PAST CRIMES AND PREJUDICE

STRATEGIES FOR SUCCESSFUL 404(b)/403 ARGUMENTS

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Rule 404. Character Evidence; Crimes or Other Acts

(**a) Character Evidence.**
(1) Prohibited Uses. *Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.*

(2) **Exceptions** for a Defendant or Victim in a Criminal Case. The following exceptions apply in a criminal case:
(A) a *defendant may offer evidence of the defendant's pertinent trait*, and if the evidence is admitted, *the prosecutor may offer evidence to rebut it*;

(B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:
(i) offer evidence to rebut it; and
(ii) offer evidence of the defendant's same trait; and

(C) in a *homicide* case, the *prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor*.
(3) Exceptions for a Witness. Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

U.S. v. Wells, 879 F.3d 900 (9th Cir. 2018) (District Court erred by allowing government to use expert's criminal profile testimony regarding workplace homicide perpetrators as substantive evidence of guilt; case-in-chief testimony invited jury to find "fit" between profile and lay witnesses' testimony concerning defendant's own character traits, defendant did not place his character in issue by relying on history as non-violent, non-threatening and peaceful man)

(b) Crimes, Wrongs, or Other Acts.
(1) **Prohibited Uses.** 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**; Notice in a Criminal Case. *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.

On request by a defendant in a criminal case, the prosecutor must:
(A) provide *reasonable notice* of the general nature of any such evidence that the prosecutor intends to offer at trial; and
(B) do so before trial--or during trial if the court, for good cause, excuses lack of pretrial notice.

***Compare* FRE 413 (Sexual Assault) and FRE 414 (Child Molestation)**
In a criminal case in which a defendant is accused of a [sexual assault or child molestation] the court may admit evidence that the defendant committed any other [sexual assault or child molestation]. *The evidence may be considered on any matter to which it is relevant.*

Rules provide specific definitions of "sexual assault," child (under 14), and "child molestation"

See U.S. v. LeMay, 260 F.3d 1018, 1027-28 (9th Cir. 2001)

Rule 405. Methods of Proving Character

(a) *By Reputation or Opinion*. When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct.

(b) *By Specific Instances of Conduct.* When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct.

Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

The 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, undue delay, wasting time, or needlessly presenting cumulative evidence.

Rationales Underlying 404(b)

"The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. **The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience** that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice." *Old Chief v. U.S.*, 519 U.S. 172, 181–82 (1997) (quoting *Michelson v. U.S.*, 335 U.S. 469, 475-476(1948) (footnotes omitted).
Rule of Evidence 404(b) reflects this common-law tradition by addressing propensity reasoning directly: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." *Id.* (quoting Fed. Rule Evid. 404(b)).

But see David A. Sonenshein, *The Misuse of Rule 404(b) on the Issue of Intent in the Federal Courts*, 45 CREIGHTON L. REV. 215, 255-57 (2011)
In his recent review of the social science of personality in the context of similar acts evidence, Professor Imwinkelreid has demonstrated that **pure "trait theory,"** the notion that people possess immutable traits governing their actions irrespective of context and circumstances, the sole foundation for the liberal admissibility of similar acts evidence, **has been discredited** and is now rejected by most social scientists in favor of a more nuanced approach; subsequent empirical research into the trait theory and personality generally showed that behavior is largely shaped by specific situational factors—factors that do not lend themselves to steady predictions about an individual's behavior. Accordingly, "[a]ny specific action is a product of innumerable determinants, not only of traits but of momentary pressures and specialized influences . . . .; Most social scientists, agree that it is impossible to infer intent from one crime to another absent some inextricable link between them, which would be another independent non-intent purpose for admitting Rule 404(b) acts. Making any correlation between past behavior or intent and future behavior or intent requires a significant expert psychological study of the person involved and the specifics of the situation in order to more specifically define behavior dispositions.

Guiding Principles in Tension: Rule of Exclusion vs. Rule of Inclusion

U.S. v. Hernandez-Miranda, 601 F.2d 1104, 1108 (9th Cir. 1979)
When the Government offers evidence of prior or subsequent crimes or bad acts as part of its case-in-chief, it has the burden of first establishing relevance of the evidence to prove a fact within one of the exceptions to the general exclusionary rule of Rule 404(b) and thereafter of showing that the proper relevant evidence is more probative than it is prejudicial to the defendant.

U.S. v. Bradley, 5 F.3d 1317, 1320 (9th Cir. 1993) (citations omitted).
"We have "emphasized that *extrinsic acts evidence 'is not looked upon with favor.'* We have stated that '[o]ur reluctance to sanction the use of evidence of other crimes stems from the underlying premise of our criminal justice system, that the defendant must be tried for what he did, not for who he is.' Thus, 'guilt or innocence of the accused must be established by evidence relevant to the particular offense being tried, not by showing that the defendant has engaged in other acts of wrongdoing.'"

U.S. v. Hall, 858 F.3d 254, 266, 276-77 (4th Cir. 2017); *U.S. v. Caldwell*, 760 F.3d 267, 276 (3d Cir. 2014) (Rule 404(b)'s general exclusion of evidence of a defendant's prior bad acts "reflects the revered and longstanding policy that, under our system of justice, an accused is tried for what he did, not who he is); characterization of Rule 404(b) as a rule of inclusion reflects determination that the Rule's list of non-propensity uses of prior bad acts evidence is not "exhaustive.

vs.

U.S. v. Curtin, 489 F.3d 935, 944 (9th Cir. 2007) (en banc).
"*Rule 404(b) is a rule of inclusion-not exclusion*-which references at least three categories of other "acts" encompassing the inner workings of the mind: motive, intent, and knowledge. Once it has been established that the evidence offered serves one of these purposes, the relevant Advisory Committee Notes make it clear that the "only" conditions justifying the exclusion of the evidence are those described in Rule 403: unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence."

U.S. v. Geddes, 844 F.3d 983, 989 (8th Cir. 2017) (This rule is one "of inclusion rather than exclusion and admits evidence of other crimes or acts relevant to any issue in the trial, unless it tends to prove only criminal disposition.").

See also Huddleston v. U.S., 485 U.S. 681, 685, 687, 691 (1988)
"Rule 404(b) "generally prohibits the introduction of evidence of extrinsic acts that might adversely reflect on the actor's character, unless that evidence bears upon a relevant issue in the case such as motive, opportunity, or knowledge. *Extrinsic acts evidence may be*

critical to the establishment of the truth as to a disputed issue, especially when that issue involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct."
"Rule 404(b) . . . . protects against the introduction of extrinsic act evidence when that evidence is offered solely to prove character."
"We share petitioner's concern that unduly prejudicial evidence might be introduced under Rule 404(b)" (citing *Michelson v. U.S.*, 335 U.S. 469, 475–476 (1948)); protections against this include Rule 404(b)'s requirement of a proper purpose, the relevancy requirement of Rule 402, from *"the assessment that the trial court must make under Rule 403*," and from *limiting instructions* regarding proper purpose
***petitioner did not seek review under Rule 403* (see n.8).

Multi-Part Tests for 404(b)

Huddleston v. U.S., 485 U.S. 681, 691-92 (1988) (1) evidence offered for non-propensity purpose, (2) relevant to that purpose, (3) admissible under 403, (4) accompanied by appropriate limiting instruction, upon request

U.S. v. Hall, 858 F.3d 254, 266 (4th Cir. 2017)
(1)"[t]he evidence must be relevant to an issue, such as an element of an offense, and must not be offered to establish the general character of the defendant."(2) "[t]he act must be necessary in the sense that it is probative of an essential claim or an element of the offense." (3) "[t]he evidence must be reliable." (4) "the evidence's probative value must not be substantially outweighed by confusion or unfair prejudice in the sense that it tends to subordinate reason to emotion in the factfinding process."

U.S. v. Geddes, 844 F.3d 983, 989-90 (8th Cir. 2017)
Such evidence is admissible if "(1) it is relevant to a material issue; (2) it is similar in kind and not overly remote in time to the crime charged; (3) it is supported by sufficient *990 evidence; and (4) its potential prejudice does not substantially outweigh its probative value."

U.S. v. Matthews, 431 F.3d 1296, 1310–11 (11th Cir. 2005)
(1) the evidence must be relevant to an issue other than the defendant's character; (2) the act must be established by sufficient proof to permit a jury finding that the defendant committed the extrinsic act; (3) the probative value of the evidence must not be substantially outweighed by its undue prejudice, and the evidence must meet the other requirements of Rule 403.

U.S. v. Vizcarra-Martinez, 66 F.3d 1006, 1013 (9th Cir. 1995) (Evidence of [extrinsic acts] may be admitted if (1) the evidence tends to prove a **material point**; (2) the prior act is **not too remote** in time; (3) the evidence is **sufficient** to support a finding that the

defendant committed the other act; (4) (in cases where knowledge and intent are at issue) the act is **similar** to the offense charged.)

Rule 403's balancing requirement incorporated into the Rule 404(b) inquiry. *U.S. v. Mayans*, 17 F.3d 1174, 1183 (9th Cir. 1994); *see also Huddleston v. U.S.*, 485 U.S. 681, 691 (1988).

"In cases involving the use of [extrinsic acts] to show 'opportunity, knowledge, preparation or motive,' similarity may or may not be necessary depending upon the circumstances." We do not consider whether our courts' four-part test regarding admission of evidence under Rule 404(b) requires that the "bad act" in question be precisely similar to the charged offense. Instead, we simply use the *similarity inquiry as a means to assess the relevance and probative value of the evidence*. *Vizcarra-Martinez*, 66 F.3d at 1014, n.5 (citations omitted).

"Other act" evidence which meets these four criteria may be admitted and the district court need not make a preliminary finding "that the Government has proved the act by a preponderance of the evidence." District court must merely determine whether jury could reasonably find conditional fact by preponderance of evidence. *Huddleston* 485 U.S. at 689. (**Federal Burden of Proof)**

<u>Seventh Circuit Test: Propensity-Free Chain of Reasoning</u>

Multipart tests are commonplace in our law and can be useful, but sometimes they stray or distract from the legal principles they are designed to implement; over time misapplication of the law can creep in. This is especially regrettable when the law itself provides a clear roadmap for analysis, as the Federal Rules of Evidence generally do. We have noted this problem in the Rule 404(b) context before. Especially in drug cases like this one, 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." *U.S. v. Gomez*, 763 F.3d 845, 853 (7th Cir. 2014) (en banc) (citations omitted) (*author Diane Sykes*)

Because other-act evidence can serve several purposes at once, evidentiary disputes under Rule 404(b) often raise the following question: Does a permissible ultimate purpose (say, proof of the defendant's knowledge or intent) cleanse an impermissible subsidiary purpose (propensity)? On the surface the rule seems to permit this. But if subsection (b)(2) of the rule allows the admission of other bad acts whenever they can be connected to the defendant's knowledge, intent, or identity (or some other plausible non-propensity purpose), then the bar against propensity evidence would be virtually meaningless. *Id.* at 855.

To resolve this inherent tension in the rule, we have cautioned that it's not enough for the proponent of the other-act evidence simply to point to a purpose in the "permitted" list and assert that the other-act evidence is relevant to it. *Rule 404(b) is not just concerned with the ultimate conclusion, but also with the chain of reasoning* that supports the non-propensity purpose for admitting the evidence. In other words, the rule allows the use of other-act evidence only when its admission is supported by some propensity-free chain of reasoning. *This is not to say that other-act evidence must be excluded whenever a propensity inference can be drawn; rather, Rule 404(b) excludes the evidence if its relevance to "another purpose" is established only through the forbidden propensity inference.*

Spotting a hidden propensity inference is not always easy. For this reason, although we have long required the record to reflect a "principled exercise of discretion" by the district court, we have more recently emphasized the *importance of identifying the non-propensity theory* that makes the other-act evidence relevant and specifically asking ***how*** the evidence tends to make a particular fact of consequence more or less probable. *Id*. at 856 (citations omitted).

Regarding 403*:* To summarize then, when intent is not "at issue"—when the defendant is charged with a general-intent crime and does not meaningfully dispute intent—other-act evidence is not admissible to prove intent because its probative value will always be substantially outweighed by the risk of unfair prejudice. In contrast, when intent is "at issue"—in cases involving specific-intent crimes or because the defendant makes it an issue in a case involving a general-intent crime—other-act evidence may be admissible to prove intent, but it must be relevant without relying on a propensity inference, and its probative value must not be substantially outweighed by the risk of unfair prejudice. And again, *the degree to which the non-propensity issue actually is contested may have a bearing on the probative value of the other-act evidence*. *Id*. at 859.

See also U.S. v. Hall, 858 F.3d 254, 266 (4th Cir. 2017); *U.S. v. Caldwell*, 760 F.3d 767, 277 (3d Cir. 2014) (citations omitted) ("the proponents of Rule 404(b) evidence must do more than conjure up a proper purpose—they must also establish a chain of inferences no link of which is based on a propensity inference"); *U.S. v. Commanche*, 577 F.3d 1261, 1266 (10th Cir. 2009) (bad act evidence is inadmissible under 404(b) "if it bears on a permissible purpose only if a jury first concludes that the defendant likely acted in conformity with a particular character trait"); *U.S. v. Bell*, 516 F.3d 432, 445 (6th Cir. 2008) (may not use propensity-based reasoning as a basis for admission under 404(b); *U.S. v. Garcia-Rosa*, 876 F.2d 209, 221 (1st Cir. 1989) (chain or reasoning must not rely on character).

Old Chief v. U.S., 519 U.S. 172, 180 (1997) (improper to "generaliz[e] a defendant's earlier bad act into bad character and tak[e] that as raising the odds that he did the . . . bad act now charged.")

How to Reconcile Seventh Circuit Test with "Rule of Inclusion"?
Rule 404(b) is indeed an exclusionary rule as to extrinsic acts that really just prove propensity, despite a different label. But the government is correct that Rule 404(b) is otherwise an inclusive rule, because—subject to Rule 403's limitations—it allows evidence tending to prove a material point without relying on propensity, but also tending to show criminal disposition. If admission of evidence depends upon propensity inference, then the probative value of that evidence is substantially outweighed by the danger of unfair prejudice.

Ninth Circuit Cases in Accord with Seventh Circuit Approach:

U.S. v. Hernandez-Miranda, 601 F.2d 1104, 1108-09 (9th Cir. 1979) (if the sole similarity between the charged and extrinsic acts is the smuggling of contraband across the border, then the evidence is not admissible under 404(b) because knowledge may be inferred only by means of the prohibited propensity inference).

U.S. v. Bradley, 5 F.3d 1317 (9th Cir.1993) (allegation that defendant had same motive for murder in charged and subsequent offense was really just an argument based on propensity for violent crime).

U.S. v. Rodriguez, 45 F.3d 302, 307 (9th Cir. 1995) (improper under Rule 404(b) to admit evidence of the defendant's fight with another inmate a month after a prohibited object was confiscated to establish that the defendant possessed the object with intent to use it as a weapon; "[e]vidence of the fight would be admissible under Rule 404(b) only if the fight itself, and not Rodriguez's character implied by the fight, provided an independent basis for establishing intent, motive, or purpose in possessing the object a month earlier." The district court abused its discretion, because "there is no support for the conclusion that evidence of a fight one month after the confiscation of the item could prove, other than by impermissible use of character evidence, Rodriguez's intent in possessing the object.").

U.S. v. Vizcarra-Martinez, 66 F.3d 1006, 1015 (9th Cir. 1995) (we hold that evidence that the defendant used methamphetamine, or possessed a small amount of the drug, does not tend to prove that he participated in a conspiracy to manufacture it. We believe that this is precisely the type of abuse that Rule 404 was designed to prevent; bad act evidence cannot be used to prove a defendant's propensity to commit a crime).

U.S. v. Preston, 873 F.3d 829, 841 (9th Cir. 2017) (when defendant denies alleged abuse ever occurred and victim's testimony—if accepted by jury—effectively proves all elements of the offense (including intent to seek sexual gratification), "proof of another act showing a defendant's sexual proclivities toward children contributes little to the government's case. It just tempts the jury to draw the impermissible inference that the

defendant has a propensity to sexually abuse children"; not appropriate to admit evidence under 404(b) to show defendant is the "type" to molest a child)

U.S. v. Rodriguez, 880 F.3d 1151, 1167 (9th Cir. 2018) (where the defendant's knowledge is contested, we have "emphasized that the government must prove a logical connection between the knowledge gained as a result of the commission of the prior act and the knowledge at issue in the charged act; "This logical connection must be "supported by some propensity-free chain of reasoning."

Note: Ban on propensity evidence does not extend to FRE 413, 414.
"The evidence may be considered on any matter to which it is relevant," **but 403 analysis is still required.**

See U.S. v. LeMay, 260 F.3d 1018, 1027-28 (9th Cir. 2001)
Approving admission of prior acts to bolster credibility of victims after defendant suggested they could be fabricating; recognizing "characterization of the evidence is essentially a veiled propensity inference," but concluding this was the use of prior acts evidence Congress had in mind when enacting Rule 414; Rule 414 does not violate Due Process; Rule 403 should always result in exclusion of evidence that is so prejudicial as to deprive the defendant of a fair trial);
Because of the inherent strength of the evidence that is covered by Rule 414, when putting this type of evidence through the Rule 403 microscope, a court should pay 'careful attention to both the significant probative value and the strong prejudicial qualities" of that evidence." In conducting this analysis, district courts must consider, (1) "the similarity of the prior acts to the acts charged," (2) the "closeness in time of the prior acts to the acts charged," (3) "the frequency of the prior acts," (4) the "presence or lack of intervening circumstances," and (5) "the necessity of the evidence beyond the testimonies already offered at trial." This "list of factors is not exclusive, and "district judges should consider other factors relevant to individual cases." **Reliability** of the evidence of other acts is an important 403 consideration.

<u>Intent/Knowledge/Absence of Mistake</u>

Is it just propensity by another name?

U.S. v. Hadley, 918 F.2d 848 (9th Cir. 1990) (the defendant, a former elementary school teacher, was charged with the aggravated sexual abuse of several young students. The Court upheld the admission under Rule 404(b) of the defendant's alleged prior identical acts of sexual abuse of additional young students at the same school, purportedly introduced to show Hadley's sexual intent in committing the charged offenses. The Court *rejected the notion that intent to sexually gratify is not a material issue for purposes of 404(b) in a child sex abuse case when the defendant denies participation in the acts.* The

Court reasoned that the *defendant's choice of defense does not relieve the government of its burden of proof on the essential* element and should not prevent the government from meeting that burden by means of Rule 404(b) other act evidence
(**Note:** Hard to fathom how prior acts show intent other than via propensity. Today, prior acts of child molestation would be admissible under **Rule 414**)

U.S. v. Curtin, 489 F.3d 935, 938-40 (9th Cir. 2007) (en banc) The Court considered under Rule 404(b) the defendant's *possession of stories involving sex between young girls and adults on his personal digital assistant at **the very time** that he arrived to meet a purported young girl he met online.* The Court held that possession of these stories properly showed his intent to engage in sex with a young girl, rather than an adult who had posed as a child online. *Id*. at 948. Defendant claimed he thought the girl was an adult woman role-playing and he did not really want to meet a 14-year-old in Las Vegas. *Id*. at 937-38. The stories were generally relevant and admissible under 404(b) "under the precise circumstances of this case, and given the nature of the defense." They were relevant not only to prove intent element, but to rebut aggressive non-intent defense. *Id.* at 948-50. (*Editorial note:* arguably not really propensity-based reasoning – direct evidence of intent because stories on his PDA at precise time he went to meet the purported girl).
But case reversed under 403 because district court did not read all the stories and let in too many, and particularly inflammatory ones. *Id.* at 956-58.

U.S. v. Preston, 873 F.3d 829, 841 (9th Cir. 2017). Court sidesteps propensity-based reasoning argument. Holds that evidence of alleged child-sex fantasy (a non-criminal act) was not admissible under 404(b) because not sufficiently similar to charged acts of actual child sex abuse, and intent was not meaningfully at issue. "[F]antasy is even less probative of intent in cases where, as here, intent is not actually disputed—that is, where the defense is a general denial of committing the offense, rather than an admission to an act coupled with a specific denial of the requisite intent."

U.S. v. Rodriguez, 45 F.3d 302, 307 (9th Cir. 1995. Evidence of a subsequent fight inadmissible to show intent with regard to apparent make-shift weapon previously found in defendant's cell.

U.S. v. Mayans, 17 F.3d 1174, 1181-84 (9th Cir. 1994) ("When the government's theory is one of knowledge—as here—this court has emphasized that the government must prove a *logical connection* between the knowledge gained as a result of the commission of the prior act and the knowledge at issue in the charged act"); "far from obvious" how knowledge gained in prior drug sales would have put him on notice that alleged coconspirators were selling drugs or that his apartments were being used as stash pads; often need details of prior transactions to determine "whether link between knowledge gained and knowledge at issue could be forged"; court does not rule on 404(b) issue because case remanded for other reasons

U.S. v. Caldwell, 760 F.3d 267, 279-81 (3d Cir. 2014) (Claiming innocence is insufficient to place knowledge at issue for purposes of the rule provision governing prior act evidence; absent unusual circumstances, the knowledge element in a case for felon in possession of a firearm will necessarily be satisfied if the jury finds the defendant physically possessed the firearm.

U.S. v. Jones, 484 F.3d 783, 790 (5th Cir. 2007) (we conclude that (1) Jones's was exclusively an actual possession case (albeit one based on circumstantial evidence), and (2) evidence of Jones's prior crime was not relevant to proving actual possession)

U.S. v. Hall, 858 F.3d 254, 272-77 (4th Cir. 2017) In assessing relevance, we consider how closely "the prior act is related to the charged conduct in time, pattern, or state of mind;" for example, other acts might be admissible under Rule 404(b) to show intent, if they involve the same residence, the same modus operandi (e.g. storing marijuana in a locked bedroom), or the same supplier or coconspirators; claim of innocence does not always permit the government to introduce prior bad acts to show intent; Defendant's prior convictions of possession of marijuana with intent to distribute were not admissible to prove his intent to distribute marijuana found inside a deadlocked bedroom in his purported residence, in prosecution for possession with intent to distribute marijuana, where government failed to establish any connection or similarity between the prior drug convictions and the charged offense; while those prior convictions were relevant to establishing his knowledge that marijuana was present in the residence, the convictions were inadmissible under Rule 403 because, *inter alia*, defendant did not contest knowledge

But see U.S. v. Howell, 231 F.3d 615, 618-19, 628-29 (9th Cir. 2000) (defendant appeals conviction for possession of cocaine with intent to distribute; defendant traveling with his girlfriend on a bus; cocaine found in girlfriend's duffel bag in overhead compartment; defendant claimed mere presence; court ruled admission of prior convictions for cocaine possession and possession with intent to deliver cocaine admissible to show knowledge and rebut "claimed innocent motives for being on the bus")

U.S. v. Geddes, 844 F.3d 983, 989-90 (8th Cir. 2017)(Evidence of prior incident where defendant allegedly physically assaulted former girlfriend and threatened to kill her was relevant to issue of defendant's intent to force or coerce victim to engage in prostitution, so as to support admissibility under other-acts rule, in prosecution for aiding and abetting sex trafficking by force, fraud, or coercion and aiding and abetting transportation with intent to engage in prostitution; prosecution was required to prove that defendant acted knowingly or in reckless disregard of fact that means of force, threats of force, fraud, coercion, or any combination would be used to cause victim to engage in commercial sexual act and that defendant knowingly transported victim in interstate or foreign commerce with intent that she engage in prostitution)

U.S. v. Matthews, 431 F.3d 1296, 1311 (11th Cir. 2005) (in prosecution for conspiracy to distribute cocaine, district court did not abuse its discretion in admitting testimony regarding defendant's arrest for drug dealing eight years before beginning of alleged conspiracy; defendant's plea of not guilty made his intent a material issue, prior arrest was relevant to intent at issue in charged conspiracy, and district court did not abuse its discretion in finding that prior offense was proximate enough to be more probative than prejudicial); "circuit precedent regards virtually any prior drug offense as probative of the intent to engage in a drug conspiracy, and we cannot say that the district court abused its discretion in rejecting the contention that the factual dissimilarity here resulted in disproportionate prejudice"

Rationale to exclude propensity evidence as showing knowledge/intent:
Other act/charged crime must be part of similar scheme or involve same modus operandi.

Similarity not a "perquisite having independent force" but a means to evaluate the extrinsic acts's probative value relative to the proffered purpose.
***U.S. v. Ramirez-Jiminez*, 967 F.2d 1321, 1326 (9th Cir. 1992).**

U.S. v. Bell, 516 F.3d 432, 443 (6th Cir. 2008) (using same scheme/modus operandi requirement to exclude veiled propensity evidence under 404(b))

U.S. v. Hall, 858 F.3d 254, 267 (4th Cir. 2017) (prior acts of drug possession for personal use typically not admissible to show knowledge or intent for drug distribution)
Accord U.S. v. Davis, 726 F.3d 434, 444 (3d Cir. 2013); *U.S. v. Haywood,* 280 F.3d 715 (6th Cir. 2002); *U.S. v. Ono*, 918 F.2d 1462, 1465 (9th Cir.1990)
But see U.S. v. Butler, 102 F.3d 1191, 1196 (11th Cir. 1997) (we conclude that the logical extension of our current jurisprudence is to admit evidence of prior personal drug use to prove intent in a subsequent prosecution for distribution of narcotics); *U.S. v. Logan*, 121 F.3d 1172, 1178 (8th Cir.1997); *U.S. v. Gadison*, 8 F.3d 186, 192 5th Cir.1993).

U.S. v. Hernandez-Miranda, 601 F.2d 1104, 1107-09 (9th Cir. 1979) (error to admit evidence that the defendant had previously carried marijuana in a backpack across the border in a case where he was charged with importing heroin into the country by concealing it in the spare tire compartment of a vehicle; "sole similarity between the prior offense and the offense for which Miranda was on trial is smuggling contraband across the border," and the only inference that could be drawn based on that similarity is that a person who has previously smuggled contraband "on one occasion may be inclined to do so on another;" while it may be reasonable to infer that a person who has knowingly backpacked marijuana across the border "will know that he is carrying marijuana in his

backpack when he is caught carrying marijuana in the same way," it is not reasonable to infer such knowledge when a smuggling offense occurs in a very different way

U.S. v. Bibo-Rodriguez, 922 F.2d 1398, 1402 (9th Cir. 1991) (defendant's other act of transporting marijuana concealed in a vehicle's roof panel admissible under Rule 404(b) to show he knowingly transported cocaine "similarly hidden" in panels of a vehicle.).

U.S. v. Ramirez-Jiminez, 967 F.2d 1321, 1325-26 (9th Cir. 1992) (approving admission to show knowledge where the "'other act' of appellant was his association with other smugglers on the premises of an alien smuggling operation employing a modus operandi strikingly similar to that employed" in appellant's case—including loading illegal aliens in stolen bobcat trucks in San Diego; hence, defendant's prior conduct involved very same alien-smuggling organization, which operated at the same location and used the same modus operandi in the charged and prior incidents).

U.S. v. Sager, 227 F.3d 1138, 1141-44 (9th Cir. 2000) (prior conviction involved identical mail/credit-card fraud scheme, i.e. redirecting credit cards to addresses at which defendant had access; defendant testified to innocent motives for presence at mailboxes)

U.S. v. Flores-Blanco, 623 F.3d 912, 920 (9th Cir. 2010) (current and prior apprehensions for alien smuggling all involved smuggling aliens through the border fence "in precisely the same area of Calexico" and, in each offense, Flores-Blanco "guide[d] aliens through the neighborhood immediately after" their border-crossing)

U.S. v. Lozano, 623 F.3d 1055, 1058-59 (9th Cir. 2010) (spring 2007 acts showed Lozano's engagement in dealing marijuana grown in and mailed from California, and evidence showed the marijuana sold by Lozano in February 2008 (the charged offense) was also mailed from California)

U.S. v. Beechum, 582 F.2d 898, 911 (5th Cir. 1978) Where the evidence sought to be introduced is an extrinsic offense, its relevance is a function of its similarity to the offense charged. In this regard, however, similarity means more than that the extrinsic and charged offense have a common characteristic. For the purposes of determining relevancy, "a fact is similar to another only when the common characteristic is the significant one for the purpose of the inquiry at hand).

Bonner v. City of Prichard, Ala., 661 F.2d 1206, 1207 (11th Cir. 1981) (decisions of the U.S. Court of Appeals for the Fifth Circuit (the "former Fifth" or the "old Fifth"), as that court existed on September 30, 1981, handed down by that court prior to the close of business on that date, shall be binding as precedent in the Eleventh Circuit, for this court, the district courts, and the bankruptcy courts in the circuit.

Motive

Motive is also likely to blend with improper propensity uses.

U.S. v. Bradley, 5 F.3d 1317 (9th Cir.1993) (allegation that defendant had same motive for murder in charged and subsequent offense was really just an argument based on propensity for violent crime).

U.S. v. Rodriguez, 45 F.3d 302, 307 (9th Cir. 1995*), supra*. Evidence of the fight would be admissible under Rule 404(b) only if the fight itself, and not Rodriguez's character implied by the fight, provided an independent basis for establishing intent, motive, or purpose in possessing the object a month earlier.

U.S. v. Wells, 879 F.3d 900 (9th Cir. 2018) (no logical basis to explain how a 2003 incident, marked by a different supervisor and bearing no connection to either victim, might provide motive for a double homicide nearly one decade later. It is an unexplainable outlier. The only possible purpose of this testimony would be to show Wells' propensity).

U.S. v. Kinchen, 729 F.3d 466, 473 (5th Cir. 2013) ("when defendant testified and portrayed himself as a mere user of drugs, evidence of prior drug transactions and statement that he could only support family through drug-dealing were admissible to prove motive under 404(b))

U.S. v. Smith, 725 F.3d 340, 345-46 (3d Cir. 2013) (Evidence that defendant charged with threatening federal officer with gun had been observed dealing drugs at same location two years earlier demonstrated defendant's purported motive to defend his turf only if one assumed, based on such evidence, that defendant had been drug dealer when previously observed and was acting in conformity with that character subsequently, by dealing drugs, and so was motivated to defend his turf, and therefore evidence lacked proper purpose required for its admissibility under Rule 404(b)

Identity – Other Act/Modus Operandi Must Be "Sufficiently Distinctive"

Factors to Consider in Assessing Distinctiveness: (1) geographic and temporal proximity of the crimes; (2) distinguishing costumes, equipment, or technique; (2) use of a unique weapon; (3) identity of participants; (4) number of participants and (5) demonstration of specialized knowledge. "Substantial similarity" between crimes is not enough for admission to prove identity. "The offense must be *so similar* in their circumstances *as to guarantee a reasonable likelihood that they were committed by the same person*." *U.S. v. Vavages*, 151 F.3d 1185, 1193 (9th Cir. 1998) (fact that defendant fled from vehicle

containing a substantial amount of marijuana in prior incident not admissible to prove identity because such behavior is "hardly peculiar, unique, or bizarre").

McCormick on Evidence § 190 at 801–803 (6th ed.). Evidence must involve acts by the defendant that are "so nearly identical in method as to earmark [the charged offense] as the handiwork of the accused" and that are "so unusual and distinctive as to be like a signature."

U.S. v. Luna, 21 F.3d 874, 878-79, 881-82 (9th Cir. 1994) (If another crime is offered to show that the defendant is the culprit, that crime must be sufficiently distinctive to warrant an inference that the person who committed the act also committed the offense at issue."; the similarities between the crimes cannot be simply generic features common to such offenses; (wearing Mickey Mouse ears distinctive; different number or combination of persons not distinctive)

U.S. v. Quinn, 18 F.3d 1461, 1466 (9th Cir. 1994) ("The offenses must be so similar in their circumstances as to guarantee a reasonable likelihood that they were committed by the same person"; Absent these distinctive similarities, "the possibility that the jury will draw improper conclusions as to the accused's character is too great to allow admission of the evidence, notwithstanding its marginal probative value."; approving admission of evidence related to use of specially modified silver handgun later identified by experts in takeover robberies in same metropolitan area two weeks apart

U.S. v. Smith, 103 F.3d 600, 603 (7th Cir. 1996) (vertical brandishing of knives, atypical for bank robberies, by slender white males in similar banks in same geographic area, close in time; "Compared to a prior robbery in, say, southwest California, Smith's prior robbery" in rural Wisconsin, forty miles from the locale of the charged robbery, "suggests a modus operandi and strengthens" the inference Smith committed both crimes within the span of about five weeks, in light of the other distinctive common features.

U.S. v. Carroll, 207 F.3d 465, 46 (8th Cir. 2000) (citation omitted) (offense typically must be close in time and place; e.g. use of orange ski mask and "distinctive" duffel bag would qualify; since crimes occurred ten years apart, although in same city, and common features were generic, same perpetrator could not be inferred).

U.S. v. Gonzalez, 533 F.3d 1057 (9th Cir. 2008) Court upheld the admission of prior acts to show identity without clearly articulating the applicable, universally-accepted standard that the characteristics of the extrinsic and charged offenses must be sufficiently distinctive to warrant the inference that the same person committed both crimes. *Id.* at 1063-64 (citing as relevant factors dress as a police officer with badge and gun, targeting and isolating women alone at night, engaging in conversation about personal life, issuing some kind of command, and obtaining sexual stimulation by contact with flesh).

Editorial Note: Close examination of the facts, however, reveals the acts shared truly distinctive characteristics. The defendant was employed by the Los Angeles Sheriff's Department and presumably used the same – his own – patrol car, uniform, and badge in all incidents. *Id.* at 1059-60, 1064. Moreover, all five incidents occurred in the Los Angeles metropolitan area between November 2001 and January 2003. *Id.* at 1059-60. Even though Gonzalez may not have engaged in conduct amounting to a "signature," such as wearing Mickey Mouse ears, it was proper for the jury to infer that he committed all of the acts, since they were committed so close in time and locale and shared other significant similarities. It is extremely unlikely that different Los Angeles officers would have independently committed such similar crimes within such a short time frame.

U.S. v. Cherer, 513 F.3d 1150, 1158-59 (9th Cir. 2008) Court held that prior conduct involving communications on America Online (AOL) was admissible under 404(b) to prove the defendant's intent to commit the charged offense of attempting to persuade a minor to engage in sexual acts. In dicta, the Court explained that the prior AOL incidents also tended to prove identity, since, using the same screen name – G8rwith8nGV – the defendant had used almost identical language and propositions. *Id.* at 1153, 1156, 1158.

Inextricably Intertwined/Completing the Story: *Not* Analyzed under 404(b)

Evidence of acts may be admitted as "inextricably intertwined" if (1) the evidence "constitutes a *part of the transaction that serves as the basis for the criminal charge*" or (2) "when it was *necessary* to do so in order to permit the prosecutor to *offer a coherent and comprehensible story* regarding the commission of the crime." *U.S. v. Vizcarra–Martinez*, 66 F.3d 1006, 1012-13 (9th Cir.1995).

U.S. v. Williams, 989 F.2d 1061, 1070 (9th Cir.1993) (contemporaneous sales of cocaine and crank by the defendant were inextricably intertwined with the crime with which the defendant was charged: the sale of cocaine; "[t]he policies underlying rule 404(b) are inapplicable when offenses committed as part of a 'single criminal episode' become other acts simply because the defendant 'is indicted for less than all of his actions.')

U.S. v. Daly, 974 F.2d 1215, 1216 (9th Cir.1992) (evidence regarding a shoot-out was "inextricably intertwined" with the charge that the defendant was a felon in possession of a firearm; "evidence regarding the shoot-out was necessary to put [the defendant's] illegal conduct into context and to rebut his claims of self-defense"; jury "cannot be expected to make its decision in a void—without knowledge of the time, place, and circumstances of the acts which form the basis of the charge.'"

U.S. v. Vizcarra–Martinez, 66 F.3d 1006, 1012-13 (9th Cir.1995) (defendant's personal possession of small amount of drugs NOT inextricably intertwined and NOT admissible to prove that he conspired to possess and possessed hydriodic acid with knowledge that it would be used to manufacture methamphetamine; mere fact that a defendant is in

possession of a small amount of a prohibited narcotic substance at the time he commits a crime is not enough to support the introduction of the evidence of drug usage – (1) it was not part of the transaction with which defendant was charged, and (2) it is clear that the prosecution would encounter little difficulty in presenting the evidence relevant to its case against the defendant without offering into evidence the personal-use amount of methamphetamine the police discovered in the defendant's pocket upon arrest. The methamphetamine found in the defendant's pocket had nothing to do with the incidents leading to the search, nor did it have any bearing upon the commission of the crime.

U.S. v. DeGeorge, 380 F.3d 1203, 1220 (9th Cir. 2004) (prior loss evidence was part of coherent story of crime was necessary to understand the charged transactions; jury needed to understand why defendant could not obtain insurance in his own name (nondisclosure of prior losses) in order to understand relevance of charged sham transactions; court precluded aspects of extrinsic acts (collection under previous insurance policies) that tended only to show propensity); *admission of the evidence passed muster under 403*

U.S. v. Loftis, 843 F.3d 1173, 1175 (9th Cir. 2016) Limitation on admissibility of "other crimes" evidence did not preclude government, in wire fraud prosecution, from introducing evidence of *uncharged transactions in order to prove the first element of wire fraud offense, i.e., the existence of scheme to defraud*; crime charged in wire fraud prosecution included, not only the specific executions of scheme alleged as second element of wire fraud offense, but also the overall scheme, so that evidence of other incidents tending to show existence of such a scheme was not "other crimes" evidence; **moreover,** even if uncharged incidents of which evidence was offered in attempt to establish existence of fraudulent scheme were not part of the crime charged in wire fraud prosecution, evidence of these incidents would not be subject to exclusion under Rule 404(b), on ground that these incidents were part of same transaction as the charged incidents, and that the "inextricably intertwined" doctrine thus provided a second basis for admissibility.

U.S. v. Wells, 879 F.3d 900 (9th Cir. 2018) (none of the other acts evidence [including 2003 insubordination, 2012 letter of caution regarding use of fuel card, and various disagreement with co-workers] bears "directly" on the charged 2012 workplace double homicide, or has the requisite "contextual or substantive connection" to be categorized as inextricably intertwined)

Note: Other circuits prohibit or disfavor use of "inextricably intertwined" doctrine. *See U.S. v. Fuertes,* 805 F.3d 485, 494 n.4 (4th Cir. 2015); *U.S. v. Gorman,* 613 F.3d 711, 718-19 (7th Cir.2010) (abandoning the "inextricable intertwinement doctrine" because it "has outlived its usefulness" and "become overused, vague, and quite unhelpful"; "If evidence is not direct evidence of the crime itself, it is usually propensity evidence simply disguised as inextricable intertwinement evidence, and is therefore improper, at

least if not admitted under the constraints of Rule 404(b).”)*; U.S. v. Green,* 617 F.3d 233, 248 (3d Cir.2010) (“[T]he inextricably intertwined test is vague, overbroad, and prone to abuse, and we cannot ignore the danger it poses to the vitality of Rule 404(b).”); *U.S. v. Bowie*, 232 F.3d 923, 927 (D.C. Cir. 2000) (“[I]t is hard to see what function this [intrinsic/extrinsic] interpretation of Rule 404(b) performs.”)*; see also U.S. v. Irving,* 665 F.3d 1184, 1215 (10th Cir. 2011) (Hartz, J., concurring) (stating that “the intrinsic/extrinsic dichotomy serves no useful function and consumes unnecessary attorney and judicial time and effort,” and that “the distinction between intrinsic and extrinsic evidence is unclear and confusing, and can lead to substituting conclusions for analysis”).

Reverse-404(b)/Third-Party Culpability

U.S. v. McCourt, 925 F.2d 1229, 1236 (9th Cir. 1991) (Rule 404(b) applies to third persons and the district court did not err in excluding McCourt’s use of third party misconduct to show that person acted in conformity with a criminal disposition such that he was more probably the guilty party than defendant; recognizes, however, that prejudice concerns are diminished in the context of third-party culpability: “it may well be that courts should indulge the accused when the defendant seeks to offer prior crimes evidence of a third person for an issue pertinent to the defense other than propensity”

But see State v. Machado, 246 P.3d 632 (Ariz. 2011) (“The admission of third-party culpability evidence is governed by the standards of Rules 401 through 403 of the Arizona Rules of Evidence, not by Rule 404(b)”; “the more convincing [federal] opinions have recognized that although the language of Rule 404(b) appears to apply universally, its central purpose is to protect criminal defendants from unfair use of propensity evidence”).

See also Wynne v. Renico, 606 F.3d 867, 872–73, 873& n. 3 (6th Cir. 2010) (Martin, J., concurring) (collecting cases) (“The majority of circuits have rightly held that Rule 404(b) primarily exists to protect a criminal defendant from the prejudice of propensity taint and should not be applied in cases where, as here, the defendant offers prior-act evidence of a third-party to prove some fact relevant to his defense.”;“The First, Second, Third, Fifth, and Eleventh Circuits have determined that Federal Rule of Evidence 404(b) is not applicable to evidence regarding acts of someone other than the defendant. *See U.S. v. Morano*, 697 F.2d 923, 926 (11th Cir.1983) (holding that “Rule 404(b) does not specifically apply to exclude ... evidence [that] involves an extraneous offense committed by someone other than the defendant [because] the evidence was not introduced to show that the defendant has a criminal disposition ... so the policies underlying Rule 404(b) are inapplicable.”); *U.S. v. Gonzalez-Sanchez*, 825 F.2d 572, 583 (1st Cir.1987) (holding that “Rule 404(b) does not exclude evidence of prior crimes of persons other than the defendant.”); *U.S. v. Sepulveda*, 710 F.2d 188, 189 (5th Cir.1983) (holding that Rule 404(b) only applies to acts by the defendant individually.); *U.S. v. Stevens*, 935 F.2d

1380, 1401-06 (3d Cir.1991) (allowing a defendant to introduce "other crimes" evidence against a third-party under Rule 404(b) because "prejudice to the defendant is no longer a factor."); *U.S. v. Blum*, 62 F.3d 63, 68 (2d Cir.1995) (stating that Rule 404(b) permits "admission against third parties of evidence of 'crimes, wrongs or acts' if used to show 'motive, opportunity, intent, preparation, plan, knowledge, identity of absence of mistake or accident.'") (quoting *U.S. v. Aboumoussallem*, 726 F.2d 906, 911-12 (2d. Cir.1984)); *but see Agushi v. Duerr*, 196 F.3d 754, 760 (7th Cir.1999) (holding that Rule 404(b) "does apply to third parties."); *U.S. v. McCourt*, 925 F.2d 1229, 1232 (9th Cir.1991) (holding that, "because Rule 404(b) plainly proscribes other crimes evidence of a person, it cannot reasonably be construed as extending only to the accused.") (internal citations and quotations omitted)."

State v. Vargas, 20 P.3d 271, 278-79 (Utah 2001) (When interpreting an evidentiary rule, we apply principles of statutory construction. Thus, we first look to the plain language of the rule. Here, both subsections (a) and (b) use the term "person" in describing their scope. Applying principles of statutory construction, the plain language of a rule "is to be read as a whole, and its provisions interpreted in harmony with other provisions in the same [rule]." Thus, we are obligated to define "person" harmoniously throughout rule 404. Accordingly, we hold that "person" as set out in rule 404(b) can be an "accused," a "victim," or a "witness")

At a minimum, standard for admissibility is relaxed when third-party's extrinsic acts are at issue:

U.S. v. Espinoza, No. 16-50033, 2018 WL 493194 (9th Cir. Jan. 22, 2018) (Evidence of third-party culpability that is relevant is admissible in criminal prosecution, unless barred by another evidentiary rule—a showing of "substantial evidence" connecting the third party to the crime is not necessary;
Rule 404(b) bars introduction of propensity evidence regarding potential third-party culprits; where defendant presented blind mule defense, third-party neighbor's prior convictions for importation of methamphetamine from Mexico and possession with intent to distribute marijuana in Los Angeles were admissible to show the neighbor's knowledge of how to find and transport large quantities of methamphetamine into the U.S. and his ability to sell the drugs in the in the U.S (because of possible connection to drug dealers here); "*We caution, however, that our ruling that the conviction documents were admissible here is not transferable to a situation in which the government seeks to introduce similar evidence with respect to a defendant's prior crimes under Rule 404(b)*; when other acts are introduced against defendant, Rule 404(b) "protects" a defendant and ensures that guilt or innocence is "established by evidence relevant to the particular offense being tried" {citation omitted].

U.S. v. Aboumoussallem, 726 F.2d 906, 911-12 (2d Cir. 1984) ("[W]e believe that the standard of admissibility when a criminal defendant offers similar acts evidence as a

shield need not be as restrictive as when the prosecutor uses such evidence as a sword.... [R]isks of prejudice are normally absent when the defendant offers similar acts evidence of a third-party to prove some fact pertinent in the defense. In such cases the only issue arising under 404(b) is whether the evidence is relevant to the existence or non-existence of some fact pertinent to the defense.")

U.S. v. Stevens, 935 F.2d 1380, 1404-05 (3d Cir. 1991) (We agree with the reasoning of *Garfole* and with its holding that the admissibility of "reverse 404(b)" evidence depends on a straightforward balancing of the evidence's probative value against considerations such as undue waste of time and confusion of the issues. Recasting this standard in terms of the Federal Rules of Evidence, we therefore conclude that a defendant may introduce "reverse 404(b)" evidence so long as its probative value under Rule 401 is not substantially outweighed by Rule 403 considerations.).

Rule 403 Balancing

U.S. v. Curtin, 489 F.3d 935, 958 (9th Cir. 2007) (en banc) ("as a matter of law that a court does not properly exercise its balancing discretion under Rule 403 when it fails to place on the scales and personally examine and evaluate all that it must weigh."; district court did not read all of the child-sex stories admitted, some of which contained highly inflammatory depictions))

Huddleston v. U.S., 485 U.S. 681, 689, n.6 (1988) (the strength of the evidence establishing the similar act is one of the factors the court may consider when conducting the Rule 403 balancing).

U.S. v. LeMay, 260 F.3d 1018, 1029 (9th Cir. 2001) (The extent to which the [extrinsic] act has been proved" is an appropriate factor to consider in conducting Rule 403 balancing)

The extent to which 404(b) purpose is in dispute is part of the balancing:

F.R.E. 403 Advisory Committee Notes: "Situations in this area call for balancing the probative value of *and need for the evidence* against the harm likely to result from its admission."; "The availability of other means of proof may also be an appropriate factor" to consider "in reaching a decision whether to exclude on grounds of unfair prejudice[.]"

F.R.E. 404(b) Advisory Committee Notes: "The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the *availability of other means of proof* and other factors appropriate for making decisions of this kind under Rule 403."

Old Chief v. U.S., 519 U.S. 172, 191 (1997) (district court abuses its discretion when it spurns defendant's offer to stipulate to evidence of prior conviction element of offense and instead admits full record of prior judgment of conviction when name or nature of prior offense raises risk of verdict; whenever an extrinsic act of little or no probative value is "likely to support conviction on some improper ground, the only reasonable conclusion [is] that the risk of unfair prejudice" substantially outweighs its evidentiary value).

U.S. v. Hitt, 981 F.2d 422, 424 (9th Cir.1992) ("[w]here the evidence is of very slight (if any) probative value, it's an abuse of discretion to admit it if there's even a modest likelihood of unfair prejudice or a small risk of misleading the jury.")

Blind-Doan v. Sanders, 291 F.3d 1079, 1083 (9th Cir. 2002) (extrinsic evidence offered to show the defendant's identity was inadmissible under Rule 403 because—although the government, as always, had the burden to prove it—identity was "not at issue," as "the defendant did not dispute" he was the one in the cell with the plaintiff when the alleged incident occurred).

U.S. v. Preston, 873 F.3d 829, 841-42 (9th Cir. 2017) ("fantasy is even less probative of intent in cases where, as here, intent is not actually disputed—that is, where the defense is a general denial of committing the offense, rather than an admission to an act coupled with a specific denial of the requisite intent"; "In such circumstances, proof of another act showing a defendant's sexual proclivities toward children contributes little to the government's case. It just tempts the jury to draw the impermissible inference that the defendant has a propensity to sexually abuse children.").

U.S. v. Curtin, 489 F.3d at 948-58 (9th Cir. 2007) (en banc) (probative value of child-sex stories heightened where defendant puts intent at issue)

But see U.S. v. Hadley, 918 F.2d 848 (9th Cir. 1990) (Admitted prior acts of sexual abuse to show intent, although defendant denied the acts occurred and did not put intent at issue; today evidence could be admitted under Rule 414) **Arguably,** *Hadley* is not binding on this point because its reasoning is clearly irreconcilable with *Curtin* and *Old Chief*. *See Miller v. Gammie*, 335 F.3d 889 (9th Cir. 2003) (en banc). It is also at odds with prior cases. *See U.S. v. McCollum,* 732 F.2d 14124 (9th Cir. 1984) (extrinsic acts cannot be admitted to show intent when there is a substantial dispute as to whether charged acts occurred at all); *U.S. v. Powell*, 587 F.2d 443, 445, 447-49 (9th Cir. 1978) (district court "correctly rejected the [prior act] evidence for the purpose of proving intent or plan" because—although intent was an element of the charged crime—the defendant did not "purport to controvert" that issue; not dicta (as *Hadley* Court claimed) because could have affirmed on any basis).

U.S. v. Gomez, 763 F.3d 845, 857, 859 (7th Cir. 2014) (en banc) (the degree to which non-propensity issue actually is contested may have a bearing on the probative value of the other-act evidence; trial judge's Rule 403 balancing must do "much of the heavy lifting in the admissibility analysis by excluding other-act evidence that may be slightly probative through a non-propensity theory but has a high likelihood of creating unfair prejudice by leading a jury to draw conclusions based on propensity."

U.S. v. Hall, 858 F.3d 254, 278 (4th Cir. 2017)
(Even when a defendant enters a plea of not guilty, thereby formally placing all elements of the charged offense at issue, a defendant's decision not to contest certain elements of the charged offense may so diminish the probative value of prior bad acts evidence that such evidence becomes unduly prejudicial and, therefore, inadmissible under Rule 404(b); Put differently, when a defendant does not contest a particular element of a charged offense, that element is " 'at issue' in only the most attenuated sense," minimizing the probative value of any prior bad act the government maintains is relevant to that uncontested element)

U.S. v. Kinchen, 729 F.3d 466, 473 (5th Cir. 2013) ("The prejudicial effect of extrinsic evidence substantially outweighs its probative value when the relevant exception [under which the government seeks admission of an extrinsic offense] is uncontested, because the incremental probative value of the extrinsic offense is inconsequential when compared to its prejudice.")

U.S. v. Beechum, 582 F.2d 898, 914 (5th Cir. 1978) (probity in [the 404b] context is not an absolute; its value must be determined with regard to the extent to which the defendant's unlawful intent is established by other evidence, stipulation, or inference; If the defendant's intent is not contested, then the incremental probative value of the extrinsic offense is inconsequential when compared to its prejudice; therefore, in this circumstance the evidence is uniformly excluded; *Bonner v. City of Prichard, Ala*., 661 F.2d 1206, 1207 (11th Cir. 1981) (5th Circuit decision prior to 09/30/81 binding precedent in 11th Cir.)

Unfair Prejudice: *undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one***.** F.R.E. 403 Advisory Committee Notes.

Huddleston v. U.S., 485 U.S. 681, 691 (1988) (Supreme Court expressed concern that, despite some relevance, "unduly prejudicial evidence might be introduced under Rule 404(b)," and the trial court must therefore carefully consider whether such evidence meets Rule 403's requirements).

Old Chief v. U.S., 519 U.S. 172, 185 (1997) (The risk of unfair prejudice is especially acute when the prior bad act is similar to the acts at issue in the pending case).

U.S. v. Hitt, 981 F.2d 422, 424 (9th Cir.1992) (finding that mere "photographs of firearms often have a visceral impact that far exceeds their probative value").

U.S. v. Preston, 873 F.3d 829, 841-42 (9th Cir. 2017) (evidence of aberrant sexual fantasies has a high tendency to disgust and promote decision on a visceral, emotional basis).

U.S. v. Haywood, 280 F.3d 715, 723 (6th Cir. 2002) (evidence of crack cocaine possession has powerful prejudicial impact).

Confusion of the Issues/Waste of time:

U.S. v. Bussell, 414 F.3d 1048, 1059 (9th Cir. 2005) (district court's decision, in bankruptcy fraud prosecution, not to admit evidence of pattern by debtor's attorneys to provide similarly incorrect responses in documents filed for other clients, on theory that admission of such evidence would necessitate trial within trial of other clients' participation in alleged fraud, was not abuse of discretion)

State v. Vargas, 20 P.3d 271, 280 (Utah) (The trial court justifiably found that calling two witnesses to attack the credibility of another witness would only distract from the trial at hand)

Cumulative Evidence :

Old Chief v. U.S., 519 U.S. 172, 184-85 (1997) (in conducting 403 balancing, court must consider the availability of other means of proof)

U.S. v. LeMay, 260 F.3d 1018, 1027-28 (9th Cir. 2001 (the court is obliged to consider the "necessities of the evidence beyond the testimonies already offered at trial" when determining whether Rule 403 permits the admission of prior bad act evidence).

U.S. v. Weiland, 420 F.3d 1062, 1078 (9th Cir. 2005) (district court abused discretion in admitting four felony convictions when only one was necessary to prove status as a felon under § 922(g)(1) even though there was no stipulation as to admissibility of any one conviction)

U.S. v. Bejar-Matrecios, 618 F.2d 81 (9th Cir. 1980), *overruled on other grounds, U.S. v. Smith-Balthier,* 424 F.3d 913 (9th Cir. 2005) (prejudice substantially outweighed probative value of prior illegal reentry conviction because evidence was cumulative and jury was not instructed was not instructed to consider the evidence as proof of alienage).

Limiting Instructions

F.R.E. 403 Advisory Committee Notes: In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction.

Burgett v. Texas, 389 U.S. 109, 115 & n.7 (1967) (citation omitted) (reversing conviction because of improper admission of prior convictions despite instruction to disregard that evidence; "'[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction."

Greer v. Miller, 483 U.S. 756, 767 n.8 (1987) A limiting instruction simply will not cure the prejudice from "devastating," inadmissible evidence.

But see Watkins v. Sowders, 449 U.S. 341, 347 (1981) (noting presumption that juries will follow instructions); *U.S. v. Dorsey*, 677 F.3d 944, 955 (9th Cir. 2012) ("strong presumption that jurors follow their instructions").

Note: This rule emanates from cases in which evidence was admissible and highly probative. *See Richardson v. Marsh,* 481 U.S. 200, 206-11 (1987) (Confrontation Clause not violated by admission of nontestifying codefendant's confession with proper limiting instruction when the confession is redacted to eliminate not only defendant's name, but any reference to his or her existence)*; Watkins v. Sowders,* 449 U.S. 341, 344-47 (1981) (eyewitness identification under suggestive circumstances properly admitted under state's procedure without pretrial suppression hearing; juries must always evaluate reliability of such evidence according to instructions, notwithstanding circumstances of identification).

Thus, limiting instructions may sometimes be a necessary evil when prejudicial evidence is probative and admissible for a proper purpose, but they cannot be counted on to cure the prejudice from highly prejudicial, inadmissible evidence. *See Richardson,* 481 U.S. at 211) ("[t]he rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process," when potentially prejudicial evidence is properly admitted.).

Helpful Cases:

Old Chief, 519 U.S. at 191-92, 196 (reversing based on improper admission of prior bad act despite a strong limiting instruction).

U.S. v. Haywood, 280 F.3d 715, 724 (6th Cir. 2002) (limiting instruction is not a "sure-fire panacea" for the harm done by improper admission of extrinsic acts).

U.S. v. Bradley, 5 F.3d at 1322 (quoting *U.S. v. Neary*, 733 F.2d 210, 217 (2d Cir.1984) ("[n]o matter what limiting instruction might be given" reversal is necessary when evidence presents a high risk the jury will infer probable guilt based on propensity).

U.S. v. Bland, 908 F.2d 471, 473 (9th Cir. 1990) ("Under [some] circumstances the trial court's curative instruction[s] to the jury [are] not sufficient to obviate the prejudice."; defendant was on trial for felon in possession of a firearm; officer shot defendant at scene because knew of warrant for his arrest and believed defendant attempting to escape; jury was told that officer knew warrant involved charges that defendant tortured and murdered 7-year-old).

U.S. v. Lindsey, 850 F.3d 1009, 1018 (9th Cir. 2017) (noting "risk that despite a limiting instruction" jurors will use evidence for improper purpose).

Estate of Diaz v. City of Anaheim, 840 F.3d 592, 603-04 & n.13 (9th Cir. 2016) (citations omitted) (reversing despite limiting instruction and "stricken" testimony; recognizing that instruction not likely to cure prejudice from "highly prejudicial" evidence and that the effect on the jury of striking testimony is speculative).

U.S. v. Hall, 858 F.3d 254, 279 (4th Cir. 2017)
(limiting instructions serve as "additional protection" against undue prejudice but cannot render admissible evidence that is unduly prejudicial or otherwise does not meet the requirements of 404(b)

Empirical research:

Joel Lieberman and Jamie Arndt, *Understanding the Limits of Limiting Instructions*, 6 PSYCHOL. PUB. POL'Y & L, 685-701 (2000).

Robert Dodson, *What Went Wrong with Federal Rule of Evidence 609: A Look at How Jurors Really Misuse Prior Conviction Evidence*, 48 DRAKE L. REV. 1, 31-44 (1999).

David A. Sonenshein, *The Misuse of Rule 404(b) on the Issue of Intent in the Federal Courts*, 45 CREIGHTON L. REV. 215, 267, 267-74 (2011) ("social science research clearly demonstrates the significant, perhaps overwhelming, prejudicial impact of prior conviction impeachment, which cannot be ameliorated by limiting instructions.").

• Judge Easterbook: telling jurors not to consider prior bad acts for anything but the issue of intent is "like telling someone to ignore a hippopotamus," because "the 'bad character" inference is inseparable from the 'bad intent' inference." Dodson at 43 & n.440 (quoting *U.S. v. DeCastris*, 798 F.2d 261, 264 (7th Cir. 1986)).

• Judge Learned Hand: asking jurors to follow a limiting instruction is "a mental gymnastic which is beyond, not only their powers, but anybody's else." Dodson at 43 & n.441 (quoting *Nash v. U.S.*, 54 F.2d 1006, 1007 (2d Cir. 1932)).

• The underlying assumption supporting the effectiveness of limiting instructions is that juries are able to either disregard or selectively apply information after they hear it. A large body of research undercuts this baseline assumption. Sonenshein at 270.

• The most basic explanation is *that jurors fail to understand* a judge's instructions. Another theory suggests that *jurors comprehend limiting instructions but ignore them in favor of their own sense of fairness*. There are also a number of more complicated psychological theories that may provide explanations as to why limiting instructions are often ineffective. The overall trend of social science is clear, however, as there are many factors at play that demonstrate the ineffectiveness of limiting instructions. *Id.* at 271.

• It is particularly difficult for jurors to suppress emotional information, because people tend to have a "heightened trust" for such information. Lieberman/Arnt at 698-99.

• Jurors are likely to disregard limiting instructions when they believe they should be able to consider the inadmissible testimony. *Id.* at 688, 690-91.

• Judges, like the jury, may have similar bias in deciding the guilt of a defendant after learning of the defendant's prior convictions. This is because "[e]ven when decision makers are knowledgeable about the factors limiting the accuracy of predictions, their intuitions press them compellingly toward error." Sonenshein at 272.

• Caucasian jurors are more likely to consider inadmissible evidence when the defendant is a person of color. Lieberman/Arnt at 687.

• Jurors are less likely to follow a limiting instruction when the government's evidence against the defendant is relatively weak. *Id*. at 687; Sonenshein at 268.

• When a similar offense is offered as evidence, the standard to find the defendant guilty is lower compared to when a dissimilar offense or no offense is presented as evidence. Sonenshein at 269.

• Although prior conviction impeachment (under F.R.E. 609) generally had little impact on the defendant's credibility (because jurors generally have a low regard for the defendant's credibility), the impact of the similar crime impeachment had a much greater impact on finding the defendant guilty than even the perjury conviction. Sonenshein at 269.

• *backfire effect:* a limiting instruction may even do more harm than good by drawing attention to testimony that the jury is already inclined to consider. Lieberman/Arnt at 689-91; A limiting jury instruction could actually increase the prejudicial effect of unfavorable evidence against the defendant by causing jurors to increase their focus on that evidence. In one study . . . when the judge specifically admonished the jurors to disregard the inadmissible testimony, their verdicts were influenced in the direction of that testimony. Sonenshein at 270.

Double-edged Sword: Strategic Decision

U.S. v. Gomez, 763 F.3d 845, 860-61 (7th Cir. 2014) (en banc):
Appropriate jury instructions *may help* to reduce the risk of unfair prejudice inherent in other-act evidence. . . . A limiting instruction must be given upon request. *See* F.R.E. 105. But a defendant may choose to go without one to avoid highlighting the evidence. *We caution against judicial freelancing in this area*; sua sponte limiting instructions in the middle of trial, when the evidence is admitted, may preempt a defense preference to let the evidence come in without the added emphasis of a limiting instruction. The court should consult counsel about whether and when to give a limiting instruction." (citations omitted)

When given, the limiting instruction should be customized to the case rather than boilerplate. In order to "effectively distinguish appropriate from inappropriate inferences, jurors should be told in plain language the specific purpose for which the evidence is offered and that they should not draw any conclusions about the defendant's character or infer that on a particular occasion the defendant acted in accordance with a character trait.

Moreover, we see no reason to keep the jury in the dark about the rationale for the rule against propensity inferences. Lay people are capable of understanding the foundational principle in our system of justice that "we try cases, rather than persons." The court's limiting instruction would be more effective if it told the jurors that they *must not use the other-act evidence to infer that the defendant has a certain character and acted "in character" in the present case because it does not follow from the defendant's past acts that he committed the particular crime charged in the case.*

Finally, the instruction would be improved by tying the limiting principle to the prosecution's burden of proof. The jurors should be reminded that the government's duty is to prove beyond a reasonable doubt every element of the specific crime charged, and it cannot discharge its burden by inviting an inference that the defendant is a person whose past acts suggest a willingness or propensity to commit crimes.

Indications Jury Couldn't Follow Limiting Instruction:

• Empirical Evidence and Social Science discussed in articles above

• Juror Questions. *See U.S. v. Preston*, 873 F.3d 829, 845 (9th Cir. 2017) (juror questions can serve as evidence of the effectiveness of curative instructions).

Advisory Committee on Federal Rules of Evidence is considering revisions.

• Aware of differing approaches regarding propensity-based reasoning

• Aware of research on inefficacy of limiting instructions

• Considering changing the balancing test to exclude bad acts unless their probative value for the proper purpose outweighs the prejudicial effect.

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 (2018)

ADVISORY COMMITTEE ON RULES OF EVIDENCE, October 26-27, 2017, available at http://www.uscourts.gov/sites/default/files/a3_0.pdf

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