PROPENSITY IN DISGUISE? EVIDENTIARY USE OF DEFENDANTS' PRIOR DRUG ACTIVITY

ABSTRACT

"Once a druggie, always a druggie." A potential juror would certainly be stricken for admitting to such a logic. Yet, evidence of defendants' past bad actions is routinely admitted in criminal trials which could tempt juror misuse. Some limited uses of defendants' other acts that may reflect on character are relevant and helpful to determining issues in the case. However, some uses are a stretch of the permissible purposes, or are questionable at best.

This Note will outline some historical context of the character evidence prohibition. Next, it will explore how character evidence rules are implemented in drug prosecutions today throughout various federal and state courts and how variations influence outcomes for criminal defendants. Finally, the Author poses questions for thought and proposes a deeper, more careful preliminary analysis to further the overall goal of the character evidence ban—to ensure just verdicts.

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I. INTRODUCTION

A fundamental goal of the U.S. trial process is to try cases—not people.[1] Put another way, "a defendant must be tried for what he did, not for who he is."[2] This idea has informed the ban on character evidence for propensity, or evidence that leads to a propensity reasoning regarding guilt.[3] The concern is that jurors may use this evidence to conclude that if the defendant had committed crimes before, the defendant must have committed the crime being charged. Alternatively, jurors could reason that even if the defendant did not commit *this* charged crime, the defandant is a criminal or a bad person, and therefore deserving of punishment. The modern consensus is that the use of character evidence to show that an individual behaved in accordance with a predisposition to commit an act is an "illegitimate form of fact-finding proof."[4]

Even if evidence has a likelihood to lead to propensity reasoning, it is often still used in criminal trials for claimed non-propensity purposes. "American courts ban character evidence only if it is proffered to show that a party has a certain undesirable character trait, and *because of that character trait*, the party committed an act relevant to the cause of action."[5] Therefore, prosecutors may admit evidence of defendants' other acts if they can convince the judge it is relevant to an issue in the case and not solely used for propensity purposes—even if the danger for propensity reasoning is still present. This argument for admittance and evidentiary use is often advanced in drug prosecutions.[6]

Although federal courts follow the Federal Rules of Evidence, and most state practices mirror the federal rules, outcomes in criminal trials are considerably different across the nation. Differences in analytical steps and depth of review have led, in part, to these outcomes.[7]

1. Geoffrey M. Stannard, Note, *The Liar and the Loophole: Corporate Character Evidence and Impeachment*, 81 BROOK. L. REV. 239, 240 (2015).

2. United States v. Myers, 550 F.2d 1036, 1044 (5th Cir. 1977).

3. In this context, propensity reasoning refers to the thought process that people are likely to act in accordance with their bad character traits evidenced by past actions, or that some people have an inclination to commit crimes and are more likely to be guilty. *See Propensity*, BLACK'S LAW DICTIONARY (11th ed. 2019).

4. Justin Sevier, *Legitimizing Character Evidence*, 68 EMORY L.J. 441, 441 (2019).

5. *Id.* at 452.

6. *See* Daniel J. Capra & Liesa L. Richter, *Character Assassination: Amending Federal Rule of Evidence 404(b) to Protect Criminal Defendants*, 118 COLUM. L. REV. 769, 771 (2018).

7. *See infra* Parts IV, V.

II. GUIDELINES AND PROCEDURES FOR ADMITTING CHARACTER EVIDENCE

Use of defendants' prior acts in criminal trials has been common for centuries. What has evolved is the way society and courts view the usage of this evidence and the procedures for admitting it against an accused.[8] Much of this development has stemmed from evolving societal values and recognition of the grave risk of improper use.

A. *Common Law*

Character evidence was routinely "resorted to without limitation" in early English practice of law.[9] There was no indication from early texts that a rule existed that excluded evidence of similar acts.[10] However, introduction of the idea of exclusion was evident throughout case law.[11] Even as bans on character evidence increased, many in the legal field still defended use of the evidence.[12] By the early nineteenth century, the rule excluding character

8. *See* Sevier, *supra* note 4, at 449–50 (finding industrialization, social sciences, and enlightenment-inspired thought influenced societal views toward character evidence).

9. David P. Leonard, *In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial by Character*, 73 IND. L.J. 1161, 1167 (1998) (quoting 1 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 64, at 472–73 (3d ed. 1940)). *See, e.g.*, Trial of Robert Hawkins, Clerk, Late Minister of Chilton, at the Assizes at Aylesbury, for Felony: 21 Charles II. A.D. 1669, *in* 6 A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, at 921, 935, 949 (T.B. Howell ed., London, T.C. Hansard 1816) (allowing evidence of a previous larceny of a different type of property from a different person in a trial for larceny).

10. Leonard, *supra* note 9, at 1167–68.

11. *Rex v. Cole* is attributed with being the source of the exclusion of character evidence. *See* SAMUEL MARCH PHILLIPPS, A TREATISE ON THE LAW OF EVIDENCE 137 (London, J. Butterworth & Son 2d ed., 1815) (ruling it was not allowable in a criminal trial to show the defendant had a general disposition for committing the same kind of offense being charged); Trial of Henry Harrison at the Old Bailey, for the Murder of Andrew Clench, Doctor of Physic: 4 William & Mary, A.D. 1692, *in* 12 A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, at 834, 864 (T.B. Howell ed., London, T.C. Hansard 1816) (excluding propensity evidence in a murder trial, the court exclaimed: "Are you going to arraign his whole life? Away, away, that ought not to be; that is nothing to the matter").

12. *See, e.g.*, Darling v. Westmoreland, 52 N.H. 401, 406–07 (1872) (finding that banning character evidence was excluding relevant evidence of defendants' general dispositions to commit certain crimes or torts and contrary to the general principle that relevant and material evidence be admitted).

evidence to prove defendants' conduct was well settled.[13] One well known, early defense of the rule came from the high court of New York:

> This rule . . . is rooted in that jealous regard for the liberty of the individual which has distinguished our jurisprudence from all others . . . . It is the product of that same humane and enlightened public spirit which, speaking through our common law, has decreed that every person charged with the commission of a crime shall be protected by the presumption of innocence until he has been proven guilty beyond a reasonable doubt.[14]

After the general ban on character evidence to prove conduct was established, courts began carving out exceptions. Early on, these exceptions were narrowly defined, restricting use of character evidence only "to situations in which the nature of the case virtually required it," or when the proof of the claim or defense necessitated the evidence being introduced.[15] For example, specific intent[16] crimes often require circumstantial evidence to prove essential elements.[17] As Justice William Rehnquist has stated, sometimes the "only means of ascertaining [one's] mental state is by drawing inferences from conduct."[18] Some defenses also allowed such evidence to be introduced to negate the defendant's claim. For example, if a defendant charged with murder by poison claimed the death was an accident, the prosecution would likely be able to admit similar acts with the same type of poison to show the defendant had knowledge of its effects.[19] Other crimes that were sufficiently related in both time and nature were often admitted.[20]

13. Leonard, *supra* note 9, at 1170.

14. People v. Molineux, 61 N.E. 286, 293–94 (N.Y. 1901).

15. Leonard, *supra* note 9, at 1173–76.

16. In a nutshell, specific intent crimes require proof that the defendant intended to bring about the result or consequence of their actions, in addition to proof that they intended to commit the action itself. *See generally* Eric A. Johnson, *Understanding General and Specific Intent: Eight Things I Know for Sure*, 13 OHIO ST. J. CRIM. L. 521 (2016).

17. *See* Leonard, *supra* note 9, at 1176.

18. Huddleston v. United States, 485 U.S. 681, 685 (1988).

19. *See, e.g.*, Noor Mohamed v. The King [1949] AC 182 (PC). The defendant was charged with murdering a woman living with him as his wife by potassium cyanide poisoning. Evidence was admitted that the defendant's previous wife died two years earlier by potassium cyanide poisoning, although he was not charged with her murder.

20. *See, e.g.*, De Loach v. State, 13 S.E.2d 44, 44–45 (Ga. Ct. App. 1941) (admitting evidence of similar false representations made to another person to obtain money that occurred around the same time as the charged offense of swindling and cheating);

Part of the common law development included courts introducing analytical frameworks for determining admissibility of extrinsic evidence.[21] The Fifth Circuit developed a rule with two prerequisites for admissibility.[22] First, physical elements of the extrinsic offense had to "include the essential physical elements of the offense" for which the defendant was being indicted.[23] For example, in *United States v. San Martin*, the defendant was prosecuted for assaulting an FBI agent, and the issue was whether he intended to strike the agent or whether it was accidental.[24] The prosecution sought to introduce evidence of San Martin's prior convictions for resisting or opposing an officer and assault and battery on a uniformed Air Force member.[25] Each crime required proving essential physical elements of assault or interference, and that the victim was in a designated class and performing official duties.[26] The second prerequisite in the Fifth Circuit's framework required that each element from the extrinsic offense be established by plain, clear, and convincing evidence.[27] Courts still use similar multi-step tests in their admissibility analysis today.[28]

The general common law ban on character evidence for propensity remains.[29] However, today the exceptions for purported non-character purposes are more expansive, are met with less skepticism, and do not require substantial evidence that the defendant even engaged in the extrinsic misconduct introduced.[30]

Lawrence v. State, 82 S.W.2d 647, 649 (Tex. Crim. App. 1933). In a prosecution for murdering a teenager on his land by gunshot, testimony was admitted that the defendant shot at nearby duck hunters days before. *Id.*

21. Extrinsic evidence in this context generally refers to evidence of defendants' actions or state of mind outside the chain of events giving rise to the current prosecution. *See Extrinsic*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("From outside sources; of, relating to, or involving outside matters.").

22. United States v. Broadway, 477 F.2d 991, 995 (5th Cir. 1973), *overruled by* United States v. Beechum, 582 F.2d 898 (5th Cir. 1978).

23. *Id.*

24. 505 F.2d 918, 920–21 (5th Cir. 1974).

25. *Id.* at 921.

26. *See, e.g.*, 18 U.S.C. § 111 (2021).

27. *Broadway*, 477 F.2d at 995. Ultimately, applying a similar analytical framework, the court in *San Martin* found the prosecution was short on the second element, and the extrinsic offenses should have been excluded. 505 F.2d at 922.

28. *See infra* Parts IV, V.

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

30. *Id.*; *see infra* Part II.C.

B. *Federal Rules of Evidence*

Uniformity in procedure resulted for courts and counselors throughout the nation when the Federal Rules of Evidence were enacted in 1975. Rule 404 governs admissibility of character evidence and extrinsic acts.[31] Today, Rule 404(b) is titled "Other Crimes, Wrongs, or Acts" and provides:

> (1) Prohibited Uses. Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
>
> (2) Permitted Uses. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.[32]

Rule 404 has the same underlying reasoning expressed under common law: it is simply a codification of the preferred common law approach. The advisory committee notes to the original rule explained that "[n]o mechanical solution [was] offered" for determining admissibility of other-acts evidence.[33] Rather, admissibility determinations were to be made pursuant to Rule 403 analysis, in which the probative value of the evidence and its danger of undue prejudice are weighed in light of other available means of proof and additional factors.[34]

Rule 404 also requires—in criminal cases—that the prosecution give the defense advance notice of the government's intention to offer the evidence at trial.[35] Originally, the prosecution was only required, upon request, to provide notice of the "general nature" of the evidence; it did not have to describe the specific act, what it tended to prove, its relevance, or non-propensity purpose.[36] Prosecutors must now provide advanced, written notice of what evidence they intend to offer, for what non-propensity purpose, and their basis for concluding it is relevant.[37] This requirement allows the defense a fair opportunity to prepare to meet the evidence at

31. FED. R. EVID. 404(b).
32. *Id.*
33. FED. R. EVID. 404(b) advisory committee's note to the 1972 proposed rules.
34. *Id.*; *see also* FED. R. EVID 403.
35. FED. R. EVID. 404(b)(3).
36. FED. R. EVID. 404(b) advisory committee's note to 2020 amendment.
37. *Id.* FED. R. EVID. 404(b)(2).

trial.[38] Most state evidence codes regarding extrinsic acts mirror the federal rule, at least substantively.[39]

C. *Procedure and Burden for Admitting Extrinsic Acts*

In 1988, the Supreme Court addressed the procedural requirements for admitting extrinsic act evidence in *Huddleston v. United States*.[40] The defendant was charged with selling stolen goods (cassette tapes) in interstate commerce, and the material issue at trial was whether he knew they were stolen.[41] The district court allowed the prosecution to introduce testimony of two witnesses stating that the defendant had previously tried to sell them large quantities of stolen televisions and appliances.[42] The prosecution argued the similar acts were relevant to the defendant's knowledge, since the previous goods were known to be stolen and all had come from the same supplier.[43]

The Supreme Court granted certiorari to address the split among lower courts as to whether a trial court must make a preliminary finding before extrinsic act evidence may be introduced to the jury.[44] The Court determined that when met with other act evidence, the threshold inquiry is whether the evidence is probative of a material issue in the case other than character.[45] This would include a claim by the government that the extrinsic act is relevant to showing the defendant's motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, lack of accident, or any other valid argument.[46]

If the court finds the government has made a sufficient argument as to the extrinsic act's relevance, the next step is to determine admissibility.[47] The Supreme Court rejected the defendant's argument that a trial court must

38. *See* FED. R. EVID. 404(b) advisory committee's note to 2020 amendment.

39. *See, e.g.*, IOWA CT. R. 5.404; GA. CODE ANN. § 24-4-404 (2020); CAL. EVID. CODE § 1101 (West 2020). *See infra* Part V.

40. 485 U.S. 681 (1988). The *Huddleston* analysis is routinely used in all 404(b) cases, including drug prosecutions.

41. *Id.* at 682–83.

42. *Id.* at 683.

43. *Id.* at 683–84. The defendant was previously arrested for arranging the sale of a large batch of appliances that were found to be stolen. *Id.* He procured the cassette tapes from the same individual that previously provided him with the stolen appliances. *Id.*

44. *Id.* at 685.

45. *Id.* at 686.

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

47. *Huddleston*, 485 U.S. at 686–87.

resolve, under Rule 104(a),[48] the preliminary question of whether, by a preponderance of the evidence, the defendant committed the other crime or act.[49] The Court found the petitioner's proposal would require "a level of judicial oversight that is nowhere apparent from the language" of Rule 404(b) and "simply inconsistent with the legislative history" behind the rule.[50]

The determination shall instead be made under Rule 104(b)[51] because the relevance of the evidence is conditioned on a fact.[52] In the words of the Court, "similar act evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor."[53] For example, in *Huddleston*, the testimony about the defendant's prior appliance sales were only relevant to the government's theory if the jury could reasonably find that the appliances were stolen.[54] Courts do not weigh credibility or determine whether the government has proved the conditional fact by a preponderance.[55] Courts "simply examine[] all the evidence in the case and decide[] whether the jury could reasonably find the conditional fact . . . by a preponderance of the evidence."[56]

In sum, extrinsic act evidence must be offered for a proper purpose, be relevant to a material issue under a 104(b) determination, and the court must determine whether the probative value of the evidence is substantially outweighed by its potential for unfair prejudice.[57] Additionally, upon request, the court must offer a limiting instruction to the jury under Rule 105, instructing that the extrinsic act evidence is only to be considered for the purpose for which it was admitted.[58]

48. *See* FED. R. EVID. 104(a). When making a 104(a) determination on admissibility of evidence, a court can consider a broad array of evidence and surrounding circumstances in making its determination and is not bound by evidence rules, aside from those relating to privilege.

49. *Huddleston*, 485 U.S. at 686–89.

50. *Id.* at 688.

51. *See* FED. R. EVID. 104(b). When the relevancy of evidence is conditioned on whether a fact exists, the preliminary finding of admissibility is made under 104(b). The court determines whether a reasonable jury could find that the fact does exist.

52. *Id.*; *see also Huddleston*, 485 U.S. at 690.

53. *Huddleston*, 485 U.S. at 689.

54. *Id.*

55. *Id.* at 690.

56. *Id.*

57. *See* FED. R. EVID. 404; FED. R. EVID. 104; FED. R. EVID. 403.

58. *See* FED. R. EVID. 105. *See, e.g.*, United States v. Hardy, 643 F.3d 143, 147 (6th

III. ARGUMENTS FOR AND AGAINST ADMITTING EXTRINSIC ACT EVIDENCE

Both proponents and opponents of admitting extrinsic act evidence often rely on the same basic arguments for their positions. Prosecutors have a wide range of arguments, and in many jurisdictions their arguments are given considerable weight and minimal scrutiny, even though criminal defendants have much at stake.[59] The following arguments and outcomes implicate the viability of a case, the accuracy of verdicts, procedural fairness, and justice in our judicial system.

A. *Implications for Defendants*

The danger of admitting defendants' other crimes or acts is that the jury may use them for improper purposes, or in an improper way—even implicitly.[60] This is especially dangerous given the lack of knowledge regarding exactly how jurors make their determinations, and the fact that the defendant's life and liberty are on the line.[61] This danger informs the general defense argument that the prejudicial effect of extrinsic act evidence outweighs any probative value it may have.[62]

Jurors may overtly use the evidence to penalize the defendant for past misdeeds rather than for the crime being charged, or for being a bad person,

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Cir. 2011). The trial court issued the following limiting instruction:

> [T]his evidence is being admitted only for you to consider two issues. The first issue is whether the defendant had the intent to possess the drugs alleged in the indictment, and the second one is whether the defendant had the intent to distribute the drugs named in the indictment. . . . You cannot consider this testimony as evidence that the defendant committed the crime that he's on trial for now, other than those two issues. You can only consider this testimony in deciding whether the defendant had the intent as I've described it to you. Do not consider it for any other purpose.

59. *See* discussion *infra* Section III.B.1.

60. *See* Sara Gordon, *What Jurors Want to Know: Motivating Juror Cognition to Increase Legal Knowledge & Improve Decisionmaking*, 81 TENN. L. REV. 751, 766–67 (2014) (quoting Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124, 1129 (2012)) ("[W]hile some bias is explicit (in that people are aware of their own biases), much of the bias that impacts decisionmaking is implicit (in that biases are 'not consciously accessible through introspection'). And while scholars have suggested ways to reduce bias, we cannot eliminate its influence on juror decisionmaking.").

61. *See* FED. R. EVID. 606(b) (precluding inquiry into juror mental processes); *see also* People v. Molineux, 61 N.E. 286, 293–94 (N.Y. 1901).

62. *See* FED. R. EVID. 403.

in their view.[63] The evidence may also be overvalued by jurors, giving it more probative weight than it deserves.[64] As a practical matter, it is arguably unfair to require defendants to not only defend against the charges at hand, but also be prepared to answer for other alleged misdeeds—ones they are not on trial for, may not ever be charged with, but yet have to explain to jurors.[65] After all, people are capable of growth and change, and deserve to be given the benefit of the doubt—at least under the law.[66]

When their prior acts are introduced, defendants implicitly receive the message that they will not get a fresh start—that even if they "served their time," they will always be judged by their past actions and will be doubted before believed.

Two defendants arrested in the same location could face different evidentiary outcomes that could, in turn, affect the verdict in their case. In drug prosecutions specifically, factors such as the amount of contraband possessed, whether the suspect was being investigated, or whether they crossed jurisdictional lines could influence whether they are prosecuted federally or in state court.[67] The state and federal courts in that location may have a different willingness to admit extrinsic act evidence.[68] While a myriad of factors affect the outcome of criminal trials, extrinsic act evidence could make a significant difference.

63. *See* Michelson v. United States, 335 U.S. 469, 476 (1948) ("[Character evidence can] weigh too much with the jury and . . . overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge."). *See also* Michael D. Cicchini & Lawrence T. White, *Convictions Based on Character: An Empirical Test of Other-Acts Evidence*, 70 FLA. L. REV. 347, 364–65 (2018) (discussing results of an empirical study on the impact of character evidence on jury decision-making).

64. Sevier, *supra* note 4, at 457.

65. In *State v. Cott*, the Iowa Supreme Court recognized that defendants are likely "unprepared to demonstrate that the attacking [extrinsic] evidence is fabricated . . . ." 283 N.W.2d 324, 330 (Iowa 1979) (citing 1 WIGMORE, *supra* note 9, § 194, at 650).

66. *See, e.g.*, Miller v. Alabama, 567 U.S. 460 (2012) (holding mandatory life sentences without parole for juveniles are unconstitutional).

67. *See Drug Laws and Drug Crimes*, NOLO, https://www.nolo.com/legal-encyclopedia/drug-laws-drug-crimes-32252.html [https://perma.cc/BMD2-SLGW].

68. *Compare* State v. Henderson, 696 N.W.2d 5, 12 (Iowa 2005) (finding prior possession of marijuana to have weak probative value because the need for the evidence was minimal and the value was outweighed by prejudice given the similarity in offenses), *with* United States v. Davis, 867 F.3d 1021, 1029–30 (8th Cir. 2017) (finding the district court did not err in admitting an eight-year-old possession charge to show the defendant's "knowledge of drugs" and "intent to commit drug offenses") (citation omitted).

B. *Prosecution Favorable Arguments*

1. *Relevance and Need*

The prevailing argument for the prosecution is that extrinsic act evidence is often relevant to a material issue in the case and should not be excluded merely because there is also a danger of misuse.[69] Additionally, prosecutors often have a special need for admitting the extrinsic act if they lack other available means of proving their charged offense. It is difficult to prove one's state of mind or intent, which leads to the need for circumstantial evidence.

Prosecutors often advance more than one purpose for extrinsic act evidence, but the most common one is to prove intent. For example, a prosecutor might argue that prior drug dealings are relevant to whether the defendant had the requisite intent to enter into an alleged drug distribution conspiracy.[70] Likewise, in *United States v. Salinas*, the prosecution argued the defendant's prior conviction for delivery of a controlled substance was relevant to his intent to possess controlled substances with intent to distribute.[71] But would jurors have to draw any conclusions about a defendant's character or result to a propensity rationale for these arguments to be plausible? The prosecution in *United States v. Aviles* argued the defendant's prior conviction for smuggling an undocumented immigrant into the United States was relevant to whether he possessed controlled substances with intent to distribute them because it would show "intent to traffic in illegal cargo in a broad sense."[72]

Another frequently advanced permissible purpose is motive. In *United States v. Cunningham*, the defendant was a registered nurse who allegedly tampered with syringes containing the drug Demerol.[73] There were only five nurses with access to the syringes during the time they were tampered with.[74] The prosecution introduced evidence that the defendant previously had her nursing license suspended for falsifying drug test results, and evidence of her

69. *See, e.g.*, United States v. Johnson, 439 F.3d 947, 952 (8th Cir. 2006) (holding that admitting prior convictions was not an abuse of discretion because such evidence was relevant).

70. *See* United States v. Valerio, 731 F. App'x 551, 553 (8th Cir. 2018).

71. No. 3:16-CR-201-L, 2017 WL 1494506, at *1 (N.D. Tex. Apr. 25, 2017).

72. No. 16-00132-01, 2017 WL 3381371, at *2–3 (W.D. La. Aug. 3, 2017).

73. 103 F.3d 553, 555 (7th Cir. 1996).

74. *Id.*

addiction to Demerol.[75] The court found this evidence was relevant to her motive for tampering with the syringes—to consume the drug herself.[76]

Knowledge is also a proper purpose for admitting extrinsic act evidence. In *United States v. Ramirez*, the defendant claimed he had no knowledge that the package he procured from the post office, which was addressed to him, contained cocaine.[77] To rebut this claim, the prosecution sought to admit evidence that subsequent to this incident, he participated in an attempt to sell cocaine.[78] The district court admitted evidence of the subsequent act, finding it was relevant to his state of mind at the time he was arrested for the earlier charged offense.[79] In *Huddleston*, the prosecutor sought to prove the defendant's knowledge that goods were stolen with evidence that he knew previous goods from the same supplier were stolen.[80] These are merely a few examples of prosecutorial arguments advancing a relevant non-character purpose for admitting extrinsic acts in drug cases.

2. *Defendants Have Pre-Trial Strategies That May Protect Their Interests*

Defendants have the opportunity to attack the relevance of the proposed evidence in order to exclude it, given only relevant evidence is admissible.[81] This would involve arguing either: (1) the extrinsic act does not establish the supposed non-character purpose, or (2) what the evidence is purportedly aimed at proving is not in dispute in the case, and therefore not needed.[82] The former argument typically hinges on the similarity between the extrinsic act and the alleged crime charged. The greater the similarity between the two offenses, the more likely the extrinsic act is relevant and admissible.[83] As to the latter argument, some jurisdictions permit the

75. *Id.* at 556.
76. *Id.* at 557.
77. 894 F.2d 565, 566–67 (2d Cir. 1990).
78. *Id.* at 567.
79. *Id.*
80. 485 U.S. 681, 683–84 (1988).
81. *See* FED. R. EVID. 402.
82. *See* FED. R. EVID. 401. "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." *Id.*; *see also* Cicchini & White, *supra* note 63, at 365–66.
83. Cicchini & White, *supra* note 63, at 366.

government to use extrinsic act evidence even toward issues that are not contested.[84]

Defendants always have an argument grounded in unfair prejudice.[85] Without regard to the issues in a case, one could argue that any use of evidence of defendants' actions outside the alleged crime at hand is unfairly prejudicial, given that in our justice system, the accused is presumed innocent and need only answer for the crime charged. If evidence has little relevance or may be inflammatory, it is more likely to be prejudicial and the defense would have a better argument for exclusion.[86] Many courts simply issue a cautionary or limiting instruction to the jury, finding a proper instruction renders unfair prejudice "presumptively erased from the jury's collective mind."[87] In such a case, defense counsel should locate case law in that jurisdiction where a limiting instruction was found to be inadequate on appeal. For example, the Fifth Circuit analogized improper statements given to the jury followed by a limiting instruction with throwing a skunk into a jury box and telling jurors to ignore the smell.[88] Cautionary instructions for extrinsic acts evidence arguably may be just as analogous. Jurors are instructed to consider the evidence for a limited purpose such as motive or plan, but propensity reasoning may be hard to ignore or avoid. Defense counsel can also locate studies showing ineffectiveness of this type of instruction.[89] As the Seventh Circuit suggested, a defendant may choose to

84. *Id.* at 365. *See, e.g.*, State v. Datwyler, No. A04-2255, 2006 WL 163418, at *2–3 (Minn. Ct. App. Jan. 24, 2006). The defendant conceded her plan and attempt to manufacture methamphetamine and only contested conspiracy. The government was still permitted to introduce her prior conviction for manufacturing methamphetamine to demonstrate her knowledge of the manufacturing process. *Id.*

85. *See* FED. R. EVID. 403. Each state has an analogous rule addressing exclusion of evidence based on prejudice. *See* Kenneth S. Klein, *Why Federal Rule of Evidence 403 Is Unconstitutional, and Why That Matters*, 47 U. RICH. L. REV. 1077, 1078 n.8 (2013).

86. *See* FED. R. EVID. 403.

87. Roehl v. State, 253 N.W.2d 210, 217 (Wis. 1977). *But see* State v. Henderson, 696 N.W.2d 5, 12 (Iowa 2005) ("While a limiting instruction can theoretically minimize the prejudice of evidence of prior acts, the effectiveness of such an instruction is greatly diminished where the prior act is the same crime at issue in the current prosecution and other evidence that would support a conviction is not overwhelming.").

88. Dunn v. United States, 307 F.2d 883, 886 (5th Cir. 1962).

89. *See, e.g.*, Cicchini & White, *supra* note 63, at 363. In this study, mock jurors who were presented extrinsic act evidence and given a cautionary instruction were nearly 50 percent more likely to convict the defendant and reported being more certain in their verdicts than mock jurors who experienced a stipulation as to identity of the defendant. *Id.*

forego requesting a limiting instruction for fear that it will create additional risk by highlighting the evidence.[90]

Defendants sometimes use the strategy of stipulation with the prosecution to avoid extrinsic acts being admitted. In some situations, defendants can stipulate to an element of a crime for which the extrinsic act is being offered to prove.[91] This could undermine an argument by the prosecution that the extrinsic act evidence is relevant to the issue in the case—if the defendant is not disputing the element, then it is not really at issue. Additionally, stipulation is less likely to be prejudicial than providing the jury with details of an additional crime or wrong.[92] However, only in limited cases are the judge and prosecution required to accept a defendant's stipulation.[93] In other cases, such as *State v. Veach*, a stipulation may be rejected so the defendant may not escape the "full evidentiary force of the case as the Government chooses to present it."[94] Additionally, the court in *Veach* recognized that a stipulation may be inadequate to "inform the jury of what is agreed to and what is in dispute, and to remove the issues from the case."[95]

If the trial court admits extrinsic act evidence over relevance and prejudice arguments or an offer of stipulation, the defendant should request a limiting instruction as a last resort.[96] As discussed,[97] these instructions are questionable and not the preferred method of protection.

90. United States v. Gomez, 763 F.3d 845, 860 (7th Cir. 2014).

91. *See, e.g.*, United States v. Banks, 884 F.3d 998, 1025 (10th Cir. 2018).

92. In *United States v. Banks*, the defendant stipulated to two prior drug convictions, which the prosecution wanted to use to show his knowledge. *Id.* Instead of exposing the jury to details of the prior drug offenses, the stipulation was read into the record, followed by a jury instruction. *Id.*

93. *See, e.g.*, Old Chief v. United States, 519 U.S. 174, 191–92 (1997) (holding that the stipulation as to the defendant's legal status as a felon had to be accepted by the prosecution). The Court recognized that prosecutors are typically entitled to prove their case in the way they choose because stipulations have multiple utility, may present a persuasive "colorful story," or satisfy juror expectations. *Id.* at 186–89.

94. 648 N.W.2d 447, 472 (Wis. 2002) (quoting *Old Chief*, 519 U.S. at 186–87).

95. *Id.* at 473.

96. In federal court, this would be granted pursuant to Rule 105 after a timely request. FED. R. EVID. 105.

97. *See supra* pp. 508–10.

IV. FEDERAL COURT APPLICATION OF RULE 404

Although all federal courts are to follow Rule 404(b) and are bound by the *Huddleston* decision, outcomes differ significantly when it comes to admissibility of extrinsic act evidence in drug cases.[98] Each circuit has come to their own interpretation, and some have developed more specific tests or frameworks. Consequently, there is arguably a split among the circuit courts as to how broadly to construe relevance and how deep courts should be in their preliminary analysis.[99]

A. *Broader Admission of Extrinsic Acts*

Circuit courts with a broader analytical approach to admission of extrinsic act evidence generally allow its admissibility so long as the prosecutor provides a plausible non-character purpose. Additionally, in broad approach circuits, extrinsic acts are more likely to be admitted that are dissimilar to the crime charged and that occurred further in the past. Generally, no deeper argument addressing the purpose of the evidence or the need for it is required. This treats Rule 404 as one of inclusion, presuming that since the prosecutor articulated a purpose, it is admissible unless proven otherwise.

The Eighth Circuit falls into the broader admission category.[100] It has articulated that it views Rule 404(b) as "a rule of inclusion, such that evidence offered for permissible purposes is presumed admissible absent a contrary determination."[101] In the Eighth Circuit, possession of a controlled substance in an amount consistent with personal use is deemed relevant to a later distribution charge.[102] The court has reasoned that evidence of one's personal drug use gives rise to a potential motive for distributing drugs to

98. *See* FED. R. EVID. 404(b); Huddleston v. United States, 485 U.S. 681, 681 (1988).

99. *See infra* Parts IV.A, IV.B.

100. *See, e.g.*, United States v. Shelledy, 961 F.3d 1014, 1021–22 (8th Cir. 2020) (finding that evidence of gang affiliation and decades old drug possession charges were relevant to the charge of conspiracy to distribute); United States v. Rembert, 851 F.3d 836, 838–39 (8th Cir. 2017) (admitting a social media video of the defendant holding a gun, using foul language, and smoking marijuana at trial for possession of a firearm and cocaine).

101. United States v. Johnson, 439 F.3d 947, 952 (8th Cir. 2006) (citing United States v. Hill, 410 F.3d 468, 471 (8th Cir. 2005)).

102. *See, e.g.*, United States v. Powell, 39 F.3d 894, 896 (8th Cir. 1994); United States v. Williams, 340 F.3d 563, 569–70 (8th Cir. 2003).

finance their drug use.[103] In *United States v. Logan*, the defendant was charged with conspiracy to distribute and possession with the intent to distribute heroin and methamphetamine.[104] He possessed more than one kilogram of each drug—an amount clearly intended for distribution.[105] At trial, the prosecutor sought to admit evidence that at a traffic stop more than five years prior the defendant was arrested for possession of approximately one-fourth gram of methamphetamine.[106] The defendant argued this evidence was not relevant to the crime charged, as it was consistent with personal use, not distribution.[107] The court rejected this argument, finding "evidence of prior possession of drugs, even in an amount consistent only with personal use, is admissible to show such things as knowledge and intent of a defendant charged with a crime in which intent to distribute is an element."[108] The court stated this would be admissible even if the defendant had not asserted lack of knowledge or lack of intent as a defense.[109]

The Eleventh Circuit found that when a defendant pleads not guilty to a drug conspiracy crime, intent automatically becomes a material issue, opening the door for any prior drug-related offense to be admitted.[110] Further, the court stated prior offenses in such a situation would automatically be "highly probative, and not overly prejudicial, evidence of a defendant's intent" even when the offense occurred several years prior.[111] As an example, the Eleventh Circuit affirmed admission of a 15-year-old sale of a small amount of marijuana, finding it relevant to show motive and intent in a large cocaine deal.[112]

Similarly, the Tenth Circuit has articulated that "[s]imilarity of prior acts to the charged offense may outweigh concerns of remoteness in time."[113]

103. United States v. Templeman, 965 F.2d 617, 619 (8th Cir. 1992), *cert. denied*, 506 U.S. 980 (1992).

104. 121 F.3d 1172, 1173 (8th Cir. 1997).

105. *Id.* For context, one kilogram is equivalent to 2.2 pounds, and the defendant possessed more than one kilogram of both drugs, so the defendant possessed nearly 5 pounds of scheduled drugs. *See Drug Scheduling*, U.S. DRUG ENF'T ADMIN., https://www.dea.gov/drug-scheduling [https://perma.cc/LJ8A-6THT].

106. *Logan*, 121 F.3d at 1177.

107. *Id.* at 1178.

108. *Id.*

109. *Id.*

110. United States v. Smith, 741 F.3d 1211, 1225 (11th Cir. 2013).

111. *Id.* (quoting United States v. Calderon, 127 F.3d 1314, 1332 (11th Cir. 1997)).

112. United States v. Lampley, 68 F.3d 1296, 1299–1300 (11th Cir. 1995).

113. United States v. Watson, 766 F.3d 1219, 1239 (10th Cir. 2014) (quoting United States v. Meacham, 115 F.3d 1488, 1495 (10th Cir. 1997)).

Under this reasoning, it affirmed admission of testimony about a defendant's prior field cultivation of marijuana 17 years prior to show knowledge and intent to manufacture marijuana in a trailer for distribution.[114] Remoteness in time may also be less of a concern where the defendant was incarcerated for some amount of time between the two incidences of conduct.[115] The Tenth Circuit has also allowed the prosecution to admit uncharged conduct that occurred *after* the charged offense, if it is sufficiently similar to show motive, intent, or knowledge.[116]

B. *Narrower Admission of Extrinsic Acts*

Circuit courts that have a narrower admission of extrinsic act evidence generally look beyond prosecutors' claimed purposes and examine the reasoning supporting the purpose's plausibility. Additionally, these courts tend to give more credence to defendants' arguments of remoteness, lack of relevancy, and unfair prejudice.

In 2014, the Seventh Circuit abandoned their prior four-part test (similar to the *Huddleston* analysis),[117] and replaced it with a clearer analysis grounded in the Federal Rules of Evidence.[118] In the court's view: "Especially in drug cases . . . other-act evidence is too often admitted almost automatically, without consideration of the 'legitimacy of the purpose for which the evidence is to be used and the need for it.'"[119] The Seventh Circuit's new approach first looks at relevancy, which includes Rules 401, 402, and 104.[120] In the court's view, the relevancy analysis for extrinsic acts should vary depending on the purpose for which the evidence is being used,

114. *Id.* at 1235–37.

115. *See* United States v. Cherry, 433 F.3d 698, 702 n.4 (10th Cir. 2005); United States v. Adams, 401 F.3d 886, 894 (10th Cir. 2005).

116. *See* United States v. Mares, 441 F.3d 1152, 1156–59 (10th Cir. 2006); United States v. Olivio, 80 F.3d 1466, 1469 (10th Cir. 1996). In *Olivio*, the court determined the extrinsic act that occurred more than one year after the charged act was relevant to show knowledge and intent for the earlier crime, given they both involved transportation of controlled substances in a similar way. *Id.*

117. *See* Huddleston v. United States, 485 U.S. 681, 689–90 (1988).

118. United States v. Gomez, 763 F.3d 845, 850 (7th Cir. 2014).

119. *Id.* at 853 (quoting United States v. Miller, 673 F.3d 688, 692 (7th Cir. 2012) (citing United States v. Jones, 455 F.3d 800, 812 (7th Cir. 2006) (Easterbrook, J., concurring)) ("Allowing a prosecutor routinely to introduce drug convictions in the case in chief without demonstrating relevance to some concrete dispute between the litigants creates needless risk that a conviction will rest on the forbidden propensity inference.").

120. *Id.* at 853–54; FED. R. EVID. 401; FED. R. EVID. 402; FED. R. EVID. 104.

instead of using similarity and timing as checkboxes for any admissibility.[121] It stated: "The proponent of the other-act evidence should address its relevance directly, without the straightjacket of an artificial checklist."[122] Once it is determined the evidence is relevant, the next step in the courts' analysis is to examine the non-character purpose asserted by the prosecution and the logic that accompanies it.[123]

Rule 404(b) is ultimately concerned with the chain of reasoning that supports the non-character purpose.[124] Therefore, in addition to whether the act is relevant to a non-character purpose, a court should examine *how* the evidence is relevant, and whether the chain of reasoning the trier of fact would have to employ is propensity free.[125] The third step in the analysis involves Rule 403 balancing of probative value and prejudicial effect.[126] The Seventh Circuit rule is that when a defendant is charged with a general intent crime (such as drug distribution) or the defendant does not meaningfully dispute intent, the probative value of other-act evidence will always be substantially outweighed by the risk of prejudice and therefore excluded.[127] In contrast, when the charge is a specific intent crime (such as conspiracy)[128] or the defendant makes intent an issue, other-act evidence *may* be admissible, if it passes the admissibility analysis.[129] Additionally, a court should look to the extent that the non-propensity issue is truly contested to determine its probative value.[130]

In applying the new analysis, the court in *United States v. Gomez* determined that the proffered evidence was only relevant through a propensity inference, and therefore it should have been excluded.[131] Law enforcement recorded phone calls of a drug distributor under the alias "Guero" and traced the number to the defendant's residence, where he lived

121. *Gomez*, 763 F.3d at 855.

122. *Id.*

123. *Id.* at 855–56.

124. FED. R. EVID. 404.

125. *Gomez,* 763 F.3d at 856–57. The chain of reasoning should not involve any inference that the defendant possesses a certain character and acted in accordance with that character in commission of the alleged crime. *Id.* at 860.

126. *Id.* at 856–57.

127. *Id.* at 859.

128. *See* Johnson, *supra* note 16 and accompanying text.

129. *Gomez*, 763 F.3d at 859.

130. *Id.*

131. *Id.* at 863.

with a roommate.[132] The government sought to prove that the defendant, rather than his roommate, was Guero by introducing evidence that cocaine was found in the defendant's bedroom.[133] However, the court found this relied on propensity reasoning—because he possessed a small amount of cocaine at the time of arrest, he must have been a part of the cocaine distribution conspiracy.[134]

Although the Third Circuit recognizes Rule 404 as having an inclusionary approach that "reiterates the drafters' decision to not restrict the non-propensity uses of evidence," it finds that there is no presumption of admissibility, and the proponent of extrinsic act evidence must demonstrate that an exception applies.[135] The Third Circuit analysis is similar to the Seventh Circuit. First, the proponent of the evidence must identify a proper purpose for admission that is relevant to the case.[136] Next, the "crucial" step is to rationalize how the evidence is relevant to that purpose.[137] In the view of the court, this task is not just to find a hole in which the proof might logically fit, but to highlight the chain of inferences connecting the evidence to the purpose and demonstrate that no link involves propensity.[138] Instead of merely reciting the purposes outlined in 404(b)(2), the reasoning used in the particular case should be articulated in the record.[139] The final analytical step is 403 balancing. The Third Circuit advised district courts to use "great care" in this evaluation and recognized the grave risk and inherent prejudicial nature of other-act evidence.[140] Lastly, upon request, a limiting instruction should be provided at the time the evidence is admitted.[141]

V. STATE COURT APPLICATION

Most states have a statute or court rule addressing extrinsic act evidence that mirrors the federal rule. Iowa's character evidence rule provides, in part:

132. *Id.* at 850.
133. *Id.*
134. *Id.* at 863.
135. United States v. Caldwell, 760 F.3d 267, 276 (3d Cir. 2014).
136. *Id.*
137. *Id.*
138. *Id.* at 276–77.
139. *Id.*; United States v. Davis, 726 F.3d 434, 442 (3d Cir. 2013). For an example of a sufficient articulation of a non-propensity chain of inferences, see United States v. Bailey, 840 F.3d 99, 127–28 (3d Cir. 2016).
140. *Caldwell*, 760 F.3d at 277.
141. *Id.*

> (1) Prohibited Use. 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.
>
> (2) Permitted Uses. This evidence may be admissible for another purpose such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.[142]

Iowa originally viewed Rule 5.404 as a rule of exclusion, but strayed from that view in *State v. McDaniel*.[143] The court in *McDaniel* opined that when intent is an issue, "evidence of other illegal activities that tend to prove the defendants' general propensity to deliver illegal drugs is relevant and should be admitted."[144] This theory was controlling until *McDaniel* was overruled, and the Iowa Supreme Court returned its character rule and analysis to one of exclusion.[145] The court in *State v. Sullivan* recognized that the *McDaniel* reasoning is the "very thing that the proper application of the rule prohibits."[146] In *Sullivan*, the prosecution argued that the defendant's possession of crack cocaine three years prior was relevant to whether he intended to deliver marijuana.[147] The court found this was improperly based on character, reasoning that if he intended to deliver drugs in a prior incident, he probably had the same intent for this alleged offense.[148]

The current test for admissibility of extrinsic act evidence in Iowa was articulated in *State v. Putman*.[149] Before *Putman*, there was confusion about whether sufficiency of proof as to whether the defendant committed the prior act was a factor or an independent prong to be satisfied for admissibility.[150] The Iowa Supreme Court clarified that Rule 5.404 requires a three-step analysis.[151] First, the evidence must be relevant to a legitimate,

142. IOWA CT. R. 5.404.

143. 512 N.W.2d 305 (Iowa 1994), *overruled by* State v. Sullivan, 679 N.W.2d 19 (Iowa 2004).

144. *Id.* at 308.

145. *See Sullivan*, 679 N.W.2d at 28 ("[T]he better rule is that unless the prosecutor can articulate a valid, noncharacter theory of admissibility for admission of the bad-acts evidence, such evidence should not be admitted.").

146. *See id. But see* State v. Putman, 848 N.W.2d 1, 16–20 (Iowa 2014) (Wiggins, J., dissenting) (arguing the court was applying Rule 5.404 as one of inclusion).

147. *Sullivan*, 679 N.W.2d at 29.

148. *Id.*

149. *Putman*, 848 N.W.2d at 1. Although *Putman* was not a drug prosecution, its holding has been extended to all 5.404(b) decisions.

150. *See id.* at 8 n.2.

151. *Id.* at 8.

disputed issue.[152] Second, there "must be clear proof the individual against whom the evidence is offered committed the bad act or crime."[153] Finally, if the first two prongs are met, the court must determine whether the probative value of the evidence is substantially outweighed by the risk of unfair prejudice.[154]

Although the *Putman* decision was intended to clarify the standard of admissibility, practitioners may still argue that clear proof is an ambiguous standard. It requires less than beyond a reasonable doubt, but more than speculation.[155] Further, while clear proof was confirmed to be an independent requirement in the analysis, the court also articulated that one of the factors to consider in weighing probative value and risk of prejudice is whether there was "clear proof the defendant committed the prior bad acts."[156] However, this step is only to be addressed if clear proof has been satisfied.[157] Additionally, the court did not address whether the requisite proof of the extrinsic act is conditional relevance or a preliminary question of admissibility.

The state of Wisconsin follows a three-pronged test for admissibility of extrinsic act evidence pursuant to its character ban statute: (1) it must be offered for an acceptable purpose, (2) it must be relevant, and (3) its probative value must substantially outweigh its prejudicial effect.[158] This test was applied in *State v. Sanchez*, where the defendant was charged with delivery of cocaine after making a sale to an informant at his apartment.[159] Soon after the sale, he moved in with his girlfriend.[160] At trial, the prosecution offered evidence of surveillance cameras, an alarm system, handguns, ammunition, and marijuana that were recovered during a search of his girlfriend's home two months after the sale occurred.[161] The court held that the items were inadmissible for the purpose of showing his intent or "completing the story," because they tended to prove that he acted in

152. *Id.* at 9.

153. *Id.* (quoting *Sullivan*, 679 N.W.2d at 25).

154. *Id. See also* IOWA CT. R. 5.404.

155. *See Putman*, 848 N.W.2d at 9 (citing State v. Taylor, 689 N.W.2d 116, 130 (Iowa 2004)).

156. *Id.* (quoting *Taylor*, 689 N.W.2d at 124).

157. *Id.*

158. State v. Sullivan, 576 N.W.2d 30, 32–33 (Wis. 1998); WIS. STAT. § 904.04 (2019).

159. No. 00-2648-CR, 2001 WL 433375, at *1 (Wis. Ct. App. Apr. 24, 2001).

160. *Id.*

161. *Id.*

conformity with his character.[162] The court explained further that even if there was a permissible purpose for the evidence, its probative value would be substantially outweighed by the risk that the jury would convict him for believing he was a bad man deserving of punishment for association with a drug ring.[163]

Michigan utilizes a deeper analysis like that of the Seventh and Third Circuits. A perfunctory recitation of a permissible purpose without explanation is insufficient under its character statute.[164] The Michigan Court of Appeals has opined courts must "vigilantly weed out character evidence that is disguised as something else,"[165] and "closely scrutinize the logical relevance of the evidence."[166] Under this view, the court has concluded that evidence of prior drug-related activity may be excluded when offered to show the defendant possessed or intended to distribute drugs.[167]

In contrast, Georgia has followed the Eleventh Circuit approach for guidance. The Court of Appeals of the State of Georgia concluded, "Evidence of prior drug activity is highly probative of intent to sell a controlled substance," and it is "immaterial that the type of drug in the other act evidence is different from the drug at issue."[168] Further, where evidence is found to be relevant to a permissible purpose, defendants in Georgia are not likely to have it excluded under a theory of prejudicial effect, given that Georgia views its Rule 403 equivalent[169] as an "extraordinary remedy which should be used only sparingly" to exclude evidence.[170] These states demonstrate how courts have rationalized application of their character evidence rule. They also represent drastically different outcomes defendants face across the United States.

162. *Id.* at *3.

163. *Id.* at *4–5.

164. People v. Felton, 928 N.W.2d 307, 315 (Mich. Ct. App. 2018) (citing People v. Denson, 902 N.W.2d 306, 316 (Mich. 2017)); MICH. R. EVID. 404.

165. *Felton*, 928 N.W.2d at 315.

166. *Id.* at 316.

167. *See id.* The court concluded that the only purpose for the prosecution offering evidence of prior drug sales was for the jury to conclude that he was a drug dealer, and therefore, he likely would be in possession of drugs—even though the drugs were found in the driver's underwear of the vehicle in which the defendant was a passenger. *Id.* at 317–18.

168. Moton v. State, 833 S.E.2d 171, 174 (Ga. Ct. App. 2019) (citations omitted).

169. *See* GA. CODE ANN. § 24-4-403 (2020).

170. Kirby v. State, 819 S.E.2d 468, 476–77 (Ga. 2018) (quoting Hood v. State, 786 S.E.2d 648, 655 (Ga. 2016)).

VI. CONCLUSION

The character evidence ban is deeply rooted in our history and arguably one of the most important and unique aspects of our justice system. Courts have significantly progressed in developing an analysis that both protects defendants and recognizes the relevant and probative aspects of some forms of extrinsic act evidence. However, courts and practitioners may be losing sight of the original justification for the ban on character evidence: to protect defendants from being convicted on account of juror misuse and not by guilt beyond a reasonable doubt for the crime charged.

It is easy for those proffering such evidence to overstate the idea of its utility and the arguments available.[171] Even where courts have a strong character evidence rule and direct that non-propensity purposes be clearly and specifically articulated,[172] such directive often "resonates about as loudly as the proverbial tree that no one heard fall in the forest."[173]

Many areas surrounding this issue are deserving of thought and clarification. Should the character evidence rule be one of inclusion or exclusion? The first sentence in Rule 404(a) and 404(b) seems to establish a general prohibition, with exceptions to follow.[174] The Advisory Committee intended that "[n]o mechanical solution" be offered for admissibility.[175] Is treating the proper purposes as checklist items consistent with this idea? Should prosecutors seek to admit character evidence where they already have overwhelming evidence at their disposal? In such a situation, there would be less of a need for the evidence, and it would have diminished probative value. Are empirical studies needed to make an informed decision on admissibility and specifically, risk of prejudice?

When faced with the possibility of admitting extrinsic act evidence that may bear on defendants' character, prosecutors should be able to articulate

171. *See, e.g.*, State v. Collins, 799 N.W.2d 693, 708 (Neb. 2011) (determining on review that only three out of seven of the prosecution's purported non-character purposes were legitimate).

172. *See* FED. R. EVID. 404(b) advisory committee's note to 2020 amendment. This amendment clarified that notice is required of both the evidence intended to be offered *and* the basis for concluding that evidence is relevant in light of the purpose. The advisory committee's clarification was in response to "some courts [permitting] the government to satisfy the notice obligation without describing the specific act that the evidence would tend to prove, and without explaining the relevance of the evidence for a non-propensity purpose." *Id.*

173. United States v. Givan, 320 F.3d 452, 466 (3d Cir. 2003) (McKee, J., concurring).

174. FED. R. EVID. 404.

175. FED. R. EVID. 404(b) advisory committee's note to the 1972 original rule.

the specific purpose and relevancy given the facts at hand and be prepared to recite it on the record. Courts met with such evidence should examine the reasoning or chain of inferences in which the evidence would be used and ensure that it is propensity free. Finally, courts and practitioners should not lose sight of the fact that *any* character evidence outside the charged conduct is inherently prejudicial.

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