inextricably intertwined test is that some of its broader formulations, taken at face value, classify evidence of virtually any bad act as intrinsic.<sup>80</sup>

Finally, the court concluded that “the inextricably intertwined test is vague, overbroad, and prone to abuse, and we cannot ignore the danger it poses to the vitality of Rule 404(b).”<sup>81</sup>

#### 4. THE FOURTH CIRCUIT

##### a. The n-Factor *Huddleston* Heuristic

The Fourth Circuit’s three-part, *Huddleston*-based test provides: “Under Rule 404(b), evidence of other bad acts is admissible only if it is ‘probative of a material issue other than character.’ *Huddleston v. United States*, 485 U.S. 681, 686 (1988).” Such evidence is properly admitted when it is (1) relevant to an issue other than character, (2) necessary, and (3) reliable.”<sup>82</sup> As previously discussed, the problem with this test is that factor one is the only factor that remotely relates to Rule 404(b)’s prohibition of propensity evidence, but requiring that evidence be “relevant to an issue other than character” in no way guarantees that the relevance to the non-character

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<sup>80</sup> *Id.* (citations and footnotes omitted).

<sup>81</sup> *Id.* at 248.

<sup>82</sup> *United States v. Oaks*, 185 F. App’x 298, 300 (4th Cir. 2006).

issue does not rely on character inferences. For example, evidence of a prior drug conviction may be relevant to proving the issue of intent by relying on the inference that the defendant is the kind of person who intends to commit drug offenses.

b. The “Enumerated Exceptions” Heuristic

The Fourth Circuit occasionally relies on the examples of permitted purposes listed in Rule 404(b)(2) to determine whether evidence is offered for a purpose other than to prove character. For example, the court has stated: “Teran’s prior firearms conviction is admissible under the ‘intent’ exception to bad character evidence. Because Teran pled not-guilty to possession of a firearm, any past firearm conviction was relevant as to his intent.”<sup>83</sup> More generally, the court has expressly embraced the “enumerated exceptions” heuristic, stating:

Although prior “bad act” evidence is inadmissible under Rule 404(b) to demonstrate a defendant’s bad character, such evidence is not always barred from the trial altogether. The Rule itself provides a number of exceptions allowing for the admission of prior “bad act” evidence, including evidence of “proof of motive, opportunity, intent, preparation, plan, knowledge, identity, [and] absence of mistake or accident.”<sup>84</sup>

c. The “Intrinsic Evidence Exceptions” Heuristic

The Fourth Circuit has adopted a variety of versions of the “inextricably intertwined” approach to “intrinsic” evidence. Like other circuits, the Fourth Circuit has defined “inextricably intertwined” to include evidence that “completes the story.”<sup>85</sup> The court also has

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<sup>83</sup> *United States v. Teran*, 496 F. App’x 287, 293 n.\* (4th Cir. 2012) (citation omitted); *accord* *United States v. Cooper*, 482 F.3d 659, 663 (4th Cir. 2007) (“Rule 404(b) explicitly allows evidence that furnishes proof of the defendant’s knowledge and the absence of mistake or accident.”) (internal quotation marks omitted).

<sup>84</sup> *United States v. McBride*, 676 F.3d 385, 395 (4th Cir. 2012) (citation omitted) (alteration in original).

<sup>85</sup> *See, e.g., United States v. Logan*, 593 F. App’x 179, 183 (4th Cir. 2014) (“Evidence of uncharged conduct is not other crimes evidence subject to Rule

used a “context” definition; for example, the court has stated: “Evidence is intrinsic if it is necessary to provide context relevant to the criminal charges.”<sup>86</sup> Additionally, the court has created a “necessary preliminaries” definition; for example, in several recent cases the Fourth Circuit has stated: “Other bad acts are intrinsic—as opposed to extrinsic—when those acts are inextricably intertwined or both acts are part of a single criminal episode or the other acts were necessary preliminaries to the crime charged.”<sup>87</sup> It is not clear whether (or how) “completes the story,” “context,” and “necessary preliminaries” differ from each other, or whether any of these definitions differ from the typical “background” definition used by other circuits.

## 5. THE FIFTH CIRCUIT

### a. The n-Factor *Huddleston* Heuristic

Like the First Circuit, the Fifth Circuit applies a two-factor test that combines *Huddleston*’s reference to relevance to a non-character issue with Rule 403:

Evidence of an uncharged crime or other act must be sufficient to support a finding that the crime or act actually occurred. If evidence of the crime or act is sufficient, its admissibility under Rule 404(b) hinges on whether (1) it is relevant to an issue other than the defendant’s character, and (2) it possesses probative value that is not substantially outweighed by its undue prejudice under Federal Rule of Evidence 403.<sup>88</sup>

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404 . . . if evidence of the uncharged conduct is necessary to complete the story of the crime on trial.”) (citation and internal quotation marks omitted).

<sup>86</sup> *United States v. Basham*, 561 F.3d 308, 326 (4th Cir. 2009) (citation and internal quotation marks omitted).

<sup>87</sup> *United States v. Sterling*, 701 F. App’x 196, 206 (4th Cir. 2017) (citation and internal quotation marks omitted); *accord Logan*, 593 F. App’x at 183; *United States v. Marfo*, 572 F. App’x 215, 223, 226 (4th Cir. 2014).

<sup>88</sup> *United States v. Thomas*, 847 F.3d 193, 207 (5th Cir. 2017) (citation and internal quotation marks omitted).

b. The “Enumerated Exceptions” Heuristic

The Fifth Circuit on occasion relies on Rule 404(b)(2)’s list of examples (“exceptions”) in determining whether evidence is relevant for a non-character purpose. For example, the court has stated that “intent is a permitted use of extrinsic evidence under 404(b)(2)”<sup>89</sup> and “Rule 404(b)(2) includes an exception to the propensity evidence ban to demonstrate knowledge or lack of mistake.”<sup>90</sup>

Despite such examples of the court’s use of the “enumerated exceptions” heuristic, the Fifth Circuit has recognized that this heuristic is an incorrect application of the rule:

Generally, Rule 404(b)(1) excludes evidence of a person’s past misdeeds if the sole value of such evidence is to prove the existence of a trait of character, and, from that trait, an inference of particular conduct. The rule then provides what is mistakenly described as an exception to this general bar on propensity evidence: Evidence of a crime, wrong, or other act may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. Fed. R. Evid. 404(b)(2).<sup>91</sup>

c. The “Intrinsic Evidence Exceptions” Heuristic

The Fifth Circuit uses an assortment of “inextricably intertwined” definitions that is similar to the Fourth Circuit’s. For example, the court has used the “context,” “necessary preliminaries,” and “completes the story” definitions of “intrinsic”:

Evidence is “intrinsic” when the evidence of the other act and the evidence of the crime charged are “inextricably intertwined,” if both acts are part of a

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<sup>89</sup> United States v. Rojas, 812 F.3d 382, 405 (5th Cir. 2016); *accord* United States v. Smith, 804 F.3d 724, 736 (5th Cir. 2015) (stating that “an uncharged offense is relevant to intent, a proper non-character issue under Rule 404(b)”) (citation omitted).

<sup>90</sup> Brewer v. Hayne, 860 F.3d 819, 825 n.25 (5th Cir. 2017).

<sup>91</sup> United States v. Gutierrez-Mendez, 752 F.3d 418, 423 (5th Cir. 2014) (footnotes and citation omitted).

“single criminal episode,” or if the other acts were “necessary preliminaries” to the crime charged. Intrinsic evidence is admissible to complete the story of the crime by proving the immediate context of events in time and place, and to evaluate all of the circumstances under which the defendant acted, and thus does not implicate Fed. R. Evid. 404(b).<sup>92</sup>

## 6. THE SIXTH CIRCUIT

### a. The n-Factor Huddleston Heuristic

The Sixth Circuit generally follows a three-part test:

Trial courts employ a three-part test to determine the admissibility of 404(b)(2) evidence. First, a court determines whether there is sufficient evidence that the crime, wrong, or other act took place. Second, it decides whether evidence of that conduct is offered for a proper purpose, *i.e.*, whether the evidence is probative of a material issue other than character. Third, the court considers whether any risk of unfair prejudice substantially outweighs the evidence’s probative value.<sup>93</sup>

### b. The “Enumerated Exceptions” Heuristic

Like most circuits, the Sixth Circuit has relied on Rule 404(b)(2) to determine whether evidence was offered for a proper purpose. For example, the court has stated: “The government offered Richardson’s prior distribution conviction for the purpose of proving his intent to distribute crack in this case, and Rule 404(b) expressly permits prior bad act evidence to be used to prove intent.”<sup>94</sup> More generally, the court has stated that Rule 404(b)(2) creates “exceptions” to Rule 404(b)(1): “Rule 404(b)(2) provides exceptions to Rule

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<sup>92</sup> *United States v. Madrid*, 610 F. App’x 359, 385 (5th Cir. 2015) (citations, alterations, and internal quotation marks omitted).

<sup>93</sup> *United States v. Barnes*, 822 F.3d 914, 920 (6th Cir. 2016) (citations and internal quotation marks omitted).

<sup>94</sup> *United States v. Richardson*, 597 F. App’x 328, 333 (6th Cir. 2015) (citation omitted).

404(b)(1); these exceptions permit the Government to offer evidence of ‘a crime, wrong, or other act’ in limited circumstances—to prove ‘motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.’”<sup>95</sup>

In some cases, however, the Sixth Circuit has not only asked whether the evidence was offered for a purpose listed in Rule 404(b)(2) but has also asked whether the evidence’s relevance for that purpose relies on a propensity inference. For example, in the same case in which it summarily said that intent is expressly listed as a proper purpose in Rule 404(b)(2), the court also stated:

Where the district court erred was in finding that Richardson’s prior distribution was probative of his intent to distribute in this case. Generally, 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. In the context of drug distribution cases, this Court has stated time and again that prior distribution evidence can be admissible to show intent to distribute. Such evidence is admissible where the past and present crime are related by being part of the same scheme of drug distribution or by having the same *modus operandi*. Such a relationship is required because the only way to reach the conclusion that the person currently has the intent to possess and distribute based solely on evidence of *unrelated* prior convictions for drug distribution is by employing the very kind of reasoning—i.e., once a drug dealer, always a drug dealer—which 404(b) excludes.<sup>96</sup>

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<sup>95</sup> United States v. Mtola, 598 F. App’x 416, 420 (6th Cir. 2015) (internal quotation marks omitted); *accord Brewer*, 860 F.3d at 825 n.25 (stating “Rule 404(b)(2) includes an exception to the propensity evidence ban to demonstrate knowledge or lack of mistake”); United States v. Armstrong, 436 F. App’x 501, 503 (6th Cir. 2011) (“There are, however, certain identified exceptions, including proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”) (citation and internal quotation marks omitted).

<sup>96</sup> *Richardson*, 597 F. App’x at 333–34 (citations, alterations, and internal quotation marks omitted).

Although it is likely that the court's acceptance of a proper purpose when the prior drug charges are related to the present charges still allows evidence of prior acts to be admitted even though based on a propensity inference, the court's attention to the possibility that evidence offered for a specifically listed Rule 404(b)(2) purpose might nevertheless be inadmissible because it relies on "once a drug dealer, always a drug dealer" reasoning is a step in the right direction.

c. The "Intrinsic Evidence Exceptions" Heuristic

The Sixth Circuit is one of the more egregious employers of the "intrinsic evidence exception" heuristic. The court often refers to "the intrinsic evidence exception to 404(b)"<sup>97</sup> or to specific subtypes of the "intrinsic evidence exception," such as the "background evidence exception"<sup>98</sup> and the "*res gestae* evidence exception."<sup>99</sup> Even more troubling, however, is the court's statement that "intrinsic" evidence is an "exception" not to the admission of other-acts evidence but to the admission of propensity evidence. For example, the court recently stated: "*Res gestae* evidence, also described as 'background' or 'intrinsic' evidence, is 'an exception' to the Rule 404(b) bar on propensity evidence."<sup>100</sup>

7. THE SEVENTH CIRCUIT

a. The n-Factor Huddleston Heuristic

The Seventh Circuit's current approach, which explicitly rejects the *n*-factor *Huddleston* approach in favor of a more rule-based approach, is examined in Part III.

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<sup>97</sup> See, e.g., *United States v. English*, 785 F.3d 1052, 1059 (6th Cir. 2015) (citation omitted).

<sup>98</sup> *United States v. Heflin*, 600 F. App'x 407, 411 (6th Cir. 2015) ("the background evidence exception").

<sup>99</sup> *United States v. Hughes*, 562 F. App'x 393, 396 (6th Cir. 2014) ("The district court did not abuse its discretion in determining that this other-acts evidence was intrinsic to the charged offenses and therefore came within the background or *res gestae* evidence exception to Rule 404(b).").

<sup>100</sup> *United States v. Gibbs*, 797 F.3d 416, 423 (6th Cir. 2015) (citation omitted).



b. The “Enumerated Exceptions” Heuristic

The Seventh Circuit has a kind of Jekyll and Hyde approach to the list of permitted purposes. On one hand, the court often refers to the list as a set of enumerated exceptions.<sup>101</sup> On the other hand, the court also recognizes the danger of regarding the list as having special significance. For example, in one paragraph of a recent opinion, the Seventh Circuit referred to the “list” of permitted purposes as “an exception to the general rule of exclusion,” but then in the next paragraph cautioned that judges must be careful not to allow propensity evidence to be admitted under the guise of one of the listed purposes:

Federal Rule of Evidence 404 addresses the subject of character evidence. Subpart (a) of the rule generally prohibits the admission of character evidence “to prove that on a particular occasion the person acted in accordance with the character or trait”—in other words, to show propensity. But subpart (b)(2) operates as an exception to the general rule of exclusion; it offers the following list of permitted uses of the character evidence:

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.

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<sup>101</sup> See *United States v. Lee*, 724 F.3d 968, 978 (7th Cir. 2013) (“The district judge must both identify the exception that applies to the evidence in question and evaluate whether the evidence, although relevant and within the exception, is sufficiently probative to make tolerable the risk that jurors will act on the basis of emotion or an inference via the blackening of the defendant’s character.”) (citation omitted); *United States v. Gulley*, 722 F.3d 901, 907 n.2 (7th Cir. 2013) (“[I]t is unnecessary for us to explain why the evidence at issue may have been admissible under other Rule 404(b) exceptions, like identity or opportunity.”); *United States v. Richards*, 719 F.3d 746, 759 (7th Cir. 2013) (stating that “identification of an at-issue, non-propensity Rule 404(b) exception is a necessary condition for admitting the evidence”) (alterations and citation omitted); *United States v. Curescu*, 674 F.3d 735, 742 (7th Cir. 2012) (“The use of evidence of prior crimes to show ‘absence of mistake’ is an express exception to the prohibition of prior-crimes evidence.”) (quoting FED. R. EVID. 404(b)(2)).

FED. R. EVID. 404(b)(2).

We have expressed concern over the risk that practically anything can be shoehorned into this list of permitted uses if the district court is not careful. A rule of *de facto* automatic admission would wipe out the general rule prohibiting propensity evidence.<sup>102</sup>

The *Gomez* case has made the Seventh Circuit more focused on the proper application of Rule 404(b), but the court still adheres to the “enumerated exceptions” heuristic at least in form if not substance. For example, the court recently stated: “We have also been mindful that loose policing of Rule 404(b)’s exceptions historically appears in drug cases. *Gomez*, 763 F.3d at 853. The district court acted reasonably by accepting the Government’s reasoning centered around motive.”<sup>103</sup> And even in *Gomez*, the court stated: “[T]he district court must consider *specifically* how the prior conviction tends to serve the non-propensity exception.”<sup>104</sup>

Of course, the recognition that simply invoking one of the “exceptions” is insufficient is a highly desirable development. However, it would have been even better—and no more difficult—for the court to state that that the district court must consider specifically how the prior conviction tends to serve the non-propensity purpose. At one point, the *Gomez* court does take care to explain that the examples of permitted purposes are not true exceptions: “A common misconception about Rule 404(b) is that it establishes a rule of exclusion subject to certain exceptions. That’s not quite right.”<sup>105</sup> However, the value of this statement is undercut by its appearance in a footnote. The court further minimizes the importance of the statement by using the dismissive qualifier “technically”: “So it’s technically incorrect to characterize the purposes listed in subsection

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<sup>102</sup> *United States v. McMillan*, 744 F.3d 1033, 1037–38 (7th Cir. 2014) (citations omitted).

<sup>103</sup> *United States v. Ferrell*, 816 F.3d 433, 447 (7th Cir. 2015) (citing *United States v. Gomez*, 763 F.3d 845, 853 (7th Cir. 2014) (en banc)); *accord* *United States v. Schmitt*, 770 F.3d 524, 533 (7th Cir. 2014) (stating that “motive is an express exception to the Rule 404(b) bar”) (alteration and internal quotation marks omitted).

<sup>104</sup> *Gomez*, 763 F.3d at 856 (citation and alterations omitted).

<sup>105</sup> *Id.* at 855 n.3.

(2) as ‘exceptions’ to the rule of subsection (1).”<sup>106</sup> But it’s not merely technically incorrect, it’s conceptually incorrect, to say that the examples of permitted purposes are exceptions.

c. The “Intrinsic Evidence Exceptions” Heuristic

In the 2010 case *United States v. Gorman*, the Seventh Circuit explicitly rejected the “inextricably intertwined” approach to determining whether evidence is admissible under Rule 404(b):

The inextricable intertwinement doctrine is based on the notion that evidence inextricably intertwined with charged conduct is, by its very terms, not *other* bad acts and therefore, does not implicate Rule 404(b) at all. . . .

We have recently cast doubt on the continuing viability of the inextricable intertwinement doctrine . . . . We again reiterate our doubts about the usefulness of the inextricable intertwinement doctrine, and again emphasize that direct evidence need not be admitted under this doctrine. If evidence is not direct evidence of the crime itself, it is usually propensity evidence simply disguised as inextricable intertwinement evidence, and is therefore improper, at least if not admitted under the constraints of Rule 404(b). . . .

There is now so much overlap between the theories of admissibility that the inextricable intertwinement doctrine often serves as the basis for admission even when it is unnecessary. Thus, although this fine distinction has traditionally existed, the inextricable intertwinement doctrine has since become overused, vague, and quite unhelpful. To ensure that there are no more doubts about the court’s position on this issue—the inextricable intertwinement doctrine has

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<sup>106</sup> *Id.*

outlived its usefulness. Henceforth, resort to inextricable intertwinement is unavailable when determining a theory of admissibility.<sup>107</sup>

Despite this impressive assessment of the problems with the concept of “inextricably intertwined,” the Seventh Circuit still relies on some related “exceptions” heuristics. For example, the court recently stated:

The district court’s conclusion that the drug evidence was “inextricably intertwined” with the charged act and “filled the story” runs counter to our recent precedent and is not dispositive on the issue of relevance or the ultimate admissibility of the drug evidence. In the wake of several cases in which we expressed our criticism of such tongue-twisting formulas, we definitively concluded that “resort to inextricable intertwinement is unavailable when determining a theory of admissibility.” *United States v. Gorman*, 613 F.3d 711, 719 (7th Cir. 2010). Instead, we focus our analysis on the government’s argument, and the district court’s additional reasoning, that the evidence was relevant to establish Schmitt’s motive for possessing a gun. Because motive is an express exception to the Rule 404(b) bar, there is no need to spread the fog of “inextricably intertwined” over it.<sup>108</sup>

Rejecting the “inextricably intertwined exception” was a step in the right direction; rejecting related heuristics, such as the “motive exception” or the “absence of mistake exception,”<sup>109</sup> would be another step in the right direction.

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<sup>107</sup> 613 F.3d 711, 717–19 (7th Cir. 2010) (citations and footnote omitted).

<sup>108</sup> *Schmitt*, 770 F.3d at 533 (citations, alterations, and internal quotation marks omitted).

<sup>109</sup> *United States v. Curescu*, 674 F.3d 735, 742 (7th Cir. 2012) (“The use of evidence of prior crimes to show ‘absence of mistake’ is an express exception to the prohibition of prior-crimes evidence.”) (quoting FED. R. EVID. 404(b)(2)).

## 8. THE EIGHTH CIRCUIT

### a. The n-Factor *Huddleston* Heuristic

The Eighth Circuit applies a four-factor test to determine admissibility under Rule 404(b): “Rule 404(b) evidence is admissible if it is (1) relevant to a material issue; (2) similar in kind and not overly remote in time to the crime charged; (3) supported by sufficient evidence; and (4) higher in probative value than prejudicial effect.”<sup>110</sup> Like other circuits’ *n*-factor *Huddleston* tests, the Eighth Circuit’s approach tests for several non-404(b) issues—relevance (a Rule 402 issue) and probative value weighed against unfair prejudice (a Rule 403 issue)—but does not test for propensity reasoning.

### b. The “Enumerated Exceptions” Heuristic

Like most other circuits, the Eighth Circuit relies on 404(b)(2)’s listed “exceptions” to determine whether evidence is admissible. For example, the court has reasoned:

We have held on many occasions that prior convictions of firearm offenses are admissible to prove that the defendant had the requisite knowledge and intent to possess a firearm. . . .

Thus, under the initial Rule 404(b) analysis, our precedent indicates that previous firearm-related crimes can be relevant to prove that a defendant had the necessary knowledge that a firearm was present on or near his person and that a defendant had the intent to possess the firearm solely, jointly, or constructively.<sup>111</sup>

Similarly, in a drug possession case, the court stated: “Fang’s prior convictions for possession are relevant because they go directly to proving knowledge.”<sup>112</sup>

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<sup>110</sup> *United States v. Adams*, 783 F.3d 1145, 1149 (8th Cir. 2015) (citation and internal quotation marks omitted).

<sup>111</sup> *Id.* at 1149–50 (citations and footnote omitted).

<sup>112</sup> *United States v. Fang*, 844 F.3d 775, 780 (8th Cir. 2016).

c. The “Intrinsic Evidence Exceptions” Heuristic

The Eighth Circuit uses the typical “context” and “completes the story” definitions of intrinsic evidence. For example, the court recently stated: “Intrinsic evidence includes both evidence that is inextricably intertwined with the crime charged as well as evidence that merely completes the story or provides context to the charged crime.”<sup>113</sup>

9. THE NINTH CIRCUIT

a. The n-Factor *Huddleston* Heuristic

The Ninth Circuit’s *Huddleston*-based approach is discussed in Section II.A.

b. The “Enumerated Exceptions” Heuristic

As previously discussed, the Ninth Circuit refers to the examples listed in Rule 404(b)(2) as having special powers as enumerated exceptions. For example, the court requires that the evidence fit “one of the exceptions”: “When the Government offers evidence of prior or subsequent crimes or bad acts as part of its case-in-chief, it has the burden of first establishing relevance of the evidence to prove a fact within one of the exceptions to the general exclusionary rule of Rule 404(b).”<sup>114</sup> The court has also stated that Rule 404(b)(2) as a whole is an exception: “Rule 404(b)(2) functions as an exception to 404(b)(1) . . . .”<sup>115</sup> And the court refers to specifically-named exceptions, such as the “plan exception” and the “identity exception.”<sup>116</sup>

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<sup>113</sup> *United States v. Cunningham*, 702 F. App’x 489, 492 (8th Cir. 2017) (citation and internal quotation marks omitted).

<sup>114</sup> *United States v. Wolverine*, 584 F. App’x 646, 647 (9th Cir. 2014) (citations and internal quotation marks omitted).

<sup>115</sup> *United States v. McElmurry*, 776 F.3d 1061, 1067 (9th Cir. 2015); *accord United States v. Goss*, 256 F. App’x 122, 125 (9th Cir. 2007) (“FRE 404(b) sets forth exceptions to the general inadmissibility of propensity evidence, one of which is to prove knowledge, for which the district court allowed the evidence here.”).

<sup>116</sup> *United States v. Firemong*, 624 F. App’x 497, 499 (9th Cir. 2015).

c. The “Intrinsic Evidence Exceptions” Heuristic

The Ninth Circuit also misuses the “intrinsic evidence exception” heuristic in several ways. One problem is the use of the “exception” language as a means of explaining why evidence is admissible. For example, the court recently stated: “The uncharged transactions were ‘intrinsic’ to the charged counts of wire fraud as they were all part of a single scheme; therefore, evidence of the uncharged transactions was also admissible under the ‘inextricably intertwined’ exception to Rule 404(b).”<sup>117</sup> If the court is correct that the uncharged acts were intrinsic evidence of the charged acts, then the court’s further statement that the evidence is admissible because of “the ‘inextricably intertwined’ exception” is unnecessary. Another problem is the use of “inextricably intertwined” to cover a wide range of other-acts evidence, such as evidence needed to “complete the story”<sup>118</sup> or to provide “context.”<sup>119</sup> As several other circuits have observed, these are purposes that have no natural outer boundary.

## 10. THE TENTH CIRCUIT

a. The n-Factor *Huddleston* Heuristic

Under the Tenth Circuit’s four-factor *Huddleston* test:

To determine whether Rule 404(b) evidence was properly admitted we look to the four-part test set out by the Supreme Court in *Huddleston v. United States*. To be admissible, this test requires that those fac-

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<sup>117</sup> *United States v. Cuenca*, 692 F. App’x 857, 858 (9th Cir. 2017); *accord* *United States v. Loftis*, 843 F.3d 1173, 1178 (9th Cir. 2016) (“[E]vidence of the uncharged transactions falls under the first inextricably intertwined exception.”).

<sup>118</sup> *United States v. Iturbe-Gonzalez*, 705 F. App’x 486, 488 (9th Cir. 2017) (“The 2015 arrest was not an ‘other act’ under Rule 404(b), but was necessary to tell the story of the charged crime and was thus inextricably intertwined with the conduct underlying the charged crime.”).

<sup>119</sup> *United States v. Bailey*, 588 F. App’x 730, 731 (9th Cir. 2014) (“But even if Bailey did object, the evidence of other transactions between Bailey and Owens was ‘inextricably intertwined’ with the charged transactions and provided critical context about Bailey’s relationship with Owens, such that Federal Rule of Evidence 404(b) does not apply.”) (citation omitted).

tors—often called the “Huddleston factors”—be satisfied: (1) the evidence was offered for a proper purpose under Rule 404(b); (2) the evidence was relevant under Rule 401; (3) the probative value of the evidence was not substantially outweighed by its potential for unfair prejudice under Rule 403; and (4) the district court, upon request, instructed the jury pursuant to Rule 105 to consider the evidence only for the purpose for which it was admitted.<sup>120</sup>

Generally, the Tenth Circuit has interpreted the first factor to mean that the evidence was offered for one of Rule 404(b)(2)’s listed examples of permitted purposes: “Evidence is admitted for a proper purpose if allowed for one or more of the enumerated purposes in Rule 404(b).”<sup>121</sup> Thus, this test has not required trial courts to determine whether the evidence is relevant only because of a propensity inference; it only requires that the evidence is relevant to one of the “enumerated” examples.

b. The “Enumerated Exceptions” Heuristic

The Tenth Circuit also has made use of the “enumerated exceptions” heuristics. Interestingly, the court uses this kind of “exceptions” heuristic most often when characterizing a party’s argument rather than when presenting its own conclusions. For example, applying the “enumerated exceptions” heuristic, the court recently stated: “Mr. Harris objected to its admission, arguing that none of the exceptions to Rule 404(b) apply, since nothing related to the prior conviction shows plan, motive, opportunity, intent, preparation, knowledge, identity, or absence of mistake or accident.”<sup>122</sup>

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<sup>120</sup> *United States v. Watson*, 766 F.3d 1219, 1236 (10th Cir. 2014) (quoting *United States v. Becker*, 230 F.3d 1224, 1232 (10th Cir. 2000)) (alterations and internal quotation marks omitted); *accord* *United States v. Henthorn*, 864 F.3d 1241, 1247–48 (10th Cir. 2017); *United States v. Smalls*, 752 F.3d 1227, 1237 (10th Cir. 2014); *United States v. Farr*, 701 F.3d 1274, 1280 (10th Cir. 2012).

<sup>121</sup> *United States v. Mares*, 441 F.3d 1152, 1156 (10th Cir. 2006).

<sup>122</sup> *United States v. Harris*, 526 F. App’x 845, 849 (10th Cir. 2013) (internal quotation marks omitted); *accord* *United States v. Cox*, 684 F. App’x 706, 707 (10th Cir. 2017) (“Cox ultimately conceded that evidence of her earlier methamphetamine transactions might qualify for admission under the Rule 404(b)(2) exception for evidence of a common plan or design between the charged crime and



c. The “Intrinsic Evidence Exceptions” Heuristic

The Tenth Circuit uses the “intrinsic evidence” heuristic to admit “inextricably intertwined” evidence, “background” evidence, and evidence of “necessary preliminaries” or “context.” The court recently provided this list of examples of cases in which it has found evidence to be “intrinsic”:

We regard evidence as intrinsic when it [1] was “inextricably intertwined” with the charged conduct, [2] occurred within the same time frame as the activity in the conspiracy being charged, [3] was a necessary preliminary to the charged conspiracy, [4] provided direct proof of the defendant’s involvement with the charged crimes, [5] was entirely germane background information, directly connected to the factual circumstances of the crime, or [6] was necessary to provide the jury with background and context of the nature of the defendant’s relationship to his accomplice.<sup>123</sup>

This list reflects not only the problem of a potentially infinitely expansive concept of “intertwined”—the problem that almost any other-act can in some way be connected to the charged act—but also the problem of unnecessary application of the heuristic. If evidence “provided direct proof of the defendant’s involvement with the charged crimes,” then that evidence was not just “intertwined” but actually was intrinsic evidence.

## 11. THE ELEVENTH CIRCUIT

a. The n-Factor *Huddleston* Heuristic

The Eleventh Circuit applies a four-part test to determine whether evidence is admissible under Rule 404(b):

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the extrinsic act.”); *United States v. Bailey*, 133 F. App’x 534, 537–38 (10th Cir. 2005) (“Mr. Bailey argues that because the seizure of the paraphernalia took place 11 months after the alleged conspiracy had terminated, the introduction of the evidence could not fall under the exceptions listed in Rule 404(b).”).

<sup>123</sup> *United States v. Kupfer*, 797 F.3d 1233, 1238 (10th Cir. 2015) (footnotes and internal quotation marks omitted).

To be admissible under Rule 404(b), the evidence must be (1) relevant to an issue other than the defendant's character; (2) established by sufficient proof that the jury could find that the defendant committed the extrinsic act; and (3) of probative value that is not substantially outweighed by undue prejudice under Federal Rule of Evidence 403.<sup>124</sup>

In applying this test, the court analyzes relevance at a very high level of generality and does not examine the specific chain of inferences by which the evidence is relevant to determine whether the relevance is based upon a propensity inference. For example, the court has stated:

Regarding the first prong of the Rule 404(b) test, a criminal defendant makes his intent relevant by pleading not guilty. Additionally, evidence that a defendant engaged in similar behavior in the past makes it more likely that he did so knowingly, and not because of accident or mistake, on the current occasion.<sup>125</sup>

Similarly, the court has stated: "For the first prong—relevance to an issue other than character or propensity—where the state of mind required for the charged and extrinsic offenses is the same, the first prong of the Rule 404(b) test is satisfied."<sup>126</sup>

b. The "Enumerated Exceptions" Heuristic

Like all other circuits, the Eleventh Circuit has referred to the list of permitted purposes as exceptions; for example, the court has stated: "In this case, the district court did not abuse its discretion in denying Nowak's motion *in limine* because all of the challenged evidence fell within the enumerated exceptions of Rule 404(b)."<sup>127</sup>

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<sup>124</sup> United States v. Gaskins, 685 F. App'x 698, 700 (11th Cir. 2017) (citation omitted).

<sup>125</sup> United States v. Bush, 673 F. App'x 947, 950 (11th Cir. 2016) (citations omitted).

<sup>126</sup> *Gaskins*, 685 F. App'x at 700 (citation and internal quotation marks omitted).

<sup>127</sup> United States v. Nowak, 370 F. App'x 39, 42 (11th Cir. 2010).

Although such a statement is incorrect, to the extent that there are no enumerated exceptions to Rule 404(b), even more problematic is the Eleventh Circuit's statement that the examples of permitted purposes are exceptions to the inadmissibility of propensity evidence—and not simply exceptions to the inadmissibility of other-acts evidence. For example, the court has stated: “Rule 404(b)(1) generally prohibits the introduction of propensity evidence at trial. Rule 404(b)(2), however, provides an exception to this general rule for evidence that is also probative for some other purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.”<sup>128</sup>

c. The “Intrinsic Evidence Exceptions” Heuristic

Like most other circuits, the Eleventh Circuit uses the “intrinsic evidence exception” heuristic to admit a wide range of evidence. As the court has stated:

Construing this exception, we have explained that evidence, not part of the crime charged but pertaining to events explaining the context, motive and set-up of the crime, is properly admitted if it forms an integral and natural part of an account of the crime, or is necessary to complete the crime's story for the jury.<sup>129</sup>

“Inextricably intertwined” evidence is also considered to be intrinsic, with “inextricably intertwined” defined essentially the same broad way: “Evidence is inextricably intertwined when it tends to corroborate, explain, or provide necessary context for evidence regarding the charged offense.”<sup>130</sup>

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<sup>128</sup> United States v. Sterling, 738 F.3d 228, 237 (11th Cir. 2013) (internal quotation marks omitted).

<sup>129</sup> United States v. Louissaint, 407 F. App'x 378, 379 (11th Cir. 2011) (citation, alterations, and internal quotation marks omitted); accord United States v. Acosta, 660 F. App'x 749, 753 (11th Cir. 2016) (“Rule 404(b) does not apply where bad acts evidence concerns the ‘context, motive, and set-up of the crime’ and is ‘linked in time and circumstances with the charged crime, or forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury.’”) (citation omitted).

<sup>130</sup> Bush, 673 F. App'x at 950 (citation omitted).

## 12. THE D.C. CIRCUIT

### a. The n-Factor *Huddleston* Heuristic

The D.C. Circuit follows a two-step test similar to the First and Fifth Circuits:

The first step requires only that the evidence be probative of some material issue other than character. The second step requires that the evidence not be inadmissible under any of the other general strictures limiting admissibility. The most important of these general strictures is Rule 403, which requires that the probative value of the evidence not be substantially outweighed by its potential prejudice.<sup>131</sup>

### b. The “Enumerated Exceptions” Heuristic

Like other circuit courts of appeals, the D.C. Circuit refers to the Rule 404(b)(2) list of examples of permitted purposes as “exceptions,” although it has stated that these “exceptions” are “narrow”: “This court has repeatedly emphasized the narrow scope of the ‘bad acts’ evidence exceptions under Rule 404(b) (such evidence may be used to prove ‘motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident’) . . . .”<sup>132</sup>

The D.C. Circuit has invented several “exceptions” not directly borrowed from Rule 404(b)(2), including a “modus operandi exception” and a “common plan exception.” For example, the court has explained that “modus operandi” is a variant of the “identity exception”: “Although not listed in Rule 404(b)’s nonexclusive list of proper purposes, modus operandi evidence is normally admitted pursuant to the identity exception.”<sup>133</sup> Regarding a “common plan exception,” the court has explained:

One allowable purpose which traditionally has been stated as an exception to the “other crimes” rule, but

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<sup>131</sup> *United States v. Washington*, 969 F.2d 1073, 1080–81 (D.C. Cir. 1992) (citations and internal quotation marks omitted).

<sup>132</sup> *United States v. Nicely*, 922 F.2d 850, 856 (D.C. Cir. 1991) (citations omitted).

<sup>133</sup> *United States v. Burwell*, 642 F.3d 1062, 1066 (D.C. Cir. 2011) (citations omitted), *aff’d on reh’g*, 690 F.3d 500 (D.C. Cir. 2012) (en banc).

which was not included in the Rule 404(b) list of examples, is to show the existence of “a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of the one tends to establish the other.” . . . Although we can conceive of situations in which the parts of a common scheme or plan are more related than were the two crimes with which appellant was charged, we have no doubt that the evidence in this case fits within the common scheme exception to the “other crimes” rule.<sup>134</sup>

c. The “Intrinsic Evidence Exceptions” Heuristic

The D.C. Circuit recognizes an “exception” for “inextricably intertwined” evidence, although it has written at some length about the problems with such evidence, and has explicitly rejected some of the “inextricably intertwined” formulations recognized in other circuits, such as the “completes the story” exception:

When evidence is “inextricably intertwined” with the charged crime, courts typically treat it as the same crime. Every circuit now applies some formulation of the inextricably intertwined “test.” . . .

We have not defined “inextricably intertwined” in the few Rule 404(b) cases in which we used those terms. Our sister circuits have attempted various formulations. . . .

We do not find these formulations particularly helpful. Some are circular: inextricably intertwined evidence is intrinsic, and evidence is intrinsic if it is inextricably intertwined. Others are over-broad. The “complete the story” definition of “inextricably intertwined” threatens to override Rule 404(b). A defendant’s bad act may be only tangentially related to

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<sup>134</sup> United States v. Burkley, 591 F.2d 903, 920 (D.C. Cir. 1978) (citations, footnote, and internal quotation marks omitted).

the charged crime, but it nevertheless could “complete the story” or “incidentally involve” the charged offense or “explain the circumstances.” If the prosecution’s evidence did not “explain” or “incidentally involve” the charged crime, it is difficult to see how it could pass the minimal requirement for admissibility that evidence be relevant. . . .

We recognize that, at least in a narrow range of circumstances not implicated here, evidence can be “intrinsic to” the charged crime. . . . In other words, if the evidence is of an act that is part of the charged offense, it is properly considered intrinsic. In addition, some uncharged acts performed contemporaneously with the charged crime may be termed intrinsic if they facilitate the commission of the charged crime.

On the other hand, we are confident that there is no general “complete the story” or “explain the circumstances” exception to Rule 404(b) in this Circuit. Such broad exclusions have no discernible grounding in the “other crimes, wrongs, or acts” language of the rule. Rule 404(b), and particularly its notice requirement, should not be disregarded on such a flimsy basis.<sup>135</sup>

In recent cases, the court has re-asserted that its “inextricably intertwined” exception is “narrow.” For example, the court recently stated: “It is true, as Clark argues, that we have rejected a ‘complete the story’ exception to Rule 404(b) and held that the ‘inextricably intertwined’ exception is narrow.”<sup>136</sup> Similarly, the court has repeated its concerns about the over-breadth of the exception, stating: “If the government does attempt to introduce additional ‘other crimes’ evidence at a retrial, we encourage the district court to ad-

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<sup>135</sup> *United States v. Bowie*, 232 F.3d 923, 927–29 (D.C. Cir. 2000) (internal citations and footnotes omitted).

<sup>136</sup> *United States v. Clark*, 747 F.3d 890, 896 (D.C. Cir. 2014) (citing *Bowie*, 232 F.3d at 928–29).

dress Rule 404(b) before applying the inextricably intertwined doctrine, as there is a ‘danger that finding evidence “inextricably intertwined” may too easily slip from analysis to mere conclusion.’”<sup>137</sup>

### III. THE SEVENTH CIRCUIT’S RULE 404(B) REPENTANCE AND REDEMPTION

The Seventh Circuit recently acknowledged that its prior approach to Rule 404(b) had been misguided and proposed a different approach, focused on detecting and excluding evidence of propensity. Prior to 2014, in determining whether evidence was admissible under Rule 404(b), the Seventh Circuit followed a four-factor test that was almost identical to the four-factor test that the Ninth Circuit currently follows. As the Seventh Circuit observed in the initial, three-judge panel opinion in *United States v. Gomez*:

A court deciding whether to admit evidence under Rule 404(b) considers whether “(1) the evidence is directed toward establishing a matter in issue other than the defendant’s propensity to commit the crime charged, (2) the evidence shows that the other act is similar enough and close enough in time to be relevant to the matter in issue, (3) the evidence is sufficient to support a jury finding that the defendant committed the similar act, and (4) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice, as required by Rule 403.”<sup>138</sup>

Like the Ninth Circuit’s current test, this test admitted evidence as an “exception” to the rule prohibiting propensity evidence without any consideration of whether the evidence’s relevance depended upon a propensity inference. For this very reason, the Seventh Circuit reheard the *Gomez* case en banc and set forth a more rule-based

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<sup>137</sup> *United States v. Glover*, 736 F.3d 509, 517 (D.C. Cir. 2013) (quoting *Bowie*, 232 F.3d at 928).

<sup>138</sup> *United States v. Gomez*, 712 F.3d 1146, 1150 (7th Cir. 2013) (quoting *United States v. Albiola*, 624 F.3d 431, 439 (7th Cir. 2010)), *aff’d on reh’g*, 763 F.3d 845 (7th Cir. 2014) (en banc); *accord* *United States v. Boling*, 648 F.3d 474, 479 (7th Cir. 2011).

test for determining whether evidence of crimes, wrongs or other acts is admissible under Rule 404(b).<sup>139</sup>

A. *Why the Four-Factor Test is Flawed*

The en banc Seventh Circuit explained at length why the four-factor test did not adequately implement the core concern of Rule 404(b), the concern that propensity evidence was likely to be overvalued by fact-finders. The court began by acknowledging:

Our four-part test for evaluating the admissibility of other-act evidence has ceased to be useful. We now abandon it in favor of a more straightforward rules-based approach. This change is less a substantive modification than a shift in paradigm that we hope will produce clarity and better practice in applying the relevant rules of evidence.<sup>140</sup>

The court then observed that what was wrong with the four-part test was it did not actually test for propensity.<sup>141</sup> Specifically, the court explained:

Rule 404(b) is not just concerned with the ultimate conclusion, but also with the chain of reasoning that supports the non-propensity purpose for admitting the evidence. In other words, the rule allows the use of other-act evidence only when its admission is supported by some propensity-free chain of reasoning. This is not to say that other-act evidence must be excluded whenever a propensity inference can be drawn; rather, Rule 404(b) excludes the evidence if its relevance to “another purpose” is established *only* through the forbidden propensity inference.<sup>142</sup>

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<sup>139</sup> *United States v. Gomez*, 763 F.3d 845, 850 (7th Cir. 2014) (en banc) (“We reheard the case en banc to clarify the framework for admitting other-act evidence. We now conclude that our circuit’s four-part test should be replaced by an approach that more closely tracks the Federal Rules of Evidence.”).

<sup>140</sup> *Id.* at 853.

<sup>141</sup> *Id.* at 855.

<sup>142</sup> *Id.* at 856 (citations omitted).



The court noted that it is not enough for a trial court to determine that evidence of crimes, wrongs, or other acts is relevant to an issue such as motive, plan, or identity; instead, trial courts must further determine whether that relevance is based upon “a hidden propensity inference.”<sup>143</sup> Therefore, before deciding that evidence is admissible,

the district court should not just ask *whether* the proposed other-act evidence is relevant to a non-propensity purpose but *how* exactly the evidence is relevant to that purpose—or more specifically, how the evidence is relevant without relying on a propensity inference. Careful attention to these questions will help identify evidence that serves no permissible purpose.<sup>144</sup>

B. *The New, Propensity-Focused Test of Propensity*

In *Gomez*, the Seventh Circuit replaced its four-part *Huddleston* test with what it characterized as a “rules-based framework.”<sup>145</sup> This approach seeks to simply apply Rule 404(b) without any four-part heuristics. Like the law student who realizes that she cannot obtain a full and accurate understanding of a case from her outlines and supplements and decides that the best way to understand the case is by focusing on the case itself, the Seventh Circuit has decided that the best approach to Rule 404(b) is found in the rule itself. As the court stated:

Multipart tests are commonplace in our law and can be useful, but sometimes they stray or distract from the legal principles they are designed to implement; over time misapplication of the law can creep in. This is especially regrettable when the law itself provides

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<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 850 (“We now conclude that our circuit’s four-part test should be replaced by an approach that more closely tracks the Federal Rules of Evidence. Applying a rules-based framework here . . .”).

a clear roadmap for analysis, as the Federal Rules of Evidence generally do.<sup>146</sup>

What the Seventh Circuit requires for admission of other-acts evidence under *Gomez* is what Rule 404(b) requires: evidence that is not offered to prove propensity; or as the court stated, what is required is “a chain of reasoning that does not rely on the forbidden inference that the person has a certain character and acted in accordance with that character on the occasion charged in the case.”<sup>147</sup>

C. *Post-Gomez Rule 404(b) in the Seventh Circuit*

In one way, the en banc decision in *Gomez* dramatically changed how federal courts in the Seventh Circuit apply Rule 404(b). It is no longer sufficient to determine that evidence of other-acts “fits” an “exception.”<sup>148</sup> However, the practical effect of *Gomez* has been more difficult to assess. Shortly after the en banc *Gomez* decision, Judge Easterbrook suggested: “Prosecutors who do not understand and apply the full scope of the *Gomez* decision will find their convictions hard to sustain on appeal.”<sup>149</sup> However, subsequent cases have shown that *Gomez* has not made affirming criminal convictions so difficult after all. Of course, in some cases, the Seventh Circuit has found that other-acts evidence was admitted in error. In many of these cases, though, the error has been found to be harmless.<sup>150</sup> And

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<sup>146</sup> *Id.* at 853.

<sup>147</sup> *Id.* at 860.

<sup>148</sup> *Id.* at 855 n.3.

<sup>149</sup> *United States v. Lawson*, 776 F.3d 519, 522 (7th Cir. 2015).

<sup>150</sup> *See, e.g., United States v. Seals*, 813 F.3d 1038, 1044 (7th Cir. 2016) (“Regarding Seals’ conviction for being a felon in possession of a firearm, there can be no doubt that any error regarding 404(b) evidence was harmless.”); *Lawson*, 776 F.3d at 522 (“As for this appeal, however: We’ve already stressed that Lawson’s best potential arguments are not presented for decision, and now we add that any error was harmless.”); *United States v. Curtis*, 781 F.3d 904, 911 (7th Cir. 2015) (“The court did not expressly engage in that analysis on the record here, but any error was harmless.”) (citations omitted); *United States v. Stacy*, 769 F.3d 969, 976 (7th Cir. 2014) (“As in *Gomez*, the government’s case here was strong, and the district court’s error in admitting the evidence of prior acts under Rule 404(b) was harmless.”); *United States v. Clark*, 774 F.3d 1108, 1116 (7th Cir. 2014); *United States v. Schmitt*, 770 F.3d 524, 538 (7th Cir. 2014); *cf. Viramontes v. City of Chicago*, 840 F.3d 423, 431 (7th Cir. 2016) (civil case; error but not reversible error).

in many other cases, the admission of the evidence has been found to have been proper.<sup>151</sup> Even after *Gomez*, it remains the rare case in which a conviction is reversed.<sup>152</sup>

Although *Gomez* appears not to have altered the outcome of many cases, the Rule 404(b) test adopted in *Gomez* is nevertheless an improvement over the prior, multi-factor test with its assorted exceptions. On appeal, the Seventh Circuit's analysis is clear: did the district court articulate a non-propensity reason for admitting the evidence?<sup>153</sup> And district courts' rulings on pre-trial motions to admit or exclude other-acts evidence are similarly straightforward: has the proponent of the evidence articulated a non-propensity reason for admitting the evidence?<sup>154</sup> Not only are these inquiries clearer and more straightforward, they also succeed in effectuating the words of Rule 404(b). For example, Judge St. Eve of the United States District Court for the Northern District of Illinois recently wrote:

Plaintiff contends that prior, similar acts by police officers are admissible as other-act evidence showing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Plaintiff, however, may not “simply to point to a purpose in the ‘permitted’ list and assert that the other-act evidence is relevant to it.” *Gomez*, 763 F.3d at 856. Other-act evidence may be admitted “only when its admission is supported by some propensity-free chain of reasoning.” *Id.* Plaintiff, however, has failed to establish a propensity-free chain of reasoning for why similar acts in the past would be relevant

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<sup>151</sup> *United States v. Mabie*, 862 F.3d 624, 633 (7th Cir. 2017) (“There is no credible argument that the government failed to comply with *Gomez*'s requirements.”), *petition for cert. filed*, No. 17-7935 (U.S. Mar. 1, 2018); *United States v. Carson*, 870 F.3d 584, 603 (7th Cir. 2017); *United States v. Gonzalez*, 863 F.3d 576, 589 (7th Cir. 2017); *United States v. Urena*, 844 F.3d 681, 684–85 (7th Cir. 2016); *United States v. Ferrell*, 816 F.3d 433, 446 (7th Cir. 2015) (“*Gomez* makes no difference in the outcome”); *United States v. Anzaldi*, 800 F.3d 872, 882 (7th Cir. 2015) (“The propensity-free chain of reasoning is clear.”); *United States v. Vance*, 764 F.3d 667, 670–71 (7th Cir. 2014).

<sup>152</sup> *See, e.g., United States v. Chapman*, 765 F.3d 720, 723 (7th Cir. 2014).

<sup>153</sup> *Gomez*, 763 F.3d at 860.

<sup>154</sup> *Id.*

to a permitted purpose. . . . The Court therefore grants Defendant's motion.<sup>155</sup>

Prior to *Gomez*, the district court might well have considered whether the plaintiff's proffered evidence met one of the "enumerated" "exceptions" of "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Instead, following *Gomez*, the district court clearly and straightforwardly considered whether the plaintiff had offered a propensity-free reason for admitting the evidence.<sup>156</sup> Because the plaintiff had not, the evidence was excluded.<sup>157</sup> Similarly, in a recent case deciding that the other-acts evidence was admissible, Judge Ellis wrote:

Llufrio first challenges Bustamante's testimony about a small drug transaction between Bustamante and Llufrio, which the Court admitted and which Llufrio claims prejudiced him at his drug trafficking trial . . . . The Government argued that the testimony helped prove that Llufrio had knowledge that he was involved with someone who was a cocaine dealer, Bustamante, and that drugs were in the truck that Llufrio drove for Bustamante. The Government's theory was not relevant to Llufrio's character or propensity for using cocaine or trafficking drugs. Further, the Government's theory did not rely on Llufrio's character or propensity for using cocaine—the testimony tended to show Llufrio knew that Bustamante was a cocaine dealer and that the truck was carrying drugs solely because Llufrio knew that Bustamante could afford to give cocaine away for free and could do so in the same time and proximity as Llufrio's driving work for Bustamante. Finally, although the risk of prejudice for Llufrio's cocaine

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<sup>155</sup> *Harris v. City of Chicago*, No. 14-CV-4391, 2017 WL 2462197, at \*3 (N.D. Ill. June 7, 2017).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

use was high, especially in a trial regarding drug trafficking of cocaine, the risk did not outweigh the probative value.<sup>158</sup>

D. *Post-Gomez Rule 404(b) in Other Circuits*

1. THE SEVENTH CIRCUIT APPROACH AS AN EXAMPLE

Further evidence of the desirability of the Seventh Circuit's approach is that fellow circuit courts are following its example. The Tenth Circuit has directly cited to *Gomez*, stating: "Rule 404(b) is concerned 'with the chain of reasoning that supports the non-propensity purpose for admitting the evidence,' and it 'allows the use of other-act evidence only when its admission is supported by some propensity-free chain of reasoning.'"<sup>159</sup> Other circuits have cited other Seventh Circuit cases, especially *United States v. Miller*,<sup>160</sup> a pre-*Gomez* case that called attention to the issue of Rule 404(b) by reversing a criminal conviction because of improperly admitted

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<sup>158</sup> *United States v. Llufrío*, No. 15 CR 703, 2017 WL 3276860, at \*1–2 (N.D. Ill. Aug. 2, 2017).

<sup>159</sup> *United States v. Rodella*, 804 F.3d 1317, 1333 (10th Cir. 2015) (quoting *Gomez*, 763 F.3d at 856). See also *United States v. Edmond*, 815 F.3d 1032, 1045 (6th Cir. 2016), *vacated*, 137 S. Ct. 1577 (2017); *United States v. Burnett*, 827 F.3d 1108, 1118 (D.C. Cir. 2016).

<sup>160</sup> 673 F.3d 688 (7th Cir. 2012).

other-acts evidence.<sup>161</sup> These other circuits that have cited *Miller* include the Third,<sup>162</sup> the Fourth,<sup>163</sup> the Sixth,<sup>164</sup> and the Eighth.<sup>165</sup>

## 2. IS EN BANC REVIEW REQUIRED?

One reason why other circuits are citing *Miller*—a three-judge panel decision—more often than *Gomez*—the decision of the en banc court—is to avoid the question whether a three-judge panel has the authority to embrace the Seventh Circuit’s approach. Recently, Judge Browning of the District of New Mexico suggested that the district court cannot formally follow the *Gomez* approach until the Tenth Circuit, sitting en banc, overrules the circuit’s current four-factor *Huddleston* test:

Because “only the en banc court can overrule the judgment of a prior panel,” this four-part test binds the Tenth Circuit—and, most importantly here, all district courts within the Tenth Circuit—until the Tenth Circuit, sitting en banc, rules otherwise, *see*

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<sup>161</sup> The court explained:

Miller’s prior conviction for possession of cocaine with intent to distribute shows he once had an intent to distribute drugs. . . . The relevance of the prior conviction here boils down to the prohibited “once a drug dealer, always a drug dealer” argument. A prosecutor who wants to use prior bad acts evidence must come to court prepared with a specific reason, other than propensity, why the evidence will be probative of a disputed issue that is permissible under Rule 404(b). Mere recitation that a permissible Rule 404(b) purpose is “at issue” does not suffice.

For these reasons, we conclude that the admission of the details of Miller’s 2000 conviction was an abuse of the district court’s discretion. . . .

Miller’s convictions for possession with intent to distribute and for possession of a firearm in furtherance of that crime are REVERSED.

*Id.* at 700–02 (citation omitted).

<sup>162</sup> *See, e.g., United States v. Caldwell*, 760 F.3d 267, 282 (3d Cir. 2014).

<sup>163</sup> *See, e.g., United States v. Hall*, 858 F.3d 254, 269 (4th Cir. 2017).

<sup>164</sup> *See, e.g., United States v. Richardson*, 597 F. App’x 328, 336 (6th Cir. 2015).

<sup>165</sup> *See, e.g., United States v. Turner*, 781 F.3d 374, 390 (8th Cir. 2015).

Stephen A. Saltzburg, Professor, George Washington University Law School, The Second Best Federal Bar Seminar Ever: Evidence (May 1, 2015) (noting that United States Courts of Appeals must go en banc to change their four-part tests). Moreover, the Tenth Circuit, and every United States Court of Appeals with a four-part test, derived its test from the “four-step framework” that the Supreme Court set forth in *Huddleston v. United States*.<sup>166</sup>

It is true that within a circuit, a three-judge panel cannot overrule another three-judge panel, and thus it is also true that changing established law within a circuit requires a decision of the court en banc.<sup>167</sup> However, it is possible to argue that the approach adopted in *Gomez* was not an overruling of any previous Seventh Circuit decision but rather a reframing of its previous approach to applying Rule 404(b).

The en banc *Gomez* Court itself characterized its decision as a reframing: “We reheard the case en banc to clarify the framework for admitting other-act evidence. We now conclude that our circuit’s four-part test should be replaced by an approach that more closely tracks the Federal Rules of Evidence. Applying a rules-based framework here . . . .”<sup>168</sup>

Several three-judge panels of the Third Circuit have taken this reframing approach. For example, as one Third Circuit decision explained, citing *Miller*:

The reason we require the proponent and the court to articulate a logical chain of inferences connecting the

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<sup>166</sup> *United States v. Folse*, 163 F. Supp. 3d 898, 912 n.7 (D.N.M. 2015) (citation omitted). The same language appears in at least three other cases by Judge Browning: *Leon v. FedEx Ground Package Sys., Inc.*, 313 F.R.D. 615, 625 n.2 (D.N.M. 2016); *United States v. Chapman*, No. CR 14-1065 JB, 2015 WL 4461243, at \*8 n.4 (D.N.M. July 15, 2015); *Upky v. Lindsey*, No. CIV 13-0553 JB/GBW, 2015 WL 3862944, at \*10 n.3 (D.N.M. June 3, 2015).

<sup>167</sup> See Arthur D. Hellman, *By Precedent Unbound: The Nature and Extent of Unresolved Intercircuit Conflicts*, 56 U. PITT. L. REV. 693, 699 n.20 (1995) (stating that “all courts of appeals follow a rule under which panel decisions are binding on later panels unless overruled by the Supreme Court or by the court of appeals en banc”).

<sup>168</sup> *United States v. Gomez*, 763 F.3d 845, 850 (7th Cir. 2014) (en banc).

evidence to a non-propensity purpose is because we must assure that the evidence is not susceptible to being used improperly by the jury. Another way to frame this requirement is to ask the prosecution to explain “exactly how the proffered evidence should work in the mind of a juror to establish the fact the government claims to be trying to prove.” *Miller*, 673 F.3d at 699. Framed this way, the flaw in the evidence proffered in this case becomes apparent.<sup>169</sup>

#### CONCLUSION

The Rule 404(b) heuristics that the federal circuit courts of appeals have created should be abandoned. *Huddleston v. United States* was not about determining whether evidence was offered for the improper purpose of proving propensity. And there are no exceptions to Rule 404(b), which prohibits the admission of evidence for the purpose of proving propensity—without exception. The Seventh Circuit’s decision in *United States v. Gomez* sets an example that other circuit courts of appeals have started—and should continue—to follow.

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<sup>169</sup> *United States v. Caldwell*, 760 F.3d 267, 282 (3d Cir. 2014).