United States v. Clay: What Standard Should Be Applied When Reviewing Rule 404(b) Proper Purpose Determinations?

Introduction

Whether evidence of a person's character has been offered for the purpose of proving or disproving a relevant issue in a case, and not to prove that the person acted in conformity with that character on a particular occasion, has been a subject of consideration by federal courts in an ever-growing number of cases. Rule 404(b) of the Federal Rules of Evidence provides in part:

> 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.
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> . . . 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.[1]

Upon amending the Federal Rules of Evidence in 1991, the Advisory Committee aptly noted, "Rule 404(b) has emerged as one of the most cited Rules in the Rules of Evidence."[2] As federal district courts are faced with daily determinations on the admissibility of evidence offered under Rule 404(b), circuit courts continue to struggle with the review of a district court's determination that evidence of a person's character is admissible for a proper purpose under Rule 404(b). This Comment specifically examines the standards that circuit courts have applied in reviewing such determinations, noting the current split and examining which standard should be applied among the circuits. Part I of this Comment explores the context and use of Rule 404(b), Part II explores the different standards circuit courts have applied in reviewing 404(b)

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[1] FED. R. EVID. 404(b)(1), (2).

[2] FED. R. EVID. 404 advisory committee's note.

determinations, and finally, Part III offers a proposition as to which standard may be most appropriate for circuit courts to apply in reviewing a district court's determination that evidence offered under Rule 404(b) has been offered for a proper purpose.

I. Federal Rule of Evidence 404(b)

"Article IV of the [Federal] Rules of Evidence deals with the relevancy of evidence" offered at trial.[3] "Rules 401 and 402 establish the broad principle that relevant evidence—evidence that makes the existence of any fact at issue more or less probable—is admissible unless the Rules provide otherwise."[4] However, Rule 403 provides that a "court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury," and others.[5] Rule 404 governs the conditions for admission of character or propensity evidence when substantively offered to establish an act that conforms to that character or propensity.[6]

Rule 404(a) prohibits "[e]vidence of a person's character or character trait [from being admitted] to prove that on a particular occasion the person acted in accordance with the character or trait,"[7] and Rule 404(b) "generally prohibits the introduction of evidence of extrinsic acts that might adversely reflect on the actor's character."[8] Rule 404 embodies the belief "that juries will tend to give [the evidence] excess weight, and on a fundamental sense that no one should be convicted of a crime based on his or her previous misdeeds."[9] However, if that evidence is not used merely to show propensity and bears upon a relevant issue in the case,

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[3] Huddleston v. United States, 485 U.S. 681, 687 (1988).

[4] *Id.*; *see also* FED. R. EVID. 401, 402.

[5] FED. R. EVID. 403.

[6] FED. R. EVID. 404. Rule 404(a) provides that character evidence may not be used to show action in conformity with such character. FED. R. EVID. 404(a).

[7] FED. R. EVID. 404(a)(1).

[8] *Huddleston*, 485 U.S. at 685.

[9] United States v. Daniels, 770 F.2d 1111, 1116 (D.C. Cir. 1985).

it may be admissible subject to the considerations set forth in Rule 403—that is, "prejudice, confusion or waste of time."[10]

One commentator has referred to the case of *Huddleston v. United States*[11] as "[t]he seminal U.S. Supreme Court opinion addressing 404(b) evidence."[12] In *Huddleston*, the defendant was convicted of possessing and selling stolen videocassette tapes, allegedly having known that the tapes were stolen.[13] To prove that the defendant had knowledge of the tapes' stolen nature, evidence was introduced and admitted under 404(b) that the defendant had previously offered to sell large amounts of stolen electronic equipment to a store manager who testified at trial.[14] On appeal, the Sixth Circuit initially reversed the conviction, concluding that the district court erred in admitting the evidence.[15] On rehearing en banc, however, the Sixth Circuit affirmed the conviction in light of the decision in *United States v. Ebens*[16] where a different panel held that "[c]ourts may admit evidence of prior bad acts if the proof shows by a preponderance of the evidence that the defendant did in fact commit the act."[17] The Supreme Court granted certiorari to resolve the circuit split "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" and "conclude[d] that such evidence should be admitted if there is *sufficient evidence* to support a finding by the jury that the defendant committed the similar act."[18]

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[10] *Huddleston*, 485 U.S. at 688 (quoting S. Rep. No. 1277 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7051); FED. R. EVID. 403, 404(b).

[11] 485 U.S. 681 (1988).

[12] *See* Jessica Broderick, Comment & Casenote, *Reverse 404(b) Evidence: Exploring Standards When Defendants Want to Introduce Other Bad Acts of Third Parties*, 79 U. COLO. L. REV. 587, 591 (2008).

[13] *Huddleston*, 485 U.S. at 682-84.

[14] *Id.* at 682-83.

[15] United States v. Huddleston, 802 F.2d 874, 875 (6th Cir. 1986).

[16] United States v. Huddleston, 811 F.2d 974, 975 (6th Cir. 1987) (per curiam) (citing United States v. Ebens, 800 F.2d 1422 (6th Cir. 1986)), *aff'd*, 485 U.S. 681 (1988).

[17] *Ebens*, 800 F.2d at 1432 (citing United States v. Leonard, 524 F.2d 1076, 1090-91 (2d Cir. 1975)).

[18] *Huddleston*, 485 U.S. at 685 (emphasis added).

Importantly, the *Huddleston* Court examined the use of Rule 404(b) in the context of and in conjunction with Rule 104.[19] At the time *Huddleston* was decided, "Rule 104(a) provide[d] that '[p]reliminary questions concerning . . . the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b).'"[20] Rule 104(b) requires that, "'[w]hen the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.'"[21] The Court denied the defendant's argument that the trial court must make the preliminary finding by at least a preponderance of the evidence that a defendant has committed a similar act offered under 404(b)—concluding that such a reading of the rule would "superimpose[] a level of judicial oversight that is nowhere apparent from the language of [the rule]."[22] The Court further stated, "[S]imilar act evidence [offered under 404(b)] is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor," thus implicating Rule 104(b).[23]

Additionally, the *Huddleston* Court noted four sources of protection against unfair prejudice arising from the introduction of 404(b) evidence—a concern raised by the defendant and shared by the Court.[24] The four sources are as follows:

> 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 [Rule] 105, which provides that the trial court shall, upon

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[19] *Id.* at 686-87.

[20] *Id.* at 687 (second alteration in original) (citing FED. R. EVID. 104(a)). Since *Huddleston* was decided, "[t]he language of Rule 404 has been amended as part of a restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules" without altering the Rules' substance. *See, e.g.*, FED. R. EVID. 104 advisory committee's note.

[21] *Huddleston*, 485 U.S. at 690 (quoting FED. R. EVID. 104(b)).

[22] *Id.* at 686-88 (footnotes omitted) (citations omitted).

[23] *Id.* at 689 (citing United States v. Beechum, 582 F.2d 898 (5th Cir. 1978)).

[24] *Id.* at 691.

request, instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted.[25]

II. *United States v. Clay* and Circuit Court Standards of Review of 404(b) Evidence

Just as district courts have struggled generally with 404(b) determinations, circuit courts have also struggled with what standards to apply when reviewing those determinations on appeal.[26] Because a circuit court's selection of which standard of review to apply when reviewing a trial court's 404(b) determination is integral to an appellant's likelihood of success,[27] a brief examination of the range of standards typically employed by circuit courts is necessary.

A. Common Appellate Standards of Review

"Standards of review" refer to the differing levels of strictness and intensity with which an appellate court will scrutinize specific actions taken and determinations made by a lower court.[28] The four standards most commonly applied are (1) abuse of discretion, (2) clear error, (3) substantial evidence, and (4) de novo.[29] Because these four phrases "have no intrinsic meaning,"[30] they are typically plotted on an "imaginary spectrum" of deference shown to the lower court, with de novo being the

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[25] *Id*. at 691-92 (footnote omitted) (citations omitted).

[26] *See* United States v. Mares, 441 F.3d 1152, 1156 (10th Cir. 2006); United States v. Bakke, 942 F.2d 977, 981 (6th Cir. 1991); United States v. Murphy, 935 F.2d 899, 901 (7th Cir. 1991).

[27] *See* Robert Anderson IV, *Law, Fact, and Discretion in the Federal Courts: An Empirical Study*, 2012 UTAH L. REV. 1, 1 ("[S]tandards of review are key determinants —perhaps the key determinant—in the success of an appeal.").

[28] *See generally* Kevin Casey et al., *Standards of Appellate Review in the Federal Circuit: Substance and Semantics*, 11 FED. CIR. B.J. 279, 279 (2002) ("'Standards of review' denote the strictness or intensity with which an appellate court evaluates the action of a trial tribunal including, for the United States Court of Appeals for the Federal Circuit, a district court judge, a jury, or an agency.").

[29] *Id.* at 287.

[30] *Id.* at 284.

least deferential standard, abuse of discretion being the most deferential, and clear error and substantial evidence usually falling somewhere in the middle.[31]

De novo[32] review is generally reserved for the review of legal issues.[33] When a court undertakes a de novo review of a trial court's rulings, "its authority concerning the case is identical to that of the court whose ruling is under scrutiny; it generally gives little or no deference to the trial judge."[34] Therefore, de novo review essentially gives an appellate court the authority to reach a conclusion on the record different from that reached by the court below.

Factual findings of a lower court are often reviewed under the clearly erroneous standard.[35] In fact, the Federal Rules of Civil Procedure specifically provide that factual findings are reviewed under this standard.[36] In *United States v. U.S. Gypsum Co.*,[37] the United States Supreme Court concluded that "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."[38]

Similarly, the substantial evidence standard is often used to examine factual determinations.[39] Under this standard, when substantial evidence in the record supports the trial court's factual determination, the review-

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[31] Amanda Peters, *The Meaning, Measure, and Misuse of Standards of Review*, 13 LEWIS & CLARK L. REV. 233, 243 (2009).

[32] The Latin phrase "de novo" means "anew" or "from the beginning." BLACK'S LAW DICTIONARY 435 (6th ed. 1990).

[33] *See, e.g.*, Ornelas v. United States, 517 U.S. 690, 691 (1996) (holding that "questions of reasonable suspicion and probable cause to make a warrantless search should be reviewed *de novo*"); Salve Regina College v. Russell, 499 U.S. 225, 231 (1991) ("We conclude that a court of appeals should review *de novo* a district court's determination of state law.").

[34] Richard H. W. Maloy, *'Standards of Review'—Just a Tip of the Icicle*, 77 U. DET. MERCY L. REV. 603, 611 (2000).

[35] *See* First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 948 (1995).

[36] *See* FED. R. CIV. P. 52(a)(6) ("Findings of fact . . . must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.").

[37] 333 U.S. 364 (1948).

[38] *Gypsum*, 333 U.S. at 395.

[39] *See* Casey et al., *supra* note 28, at 307.

ing court has no authority to reverse the lower court.[40] The United States Supreme Court has described "[s]ubstantial evidence [as] more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[41]

Finally, the abuse of discretion standard is most often used to review procedural matters decided by the lower court.[42]

> When an appellate court reviews a decision for abuse of discretion, it will be predisposed to affirm the decision[, and] . . . will not disturb [a lower court's] choice [in deciding an issue] as long as the choice is within the predetermined range [of choice], and is not influenced by any mistake of law or erroneous findings of fact.[43]

As the First Circuit has explained, an abuse of discretion occurs "when a relevant factor deserving of significant weight is overlooked, or when an improper factor is accorded significant weight, or when the court considers the appropriate mix of factors, but commits a palpable error of judgment in calibrating the decisional scales."[44]

Typically, circuit courts review a district court's evidentiary rulings for an abuse of discretion.[45] However, there is currently a circuit split on the issue of what standard of review should be applied when reviewing a district court's determination of whether evidence offered under Rule 404(b) has been offered for a proper purpose.[46] To further complicate the issue, many district courts use a multi-step analysis in determining whether to admit Rule 404(b) evidence,[47] and therefore circuit courts will

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[40] *See* Barroza v. Navy Exch., 267 F. App'x 583, 584 (9th Cir. 2008).

[41] Consol. Edison Co. of N.Y. v. N.L.R.B, 305 U.S. 197, 217 (1938).

[42] *See, e.g.*, Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 172 (1988) (using abuse of discretion to review evidentiary rulings); Gulf Oil Co. v. Bernard, 452 U.S. 89, 103 (1981) (reviewing decisions to grant or deny a trial court motion for abuse of discretion).

[43] *See* Casey et al., *supra* note 28, at 309-10.

[44] United States v. Roberts, 978 F.2d 17, 21 (1st Cir. 1992) (citations omitted).

[45] Gen. Electric Co. v. Joiner, 522 U.S. 136, 141 (1997) ("All evidentiary decisions are reviewed under an abuse-of-discretion standard.").

[46] *See infra* subsection II.D.

[47] For example, the Sixth Circuit has provided a three-part test for a district court to apply when determining the admissibility of evidence under Rule 404(b):

also utilize a multi-step process in reviewing those determinations, often applying different standards of review at each stage of the process.[48]

B. The Majority's Review

In *United States v. Clay*,[49] the Sixth Circuit used a three-step process in reviewing two 404(b) determinations made by a district court.[50] Gary Clay was convicted of "carjacking . . . and brandishing a firearm during a crime of violence" after stealing a vehicle from an IRS worker in Chattanooga, Tennessee, using a semi-automatic handgun to threaten the victim.[51] At trial, the Government offered evidence, under Rule 404(b), of an assault committed by the defendant one year before the carjacking in order to show that Clay specifically intended to hurt or kill the carjacking victim.[52] Additionally, the Government offered evidence of the theft of a handgun found in the apartment where the defendant himself was found to show preparation and identity under Rule 404(b).[53]

> *First*, the district court must decide whether there is sufficient evidence that the other act in question actually occurred. *Second*, if so, the district court must decide whether the evidence of the other act is probative of a material issue other than character. *Third*, if the evidence is probative of a material issue other than character, the district court must decide whether the probative value of the evidence is substantially outweighed by its potential prejudicial effect.

United States v. Jenkins, 345 F.3d 928, 937 (6th Cir. 2003) (citing United States v. Haywood, 280 F.3d 715, 719-20 (6th Cir. 2002)); *see also* United States v. Estrada, 453 F.3d 1208, 1213 (9th Cir. 2006) (citing United States v. Verduzco, 373 F.3d 1022, 1027 (9th Cir. 2004)) (four-part test for the admission of 404(b) evidence).

[48] *See* United States v. Clay, 667 F.3d 689, 693 (6th Cir. 2012).

[49] 667 F.3d 689 (6th Cir. 2012).

[50] *Clay*, 667 F.3d at 693-96.

[51] *Id.* at 692-93.

[52] *Id.* at 695. Pursuant to the federal carjacking statute under which the defendant had been charged, the government was required "to prove that a defendant had the specific intent to cause serious bodily harm or death when he or she took the victim's car." *Id.* According to the victim of the prior assault, "[A] car driven by Clay pulled alongside her as she was walking to a bus stop and asked her if she wanted a ride. When she resisted, [Clay] got out of the car, grabbed her, and hit her in the face with a gun. The blow knocked her unconscious . . . ." *Id.* at 694.

[53] *Id.* at 692. The evidence was also offered under the *res gestae* exception. The Sixth Circuit found that "the trial court abused its discretion in admitting the evidence of the theft under the *res gestae* exception." *Id.* at 698.

Regarding the assault, the Sixth Circuit panel first "review[ed] for clear error the factual determination that [the prior assault] occurred."[54] Specifically, pursuant to *Huddleston v. United States*, the court reviewed "the district court's determination that there [was] 'sufficient evidence to support a finding by the jury that the defendant committed' the assault."[55] The prior assault was not disputed, so no further discussion on that issue was needed.[56]

Second, the court reviewed de novo the legal determination that evidence of the assault was admissible for a permissible 404(b) purpose.[57] Although "[o]ther circuits have found that prior acts may be admissible to show specific intent to cause serious bodily harm or death in a carjacking case in narrow circumstances,"[58] the court rejected the Government's argument "that the assault is admissible to prove specific intent because it shows that Clay could develop the intent to cause serious bodily harm to innocent strangers who resist his demands."[59] In rejecting the argument, the court reasoned that the evidence "perche[d] perilously close to proving specific intent by showing propensity, as it suggest[ed] that a person who engages in bad behavior toward another is likely to do so again."[60]

Third, although it was not necessary to proceed with the 404(b) analysis after concluding that the district court had not admitted the evidence of the assault for a proper purpose, "in order to firmly establish that error occurred," the court reviewed for abuse of discretion the determination that the probative value of the evidence was not substantially outweighed by "unfair prejudicial impact."[61] The court reasoned

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[54] *Id.* at 693.

[55] *Id.* at 694 (quoting Huddleston v. United States, 485 U.S. 681, 685 (1988)).

[56] *Id.*

[57] *Id.*

[58] *Id.* at 696 (citing United States v. Rodriguez-Berrios, 573 F.3d 55, 63-64 (1st Cir. 2009) (holding evidence about prior abuse and stalking of carjacking victim was admissible to show specific intent in carjacking offense); United States v. Basham, 561 F.3d 302, 328 (4th Cir. 2009) (holding threats of violence made during crime spree were admissible to show specific intent to kill or cause serious harm to victim of carjacking, which occurred during the spree)).

[59] *Id.*

[60] *Id.*

[61] *Clay*, 667 F.3d at 696.

that evidence of the assault "was of slim probative value," as other means of proof of specific intent had been offered.[62] On the other hand, the court found that "this evidence was extremely prejudicial," as "the evidence of the assault was so unrelated to the charged offense that it creates too much of a risk that the jury will generalize from prior examples of bad character"—with the end result being that the evidence "may lure the jury into making its determination of guilt or innocence on proof unrelated to the carjacking."[63]

Regarding the handgun theft, the Sixth Circuit applied the same three-part test.[64] First, the court found "the district court did not clearly err in finding that a jury could reasonably conclude that Clay stole the handgun," albeit based on "tenuous" evidence.[65] Second, although the Sixth Circuit had previously "allowed the admission of other acts evidence to show how the defendant obtained items used in the charged offense,"[66] the court concluded there was not enough evidence that would enable a jury to reach the conclusion that the handgun in question had been used in the carjacking, and thus the evidence was not properly admitted under 404(b) as evidence of preparation.[67] The court also found that evidence of the theft was not properly admitted under 404(b) as evidence of identity for the same reason: there was no evidence that the handgun involved in the theft was used in the carjacking.[68] Finally, the court found that evidence of the theft was of limited probative value for the same reason as the prior assault and was substantially outweighed by the prejudicial impact of the evidence.[69]

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[62] *Id.* at 696-97 (citing United States v. Haywood, 280 F.3d 715, 723 (6th Cir. 2002); United States v. Merriweather, 78 F.3d 1070, 1077 (6th Cir. 1996) ("One factor in balancing unfair prejudice against probative value under Rule 403 is the availability of other means of proof.")).

[63] *Id.* at 697.

[64] *Id.* at 698-701.

[65] *Id.* at 699. The evidence that linked Clay to the theft included surveillance video and photos from the crime scene and the fact that the gun had been found at the apartment where Clay had also been located. *Id.*

[66] *Id.* (citing United States v. Hembree, 312 F. App'x 720, 724 (6th Cir. 2008)).

[67] *Id.*

[68] *Id.* at 699-700.

[69] *Id.* at 700.

C. Judge Kethledge's Dissent in *United States v. Clay*

Not all members of the Sixth Circuit panel agreed with the standards of review applied by the *Clay* majority in its three-step Rule 404(b) analysis.[70] Judge Kethledge dissented from the majority's opinion, specifically disagreeing with the majority's de novo review of the district court's determination that evidence of Clay's prior crimes was admitted for proper purposes.[71] Judge Kethledge argued that de novo was the incorrect standard of review; rather, he believed the correct standard to apply was abuse of discretion—"the deferential [standard] that we apply to every other evidentiary ruling."[72] According to Judge Kethledge, the Supreme Court's directive in *General Electric Co. v. Joiner*[73] was "categorical": "'[A]buse of discretion is the proper standard of review of a district court's evidentiary rulings.'"[74]

Judge Kethledge also reasoned that an abuse of discretion standard would be more appropriate due to the district court's superior understanding of the issues and evidence at trial: "I think we are simply wrong to say that we know just as well as the district court whether certain evidence is admissible for a proper purpose in light of all the issues and evidence at trial."[75] Reviewing for an abuse of discretion, Judge Kethledge would have affirmed the district court's 404(b) determinations.[76]

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[70] *Id.* at 702-05 (Kethledge, J., dissenting).

[71] *Id.* at 703.

[72] *Clay*, 667 F.3d at 703 (citing United States v. Jenkins, 593 F.3d 480, 484 (6th Cir. 2010); United States v. Allen, 619 F.3d 518, 524 n.2 (6th Cir. 2010) (noting the Sixth Circuit "repudiated the three-tiered standard of review for Rule 404(b) determinations in light of *Gen. Elec. Co. v. Joiner*," 522 U.S. 136 (1997)); United States v. Haywood, 280 F.3d 715, 720 (6th Cir. 2002) (rejecting to review de novo whether 404(b) evidence was offered for a proper purpose, in favor of an abuse-of-discretion review)).

[73] 522 U.S. 136 (1997).

[74] *Clay*, 667 F.3d at 703 (Kethledge, J., dissenting) (quoting *Joiner*, 522 U.S. at 141).

[75] *Id.*

[76] *Id.*

The *Clay* majority based its decision to review de novo the question of whether the 404(b) evidence was admitted for a proper purpose on the reasoning that the 404(b) determination itself was a question of law[77] and that, in *United States v. McDaniel*,[78] "[the Sixth Circuit] [had] taken the position that 'in reviewing a trial court's evidentiary determinations, [the Sixth Circuit] reviews de novo the court's conclusions of law.'"[79] Furthermore, the majority noted, "The court in *McDaniel* confirmed that 'this standard is consistent with the Supreme Court's admonition in [*Joiner*] that [circuit courts] review evidentiary decisions for an abuse of discretion, because it is an abuse of discretion to make errors of law or clear errors of factual determination.'"[80] Thus, the disagreement between the *Clay* majority and Judge Kethledge stemmed from two contrasting interpretations of *Joiner*.[81]

D. The Circuit Split: De Novo Versus Abuse of Discretion

Judge Kethledge was not alone in his belief that an abuse of discretion review of a district court's 404(b) proper purpose determination is more appropriate than de novo review.[82] The First and Seventh Circuits have both rejected de novo review of a district court's determination that 404(b) evidence has been offered for a proper purpose in favor of the abuse of discretion standard.[83]

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[77] *Id.* at 694 (majority opinion) (citing United States v. Ayoub, 498 F.3d 532, 548 (6th Cir. 2007)).

[78] 522 U.S. 136 (1997).

[79] *Clay*, 667 F.3d at 694 (quoting *McDaniel*, 398 F.3d at 544).

[80] *Id*. (quoting *McDaniel*, 398 F.3d at 544).

[81] *Id.* ("The dissent grounds its position in a reading of *Joiner* that has not been adopted in this Circuit . . . .").

[82] *See, e.g.*, United States v. Hite, 364 F.3d 874, 881 n.10 (7th Cir. 2004), *vacated on other grounds*, 543 U.S. 1103 (2005) (rejecting de novo review of 404(b) evidence and applying the abuse of discretion standard); United States v. Gilbert, 229 F.3d 15, 20-21 (1st Cir. 2000) (rejecting de novo review of 404(b) evidence and applying the abuse of discretion standard).

[83] *See Hite*, 364 F.3d at 881 n.10; *Gilbert*, 229 F.3d at 20-21.

For example, the First Circuit in *United States v. Gilbert*[84] reviewed for an abuse of discretion a district court's 404(b) determinations.[85] The defendant, Kristen Gilbert, was employed as a nurse at the Veteran's Affairs Medical Center (VAMC) in Leeds, Massachusetts and was allegedly responsible for killing four patients by poisoning them intravenously with a drug called epinephrine.[86] The Government sought to introduce evidence that, during the same time period she was employed at the VAMC, Gilbert allegedly attempted to murder her husband by poisoning him with potassium by means of a method similar to the one allegedly used on the VAMC victims.[87] "In the government's view, the evidence of Gilbert's attempted murder of her husband [was] probative on the issues of identity, intent, knowledge, and opportunity."[88] However, the evidence was excluded in limine, following the lower court's finding that the evidence had no "'special relevance' independent of its tendency simply to show criminal propensity"[89] and that the evidence's "presumed probative value [was] substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."[90] On appeal, the First Circuit reviewed the lower court's application of Rule 404(b) to the proffered evidence for an abuse of discretion, basing its decision to do so on the fact that it could "discern no basis for concluding that the district court misapprehended the scope of [Rule 404(b)]."[91] Under this abuse of discretion standard, the court affirmed the exclusion of the evidence, finding that since the "evidence [was] only marginally reliable,

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[84] 229 F.3d 15 (1st Cir. 2000).

[85] *Gilbert*, 229 F.3d at 20-21. The First Circuit reviewed the lower court's decision to exclude three separate pieces of evidence offered under 404(b). *Id*. at 19. For the purposes of this Comment, only the first piece of evidence is discussed.

[86] *Id*. at 18. "According to the government, Gilbert . . . [would] inject the patient with a fatal dose of epinephrine under the pretense of flushing his intravenous line with a saline solution . . . ." *Id.*

[87] *Id*. at 19. At the time of the appeal, no jurisdiction had indicted Gilbert for the attempted murder of her husband. *Id.*

[88] *Id*. at 20.

[89] *Id*. (quoting United States v. Trenkler, 61 F.3d 45, 52 (1st Cir. 1995)).

[90] *Id*.

[91] *Id*. at 20-21 (citing *cf.* Olsen v. Correiro, 189 F.3d 52, 58 (1st Cir. 1999)).

of marginal probative value, and so undeniably explosive, the court's decision to tread a cautious path was well within its wide discretion."[92]

On the other hand, the Third and Ninth Circuits have both applied de novo review to a district court's determination of proper purpose under Rule 404(b).[93] For example, in *United States v. Cruz*,[94] Luis Cruz was charged "with conspiracy to distribute and possession with intent to distribute more than 50 grams of cocaine base (crack cocaine)."[95] The Government sought to introduce evidence that Cruz was on parole at the time of the alleged conspiracy "because his parole status gave him an incentive to insulate himself from law enforcement scrutiny by using others . . . to engage in hand-to-hand street transactions so that he could reduce the risk of being charged with parole violation."[96] "[T]he court allowed the government to offer [the] evidence and use it in its closing argument in support of its theory that Cruz had a motive to insulate himself from direct contact with such things as customers."[97] On appeal, the Third Circuit reviewed de novo the district court's determination that the evidence had been offered for a proper evidentiary purpose under Rule 404(b) and found that "the government articulated the logical inferences that render[ed] Cruz's parole status relevant to establish[] Cruz's motive, intent and method of concealing his illegal drug activity in order to avoid the risk of parole revocation."[98]

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[92] *Id.* at 25.

[93] *See* United States v. Green, 617 F.3d 233, 239 (3d Cir. 2010) (exercising "plenary review 'of whether evidence falls within the scope of Rule 404(b)'" (quoting United States v. Cruz, 326 F.3d 392, 394 (3d Cir. 2003))); United States v. Akin, 213 F. App'x 606, 608 (9th Cir. 2006); *see also* United States v. Plumman, 409 F.3d 919, 928 (8th Cir. 2005) ("'We review de novo the district court's interpretation and application of [Rule 404(b)].'" (quoting United States v. Smith, 383 F.3d 700, 706 (8th Cir. 2004))).

[94] 326 F.3d 392 (3d Cir. 2003).

[95] *Cruz*, 326 F.3d at 393. Cruz was charged along with two co-defendants, one of whom was his father, Eladio Cruz. *Id.*

[96] *Id.* at 394.

[97] *Id.* (internal quotation marks omitted).

[98] *Id.* at 395. The Court noted the Ninth Circuit had previously found that "[a] defendant's parole status has been held to be probative of why a defendant would take extra steps to hide his criminal activity." *Id.*

Additionally, the Ninth Circuit in *United States v. Akin*[99] reviewed de novo a district court's decision to admit evidence under Rule 404(b) to determine whether the evidence was admitted for a proper purpose under the rule.[100] In that case, Aaron Akin was a felon convicted for possessing a firearm that a police officer found in the truck of the car Akin was driving.[101] At trial, the district court admitted drug paraphernalia found on the defendant's person as well as in the car, both of which the defendant admitted to either owning or knowing about, to show that the defendant had "dominion and control" over the items in the vehicle.[102] Reviewing the admission of the evidence de novo, the Ninth Circuit concluded, "Someone who admits to dominion and control over certain items in a car is more likely to have dominion and control over other items in a car, such as the gun at issue. Thus, the evidence [has] a legitimate purpose."[103]

III. Which Standard Should Courts Use?

Is one standard more appropriate than the other? It is no secret that different standards of appellate review can lead to completely contrasting appellate conclusions.[104] Whereas "[de novo review] is the standard that the appellant most desires,"[105] it is difficult for an appellant to obtain a reversal under an abuse of discretion review because, as noted above, the appellate court tends to respect the trial court's decision.[106] As the Ninth Circuit has stated,

> Restated and distilled to its essence, what is at stake in this choice between de novo and abuse of discretion review is a matter of the degree of disagree-

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[99] 213 F. App'x 606 (9th Cir. 2006).

[100] *Akin*, 213 F. App'x at 608. "The district court's ultimate decision to admit evidence pursuant to Rules 403 and 404(b) [was] reviewed for abuse of discretion." *Id.* at 608-09 (citing United States v. Holler, 411 F.3d 1061, 1067 (9th Cir. 2005)).

[101] *Id.* at 607.

[102] *Id.* at 609.

[103] *Id*.

[104] *See* Casey et al., *supra* note 28, at 280.

[105] *Id.* at 289.

[106] *Id.* at 309-10.

> ment with the trial court that is necessary to support reversal. Under de novo review, we may reverse if we *merely disagree* with the trial court; abuse of discretion requires that we *profoundly disagree* . . . .[107]

As evidenced by *United States v. Clay*—and on a larger scale, the split among the circuits—the choice between abuse of discretion and de novo review of whether evidence was admitted for a proper purpose under 404(b) hinges on the extent to which the question itself involves both legal and factual determinations.[108] Judge Kethledge advocated that the district court's familiarity with the facts of the case put it in a better position than the circuit court to determine whether 404(b) evidence was admitted for a legally proper purpose.[109] Judge Kethledge wrote that the *Clay* majority was "simply wrong to say that [it knew] just as well as the district court whether certain evidence is admissible for a proper purpose in light of all the issues and evidence at trial."[110] However, remembering that in making and reviewing 404(b) determinations, both district and circuit courts are prone to use a multi-step process—a process that

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[107] *In re* Henry Mayo Newhall Mem'l Hosp., 282 B.R. 444, 451 (B.A.P. 9th Cir. 2002).

[108] *See* Casey et al., *supra* note 28, at 316 ("Questions of law receive strict, non-deferential, *de novo* appellate review; questions of fact receive the more deferential . . . standards of review."). Appellate courts have also faced the difficult task of deciding specifically between applying de novo review or abuse of discretion review to questions not involving 404(b) determinations. For example, the Bankruptcy Panel of the Ninth Circuit concluded in *In re Henry Mayo Newhall Memorial Hospital* "that the question of [11 U.S.C.] § 1121(d) 'cause' is subject to de novo review as a mixed question of law and fact in which the historical facts are established, the rule of law is undisputed, and the issue is whether the facts satisfy the rule." 282 B.R. at 452 (citing Murray v. Bammer (*In re* Bammer), 131 F.3d 788, 792 (9th Cir. 1997) (en banc)).

[109] *See* United States v. Clay, 667 F.3d 689, 702-03 (6th Cir. 2012) (Kethledge, J., dissenting).

> Every trial presents its own field of maneuver, with issues rising up in different places on the terrain. Some issues reach commanding heights, others are just a gentle rise; some have evidence arrayed densely on each side, others have evidence more thin. Whatever the layout, the district court knows the ground better than we do. Its understanding comes from the front lines, whereas we are back in a head-quarters tent. And thus we defer a great deal to the district court's judgment as to whether a particular piece of evidence aligns with one issue, or another, or instead does not belong on the field at all.

Id.

[110] *Id*. at 703.

separates the determination of whether the facts underlying the offered 404(b) evidence actually occurred from the determination of whether the evidence was offered for a *legally* proper purpose. One may conclude that the de novo standard is more appropriate for the review of a district court's *legal* conclusion that 404(b) evidence has been offered for a proper purpose.

Conclusion

The differences among appellate standards of review may seem subtle and sometimes convoluted, but those differences can easily change the outcome of an appellate decision and have a lasting impact on the lives of the appellants. Thus, the importance of those standards in the context of Rule 404(b), as one of the most cited Rules of Evidence, cannot be stressed enough. The disagreement among the Sixth Circuit panel in *Clay* serves as evidence of the larger disagreement among the circuits as to which standard should be applied when reviewing a district court's determination that evidence offered under Rule 404(b) has been offered for a proper purpose. Until the Supreme Court provides guidance to the circuits on this issue, the disagreement is bound to persist.

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