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Every Consumer Knows How to Run a Business: The Dangerous Assumptions Made When a Prior Possession Conviction is Admitted as Evidence in a Case Involving Commercial Drug Activity

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Every Consumer Knows How to Run a Business: The Dangerous Assumptions Made When a Prior Possession Conviction is Admitted as Evidence in a Case Involving Commercial Drug Activity

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This Comment provides a discussion on Federal Rule of Evidence 404(b), which for the past few decades has allowed federal prosecutors to use instances of prior possession to fulfill elements of a different crime involving commercial drug activity. This evidence has been allowed in a variety of circumstances among the federal circuits, regardless of proximity in time, relatedness, or similarity between the previous instance of possession and the new commercial drug charge at hand. This Comment contains an in-depth analysis of the evidentiary rule, procedural requirements, case law, and the present circuit split on this issue. A recent decision by the Third Circuit has shed light on this problem and has provided a framework that suggests stricter guidelines should be used when instances of prior possession are presented as evidence to fulfill elements of a commercial drug crime. Lastly, this Comment presents an argument that emphasizes the need for a uniform approach by either requiring a greater standard of relevancy or by excluding evidence of prior possession in cases concerning commercial drug activity when the events are substantially unrelated.

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I. INTRODUCTION

On August 1, 1997, the Federal Bureau of Investigation (FBI) arranged a purchase for crack cocaine as part of an ongoing investigation at an apartment complex and targeted suspect Michael Liles.[1] Elmer Haywood, a friend of Liles, was standing outside of the apartment complex when the FBI informant first approached the building.[2] The informant was aware that Haywood and Liles were friends and asked Haywood to set up a sale for one ounce of crack cocaine from Liles.[3] Haywood told the informant to return in forty minutes.[4] The FBI equipped the informant with a monitoring wire and a recording device.[5] The informant then met Haywood outside of the building and had a brief conversation, which Liles joined shortly thereafter.[6] The informant continued to discuss the sale with both Haywood and Liles, and either Haywood or Liles went to the basement of the apartment complex to retrieve the crack cocaine, which the informant purchased.[7] The sale did not result in an immediate arrest of Haywood because his role was unclear.[8]

Four months later, authorities arrested Haywood for possessing 1.3 grams of crack cocaine found pursuant to a search during a lawful traffic stop.[9] Charges brought against Haywood in state court were for possession of crack cocaine, but the prosecutor later dismissed the charge.[10] Nearly a

1. United States v. Haywood, 280 F.3d 715, 717 (6th Cir. 2002).
2. *Id.*
3. *Id.* at 718.
4. *Id.*
5. *Id.*
6. United States v. Haywood, 280 F.3d 715, 718 (6th Cir. 2002).
7. *Id.*
8. *See id.*
9. *Id.*
10. *Id.*

year after the crack cocaine sale to the FBI informant involving Liles, Haywood was indicted by a grand jury on one count of possession of crack cocaine with the intent to distribute.[11] Haywood pled not guilty and the government offered evidence of his dismissed offense to prove his intent, as allowed under Rule 404(b)(2) of the Federal Rules of Evidence.[12] The prosecution presented testimony by the arresting officer for the dismissed offense regarding his findings and the physical quality and quantity of the crack cocaine.[13] The jury instruction stated to only consider the arresting officer's testimony with regard to the issue of intent in the present case.[14] The jury found Haywood guilty and the judge sentenced him to a 115-month prison term with an additional five years of supervised release.[15]

There are countless issues that arise when unrelated instances of possession are used for a Rule 404(b)(2) purpose and satisfy intent in a new instance of possession with intent to distribute. For example, in *United States v. Haywood*, the instance of possession occurred after the new charged drug offense.[16] Should an act that occurred after the charged offense fulfill intent for an act that occurred four months prior?[17] In addition, the use of a prior possession alone raises its own issues when used to satisfy a new and separate instance of possession *with intent to sell*.[18] A significant dispute exists as to whether a prior instance of possession is indicative or even relevant in a future instance of possession with intent to distribute because they are entirely different acts: mere possession is indicative of personal drug use and possession with intent to distribute relates to manufacturing, selling, or importing narcotics (hereinafter referred to as "commercial drug activity").[19] Therefore, how can previous possession or a possession conviction ever outweigh the risk of unfair prejudice in a new charge of possession with intent to distribute?[20] What exactly does a prior conviction reveal in this context?[21]

This Comment defends the thesis that prior possession acts or possession convictions should not fulfill elements of commercial drug crimes under Rule 404(b)(2). As a result, courts should strictly criticize the use of prior acts or convictions and only use this evidence in straightforward cir-

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11. United States v. Haywood, 280 F.3d 715, 718 (6th Cir. 2002).
12. *Id.* at 719.
13. *Id.*
14. *Id.*
15. *Id.*
16. *See* United States v. Haywood, 280 F.3d 715, 718 (6th Cir. 2002).
17. *Id.* at 721.
18. *Id.*
19. *Id.*
20. *See id.*
21. United States v. Haywood, 280 F.3d 715, 721 (6th Cir. 2002).

cumstances.[22] Part II of this Comment involves a discussion of the background of the evidentiary rule, procedural requirements, and the most prominent United States Supreme Court case first addressing this rule. Part III provides the prominent case law, includes analysis of the rule and all of its steps, and offers clarification as to why this conclusion is logical. Part IV contains an exploration of the circuit split, the differences between reasoning when presented with this issue, and how a number of courts have recently approached this issue correctly. Lastly, Part V presents arguments for the need of a uniform approach by either requiring a greater relevancy standard under Rule 401 or excluding evidence of prior possession in cases concerning commercial drug activity.

II. BACKGROUND

Studies by the London School of Economics and the Chicago Jury Project indicate evidence of a defendant's prior act or conviction increases the likelihood the jury will find a defendant guilty.[23] These studies beg the question: why admit this evidence and what are the limits of Rule 404(b)(2)?[24] As long as prior act and conviction evidence is more helpful than prejudicial, it can have legitimate purposes that may disadvantage the defendant.[25] It becomes problematic when these legitimate purposes extend to an uncertain area, as supported by a circuit split.[26]

Before the formulation of the Federal Rules of Evidence, a common law inclusionary approach treated prior act evidence as presumptively admissible as long as the evidence was not relevant *only* to show the defendant was more likely to commit the crime.[27] Beginning in the nineteenth century, the rule began to take a different form and became exclusionary.[28] With this exclusionary approach, there is a presumption that evidence is inadmissible unless it is relevant for a specific purpose.[29] This new trend occurred because the American courts mistakenly applied what they

22. *See* United States v. Lopez, 979 F.2d 1024, 1034-35 (5th Cir. 1992). There are times when the use of a prior act or conviction is logical. For example, if the defendant claims that he has never seen the drug he has been charged with possessing, a prior possession conviction for that drug is relevant and outweighs the risk of unfair prejudice.

23. Jane C. Hofmeyer, Note, *A Relaxed Standard of Proof for Rule 404(b) Evidence: United States v. Huddleston*, 6 COOLEY L. REV. 79, 83-84 (1989) (citing E.J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 1:02, at 4 (1984)).

24. *See id.*

25. *See* United States v. Lopez, 979 F.2d 1024, 1034-35 (5th Cir. 1992).

26. *See* Kenneth J. Melilli, *The Character Evidence Rule Revisited*, 1998 BYU L. REV. 1547, 1558-60 (1998).

27. *See id.*

28. *See id.*

29. *See id.*

thought was the common law English rule.[30] Due to this error, the Federal Rules of Evidence created a uniform inclusionary approach in Rule 404(b).[31] Even though the rule regarding prior act evidence has taken many different forms, these changes did not influence the results or actual application of the rule, demonstrating courts are not exactly sure what to do with prior act evidence.[32] Since the creation of Rule 404(b), it is the most challenged evidentiary rule reviewed on appeal, further demonstrating the perplexity of the rule and inconsistent application.[33]

Rule 404 provides guidance to the courts when there is a request to use character, prior act evidence, or convictions as evidence.[34] Rule 404 has two parts: (a) character evidence[35] and (b) crimes, wrongs, or other acts.[36] The overall purpose of Rule 404 and its subparts is to protect the defendant against unfair prejudice, as the jury might give prior act or character evidence too much weight.[37] If this evidence receives too much weight out of context, the jury concludes the defendant is generally a bad person and deserves punishment—not because he is guilty of the crime at issue.[38]

Rule 404(a) concerns using general character evidence and states, "[e]vidence 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."[39] Rule 404(a) also discusses exceptions to this general rule in criminal cases, regarding the defendant and victim's pertinent trait[40] or a witness's character, which exceeds beyond the scope of this Comment.[41]

Prior acts become evidence under Rule 404(b)(1) which states, "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character."[42] Rule 404(b)(2) allows prior act evidence and provides a non-inclusive list of purposes.[43] Rule 404(b)(2)

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30. *See id.*

31. *See* Melilli, *supra* note 26, at 1560; Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988, 992 (1938).

32. *See* Melilli, *supra* note 26.

33. *See* Thomas J. Reed, *Admitting the Accused's Criminal History: The Trouble with Rule 404(b)*, 78 TEMP. L. REV. 201, 211 (2005).

34. *See* FED. R. EVID. 404 (West 2015).

35. FED. R. EVID. 404(a) (West 2015).

36. FED. R. EVID. 404(b) (West 2015).

37. *See* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, 1 FEDERAL EVIDENCE § 4:21 (4th ed. 2013).

38. *Id.*

39. FED. R. EVID. 404(a)(1) (West 2015).

40. *See* FED. R. EVID. 404(a)(2) (West 2015).

41. *See* FED. R. EVID. 404(a)(3) (West 2015).

42. FED. R. EVID. 404(b)(1) (West 2015).

43. *See* FED. R. EVID. 404(b)(2) (West 2015).

states, "[t]his evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."[44]

There are three different procedural steps to consider with Rule 404(b): pretrial motion, burden of proof, and the limiting instruction.[45] The pretrial motion is not required, but is strongly encouraged and is typically the judge's preference.[46] The notice requirement encourages pretrial motions and provides an opportunity for the defendant to make a motion *in limine* to exclude the damaging evidence.[47] The defendant is usually the party that files a pretrial motion, but either party can file a pretrial motion to resolve these issues.[48]

Prosecutors bear the burden to show the other act evidence is relevant and admissible against any objections of unfair prejudice.[49] The prosecutor meets this burden by showing the evidence meets a proper purpose under Rule 404(b)(2) and the evidence is relevant to that purpose.[50] With prior act evidence, the prosecutor must show by a preponderance of the evidence that the prior act occurred, the defendant was the actor, and the prior act is relevant under Rule 404(b)(2).[51] However, under Rule 104(b), it is the jury's role to decide if the prior act occurred and the defendant was, in fact, the actor.[52] This procedure is unnecessary when the prosecution is offering a prior conviction.[53] Prior convictions automatically meet their burden of proof when presented as evidence, as it would meet any standard such as preponderance of the evidence or proof beyond a reasonable doubt.[54]

If the judge decides to allow the other act evidence or conviction over the defendant's objection, then the defendant can request a limiting jury instruction.[55] According to Rule 105, "[i]f the court admits evidence that is admissible against a party or for a purpose--but not against another party or for another purpose--the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly."[56] The purpose of the limiting instruction is to ensure that the jury only uses the evidence for a

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44. *Id.*
45. *See* MUELLER & KIRKPATRICK, *supra* note 37, § 4:29.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. MUELLER & KIRKPATRICK, *supra* note 37, § 4:29.
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *See* MUELLER & KIRKPATRICK, *supra* note 37, § 1:41.
56. FED. R. EVID. 105 (West 2015).

particular purpose and not to decide other issues in the case.[57] Prior act evidence has a serious threat of unfair prejudice and is a clear example of why the limiting instruction exists.[58] Concerning Rule 404(b), the jury should decide the defendant had the knowledge to commit the alleged crime because his past conviction was for a crime completed in the same unique manner;[59] they should not conclude the defendant committed the crime once, and therefore most likely repeated the offense.[60] This example demonstrates the significant and imperative relationship between Rule 404(b) and Rule 105.[61]

In 1988, the Supreme Court of the United States addressed the use of prior act evidence and its admissibility during trial.[62] In April of 1985, the Overnight Express yard located in South Holland, Illinois had approximately thirty-two thousand blank videocassette tapes stolen.[63] The defendant, Guy Huddleston, contacted the manager of a rent-to-own business for her assistance in selling the tapes in bulk.[64] Through their communications, Huddleston assured the manager of the legitimacy of the tapes, and she arranged the sale of five thousand tapes to a third party.[65] At trial, there was no dispute whether the tapes were stolen, but whether Huddleston *knew* they were stolen.[66]

The prosecution requested to admit evidence of similar acts under Rule 404(b)(2) to prove Huddleston's knowledge.[67] The first similar act the prosecution offered was in the form of testimony by a record storeowner.[68] The record storeowner testified that a few months before the incident at issue, Huddleston offered to sell new black and white televisions for twenty-eight dollars each and indicated he could obtain thousands more if requested.[69] The other similar act the prosecution offered was after the alleged tape theft, where testimony was provided by an undercover FBI agent who was acting as a buyer for an appliance store.[70] The FBI agent agreed to

57. MUELLER & KIRKPATRICK, *supra* note 37, § 1:41.
58. *See id.*
59. *See id.* §§ 1:41, 4:29.
60. *See id.*
61. *See id.* This example demonstrates how the limiting instruction has a valid purpose to determine the defendant's knowledge, but has the potential to be detrimental if the jury values the evidence more than its worth and makes a conclusion on the defendant's general character.
62. *See* Huddleston v. United States, 485 U.S. 681 (1988).
63. *Id.* at 682.
64. *Id.* at 682-83.
65. *Id.*
66. *Id.*
67. Huddleston v. United States, 485 U.S. 681, 683 (1988).
68. *Id.*
69. *Id.*
70. *Id.*

pay eight thousand dollars for twenty-eight refrigerators, two ranges, and forty-four icemakers from Huddleston.[71] Huddleston was arrested and it was determined the appliances were part of a stolen shipment valued at twenty thousand dollars.[72]

The prosecution claimed that Huddleston was not on trial for his similar acts; however, this prior act evidence established Huddleston's knowledge that they were stolen tapes.[73] In deciding the case, the Court developed a test for evidence offered under Rule 404(b)(2), which states the evidence must: (1) be offered for a proper purpose under Rule 404(b), (2) be relevant under Rule 402 as enforced by Rule 104(b), (3) have probative value that is not substantially outweighed by the potential of unfair prejudice, and (4) upon request, be provided in the form of a limiting jury instruction.[74] These guidelines were created by the Court to guide courts in the decision to exclude or admit evidence under Rule 404(b).[75]

III. THE *HUDDLESTON* TEST DISSECTED

Since the Court developed the test in *Huddleston v. United States*, courts have inconsistently applied the common law rule due to varying circumstances.[76] Even though the test provides a roadmap for which rules to address, the amount of judicial discretion within the rules contribute to an inconsistent application.[77] The following analysis is narrowed to case law involving drug crimes with emphasis on the issue of whether a prior possession conviction is in any way relevant or more probative than prejudicial in a new and separate charge for possession with intent to sell.

A. STEP ONE: PURPOSE ALLOWED UNDER RULE 404(B)(2)

Rule 404(b)(2) provides a non-inclusive list of purposes for prior act evidence.[78] Based on the purposes listed, it appears the list includes the only practicable purposes for prior act evidence involving drug crimes.[79] In addition, prosecutors can provide a number of purposes as to why a court should

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71. *Id.*
72. Huddleston v. United States, 485 U.S. 681, 681 (1988).
73. *Id.* at 684.
74. *Id.* at 691.
75. *See id.*
76. *See id.*
77. *See generally* United States v. Davis, 726 F.3d 434, 445 (3d Cir. 2013) (addressing the circuit split on the issue of whether prior possession convictions can support a new charge of possession with intent to sell and how different outcomes have occurred due to the amount of judicial discretion concerning prior act evidence).
78. *See* FED. R. EVID. 404(b)(2) (West 2015).
79. *See id.*

enter a prior act into evidence;[80] they are not limited to choosing one purpose.[81] The most common purposes that are offered to use prior drug convictions under Rule 404(b)(2) is to show knowledge, intent, and/or absence of mistake or accident.

1. Knowledge

When a defendant offers testimony, in which he states that he has never seen marijuana before, a prosecutor can offer a seventeen-year-old prior conviction for possession of marijuana into evidence.[82] The evidence in this instance proved the defendant's knowledge of marijuana and impeached credibility of the defendant's testimony.[83] The prosecutor involved in the possession conviction already established knowledge and met his burden of proof with the conviction itself; therefore, it is reasonable to admit this evidence for the purpose of knowledge.[84] This prior conviction was allowed to refute the defendant's claim that he had never seen marijuana before.[85] It is likely that the prior conviction would not have provided a proper purpose allowed under Rule 404(b)(2) if the defendant had not raised the issue of knowledge.[86] The use of knowledge in this instance appears to be straightforward, but consider whether a prior conviction for conspiracy to manufacture methamphetamine can prove knowledge in a separate charge of conspiracy to distribute methamphetamine.[87]

A court held that a jury could infer from a prior conviction of conspiracy to manufacture methamphetamine that the defendant had sufficient familiarity with the production of methamphetamine in order to possess adequate knowledge to know how to distribute it.[88] The defendant in this case argued that the acts involved in these charges do not have a "logical nexus" to support that he gained knowledge from manufacturing methamphetamine to know how to distribute it.[89] Against the defendant's objections, the court allowed this evidence and stated that prior act evidence does not have to be similar to the charged act; rather, the prior act only needs to make knowledge more probable than without the prior act evidence.[90]

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80. *See Davis*, 726 F.3d at 440 (the prosecution offered a prior possession conviction to show "knowledge or intent").
81. *See id.*
82. *See* United States v. Lopez, 979 F.2d 1024, 1032-35 (5th Cir. 1992).
83. *Id.*
84. *See id.*
85. *Id.*
86. *See id.*
87. *See* United States v. Montgomery, 150 F.3d 983, 1001 (9th Cir. 1998).
88. *Id.*
89. *Id.*
90. *See id.*

Courts have been able to infer enough from prior manufacturing convictions to prove knowledge in a separate charge for distribution.[91] This appears to be a logical conclusion because as a manufacturer, there is a need to sell the product to a distributer, which implies the manufacturer has the necessary knowledge of how to sell the product.[92] Based on this analysis, there is enough of a connection to infer knowledge from manufacturing to distributing.[93] If a prior manufacturing conviction is enough to infer knowledge for distribution, can a prior conviction for possession allow such an inference of knowledge for a separate conviction for intent to distribute?[94] It would appear from the previous analysis that with mere possession, a defendant only has knowledge on how to buy the drug, not how to sell it.[95] Further, a prior possession conviction is unlike prior manufacturing convictions, where knowledge of distribution is reasonably inferable as it is within the nature of the crime.[96] Nevertheless, the answer to this question is disputed, as exemplified by a circuit split.[97]

2. Intent

When a defendant enters a plea of not guilty, the defendant's intent is at issue.[98] However, if the defendant denies that the charged act even occurred, intent is not at issue.[99] The use of intent as a purpose under Rule 404(b)(2) is to show that based on the defendant's prior acts he actually intended to commit the alleged crime.[100] The purpose of intent draws a fine line and can often lead to the conclusion that the defendant was acting in conformity with his character, which Rule 404(b)(1) strictly prohibits.[101] Prior act evidence for the purpose of intent is sometimes in the form of convictions, but usually it is in the form of uncharged acts that have built up to the particular charge at hand.[102] With uncharged prior acts, the judge must find that (1) the prosecution met their burden of proof by a preponder-

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91. *See id.*
92. *See* United States v. Montgomery, 150 F.3d 983, 1001 (9th Cir. 1998).
93. *See id.*
94. *See id.*
95. *See id.*
96. *See id.*
97. *See* United States v. Davis, 726 F.3d 434, 445 (3d Cir. 2013).
98. PAUL F. ROTHSTEIN, FEDERAL RULES OF EVIDENCE 404 (3d ed.) (citing United States v. Myers, 123 F.3d 350 (6th Cir. 1997)), *available at* www.westlaw.com (search "Fed. Rules of Evidence 404 (3d ed.)"; scroll to Practice Comment (II)(A)(iv)).
99. *See id.* (citing United States v. Sumner, 119 F.3d 658, 660 (8th Cir. 1997)).
100. *See id.*
101. *See* FED. R. EVID. 404(b)(1) (West 2015).
102. *See* ROTHSTEIN, *supra* note 98 (citing United States v. Elkins, 732 F.2d 1280, 1286 (6th Cir. 1984)); scroll to Practice & Comment II.B.iii.

ance of the evidence that the prior act occurred and (2) the defendant was the actor.[103] As an example, in order to prove intent, an informant testified that on ten different occasions he had purchased cocaine from the defendant.[104] This evidence was proper to demonstrate the defendant's intent—as intent to distribute is not any clearer than by ten different transactions to the same person.[105] When a prior conviction is used that did not build up to the crime at issue, the purpose of intent becomes more complicated and less clear.[106]

The element of intent is essential to drug charges and often is in dispute.[107] If the judge allows a prior conviction to prove intent, the majority of the prosecution's work is completed and a new conviction is often the result.[108] A court found that a prior conviction for cocaine trafficking was proper for the purpose of intent for a separate charge of cocaine possession, even when the defendant claimed that he lacked constructive possession.[109] Situations like this often raise constitutional questions regarding double jeopardy, which have generally been unsuccessful.[110] Based on this outcome, it shows that the use of a prior conviction involving commercial drug activity is relevant for intent to establish a separate instance of simple possession.[111]

Some courts have been willing to extend this application in reverse: applying simple possession convictions to show intent for crimes involving commercial drug activity.[112] Yet, how can a prior conviction for mere possession show intent in a separate instance of possession with intent to distribute?[113] This conclusion means that just because someone possessed a drug at one point in time he/she now has the future intent to sell.[114]

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103. *See* MUELLER & KIRKPATRICK, *supra* note 37, § 4:29.
104. *Id.*
105. *See id.*
106. *See id.*
107. *See* ROBERT E. LARSEN, NAVIGATING THE FEDERAL TRIAL § 10:47 (2014).
108. *See* MUELLER & KIRKPATRICK, *supra* note 37, § 4:29.
109. *See* United States v. Paulino, 445 F.3d 211, 221 (2d Cir. 2006).
110. *See generally* United States v. Felix, 503 U.S. 378, 388-89 (1992) (admitting prior conviction evidence that has already been used to prove the defendant's intent for a separate conviction does not prompt the Double Jeopardy Clause contained within the Fifth Amendment).
111. *See Paulino*, 445 F.3d at 221.
112. *See* United States v. Davis, 726 F.3d 434, 444 (3d Cir. 2013).
113. *See id.*
114. *See id.*

3. Absence of Mistake or Accident/ Doctrine of Chances

Absence of mistake or accident is another way for the prosecution to enter prior acts into evidence in the absence of knowledge or intent under Rule 404(b)(2).[115] Courts often refer to this purpose as the Doctrine of Chances, which stands for the notion: the more an unusual or highly unlikely event occurs, the more likely subsequent events of the same nature are not an accident or mistake.[116] If the defendant denies the alleged crime even occurred, the evidence offered to show absence of mistake is inadmissible.[117] The specific use of the Doctrine of Chances rarely provides an opportunity for the defendant to claim the event did not even occur, especially because the event usually involves murder or insurance fraud.[118] Despite the unlikelihood component of the Doctrine of Chances, prosecutors have offered prior possession convictions in order to show absence of mistake for a separate charge of possession with intent to sell.[119]

B. STEP TWO: RELEVANT UNDER RULE 402 AS ENFORCED UNDER RULE 104(B)

After prior act evidence is offered for a proper purpose under Rule 404(b), the judge then needs to decide if the prior act is relevant under Rule 402.[120] Rule 402 states, "Relevant evidence is admissible unless any of the following provides otherwise: the United States Constitution; a federal statute; these rules; or other rules prescribed by the Supreme Court. Irrelevant evidence is not admissible."[121] Rule 402 implies the relevance standard in Rule 401, which states, "Evidence is relevant if: (a) it has *any tendency* to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."[122] Rule 402 is an informal presumption, meaning as long as the evidence is admissible under Rule 401 and not excluded from any sources listed in Rule 402, it is admissible.[123] It is important to note that Rule 402 affects evidence rules

115. LARSEN, *supra* note 107, § 10:52.
116. *Id.*
117. *See* United States v. Nichols, 808 F.2d 660, 663 (8th Cir. 1987).
118. LARSEN, *supra* note 107, § 10:52.
119. *See generally* United States v. Bell, 516 F.3d 432 (2008) (holding that the lower courts erred in admitting prior convictions to prove absence of mistake or accident because the defendant did not assert a defense based on absence or mistake).
120. *See* Huddleston v. United States, 485 U.S. 681, 691 (1988).
121. FED. R. EVID. 402 (West 2015).
122. FED. R. EVID. 401 (West 2015) (emphasis added).
123. *See* PAUL F. ROTHSTEIN, FEDERAL RULES OF EVIDENCE RULE 402 (3d ed. 2013).

both retrospectively and prospectively.[124] For instance, the creation of a constitutional rule or a new evidentiary rule immediately takes precedent over the Federal Rules of Evidence.[125] In addition, any rule changes made by the Supreme Court also take precedent over the Federal Rules.[126] This step of the analysis also requires Rule 402 be enforced through Rule 104(b), which states, "When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later."[127]

C. STEP THREE: THE BALANCING TEST

This balancing step of the analysis is perhaps the most important as it examines the potential burden of unfair prejudice placed on the defendant.[128] Rule 403 states, "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."[129] All of the potential dangers listed in Rule 403, collectively referred to as "unfair prejudice," means guilt will be determined "on a ground different from proof specific to the offense charged."[130] The logic behind this rule is, when the jury is uncertain of guilt, even if a prior act or conviction is relevant to the alleged crime, they will probably convict the defendant because he deserves punishment.[131] The other possible danger is the jury can issue a guilty verdict as a "preventative conviction"—meaning even though the defendant is innocent today, he is likely to be guilty in the future because he has been guilty previously.[132] Further, the probative value of the evidence has to outweigh "ordinary relevance."[133] The trial judge makes this determination based on a balancing test: whether the evidence is more probative than prejudicial.[134] In this determination, the judge should consider the ju-

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124. *See* KENNETH W. GRAHAM, JR. & KENNETH W. GRAHAM, JR., 22A FEDERAL PRACTICE AND PROCEDURE EVIDENCE § 5199 (2d ed. 2014).

125. *See id.*

126. *Id.*

127. FED. R. EVID. 104(b) (West 2015).

128. *See* FED. R. EVID. 403 (West 2015).

129. *Id.*

130. Old Chief v. United States, 519 U.S. 172, 180 (1997) (discussing FED. R. EVID. 403).

131. *Id.* at 181 (citing United States v. Moccia, 681 F.2d 61, 63 (1st Cir. 1982)).

132. *Old Chief*, 519 U.S. at 181.

133. *See id.*

134. *Id.* (citing United States v. Halper, 590 F.2d 422, 432 (2d Cir. 1978)).

ry's likely hostile reaction to prior conviction evidence.[135] For these reasons, arguments for or against the evidence should take place without the presence of the jury.[136]

The United States Supreme Court addressed this balancing test in depth in *Old Chief v. United States* when a defendant faced charges of felonious possession of a firearm and the prosecution requested to enter the details of the defendant's prior felony conviction to prove he was, in fact, a felon, and thus, the statute was applicable.[137] In *Old Chief*, the defendant had a prior conviction for assault with a firearm with the alleged crimes being assault with a deadly weapon and possession of a firearm by a convicted felon.[138] The defendant requested a limiting jury instruction, which would inform the jury that the defendant previously committed a felony punishable by imprisonment for at least one year.[139] The defendant argued the previous assault charges would add too much weight of unfair prejudice to the current assault charge against him.[140] The lower courts decided the prosecution did not have to agree to the stipulation and allowed the jury to hear detailed evidence of the defendant's prior felony conviction.[141] The defendant appealed and argued that the unfair prejudice from the prior felony conviction substantially outweighed the probative value, and the Court agreed.[142]

The prosecution's most convincing argument for rejecting the defendant's stipulation is the prosecution is entitled to prove the case with their choice of evidence, and a criminal defendant cannot stipulate his way out of specific details.[143] Allowing the prosecution to present such evidence "tells a colorful story with descriptive richness" and fulfills a juror's expectations.[144] The Court agreed that interrupted gaps in a story could cause confusion and be detrimental to the prosecution's case.[145] However, the issue in *Old Chief* was with the defendant's legal status, which the Court concluded did not interrupt the prosecution's story to the jury.[146]

For instance, all the jury needed to know to convict the defendant of possession of a firearm by a felon was that he was, in fact, a felon.[147] The

135. *Old Chief*, 519 U.S. at 180.
136. *See* MUELLER & KIRKPATRICK, *supra* note 37, § 4:29 (discussing Rule 104(c)).
137. *Old Chief*, 519 U.S. at 175.
138. *Id.* at 185.
139. *Id.* at 176.
140. *Id.* at 185.
141. *See id.* at 176-78.
142. *See* Old Chief v. United States, 519 U.S. 172, 180 (1997).
143. *Id.* at 186-87.
144. *Id.* at 187.
145. *Id.* at 189.
146. *See id.* at 191.
147. Old Chief v. United States, 519 U.S. 172, 191 (1997).

details of the defendant's felony conviction were immaterial because for the crime charged, the Court further explained that it did not matter whether the felony charge was for possessing short lobsters or for aggravated murder.[148] This analysis balanced the government's interest in proving the elements of a crime with the defendant's interest in avoiding unfair prejudice, which the Court concluded the lower court abused its discretion in admitting such evidence.[149] Perhaps the most compelling argument to exclude prior possession convictions in new instances of possession with intent to distribute is that the evidence's probative value can never outweigh the risk of unfair prejudice, similar to the legal status issue in *Old Chief*.[150]

D. STEP FOUR: THE LIMITING JURY INSTRUCTION

The last step of the *Huddleston* test suggests that the defense request a limiting jury instruction to ensure the jury uses the prior conviction for a proper purpose.[151] However, there are arguments that suggest the jury has a difficulty keeping the instruction separate from the rest of the case, which results in unfair prejudice.[152] Whether a jury instruction about a prior possession conviction can effectively fulfill its purpose and outweigh unfair prejudice extends beyond the scope of this Comment.[153]

IV. CIRCUIT SPLIT AND THE MODERN TREND

In order to provide a uniform approach, it is important to understand the different tests each circuit has applied when faced with the issue of evidence of a prior conviction for possession to prove a separate instance of possession with intent to sell.[154] In the 1990s, courts faced first impressions with this issue and allowed prior possession evidence in cases involving commercial drug charges; however, there is a recent trend to exclude this evidence.[155] Cases after *Huddleston* have applied their own form of the *Huddleston* test with their own supplements and the reasoning has transformed significantly.[156] Characterized as harmless error, early cases often used prior possession convictions to prove a new and separate instance of

148. *Id.* (citing United States v. Tavares, 21 F.3d 1, 4 (1st Cir. 1994)).
149. *See Old Chief*, 519 U.S. at 173.
150. *See id.*
151. *See* Huddleston v. United States, 485 U.S. 681, 691 (1988).
152. *See* United States v. Santini, 656 F.3d 1075, 1077 (9th Cir. 2011) (concluding that the limiting instruction did not "cure the error" and that the admission of the prior possession conviction was more unfairly prejudicial than probative).
153. *See id.*
154. *See* United States v. Davis, 726 F.3d 434, 445 (3d Cir. 2013).
155. *See id.*
156. *See id.*

intent to sell.[157] More recently, courts have found the error to be harmful and question the relevance of such evidence and whether the evidence could ever outweigh the risk of unfair prejudice.[158]

The Fifth, Eighth, and Eleventh Circuits continuously characterized prior conviction evidence as harmless error because of the usual amount of evidence already against the defendant and the practice continues today.[159] However, in the past ten years, the Third, Sixth, Seventh, and Ninth Circuits have undergone a more modern approach, reversing convictions due to abuse of discretion.[160] This modern approach is possibly a backlash effect from the "War on Drugs" initiative.[161] For example, prosecutors were issuing charges with greater mandatory sentences, such as intent to distribute rather than mere possession, for the purpose of keeping drugs off the streets longer.[162] However, this backlash from the "War on Drugs" has dissipated, and courts are more willing to recognize the risks associated with prior possession convictions used as evidence in new cases for intent to sell.[163] The difference between the circuits further demonstrates the need for a uniform approach for courts when faced with prior possession convictions used as evidence for a new charge involving commercial drug activity.[164]

V. NEED FOR A UNIFORM APPROACH

Alternative approaches should revolve around the concept that simple possession convictions are entirely different from commercial drug activities. As stated in *United States v. Ono*, "Acts related to the personal use of a controlled substance are of a wholly different order than acts involving the distribution of a controlled substance. One activity involves the personal abuse of narcotics, the other the implementation of a commercial activity for profit."[165] Therefore, the use of prior possession convictions as evidence under 404(b)(2) for a new commercial drug charge should require strict criticism to ensure that the prior conviction has more probative than unfairly prejudicial value.[166]

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157. *See* United States v. Monzon, 869 F.2d 338 (7th Cir. 1989).

158. *See Davis*, 726 F.3d at 445.

159. *See id.*

160. *See id.*; United States v. Haywood, 280 F.3d 715, 720 (6th Cir. 2002) (clarifying that the standard of review for all evidentiary rulings is abuse of discretion).

161. *See generally* The Honorable William W. Wilkins, Jr., Phyllis J. Newton & John R. Steer, *Competing Sentencing Policies in A "War on Drugs" Era*, 28 WAKE FOREST L. REV. 305 (1993).

162. *See id.*

163. *See id.*

164. *See Davis*, 726 F.3d at 445.

165. United States v. Ono, 918 F.2d 1462, 1465 (9th Cir. 1990).

166. *See id.*

For example, the Third Circuit most recently addressed this issue in *United States v. Davis* and decided mere possession convictions and commercial drug crimes are not similar, which makes the prior possession conviction irrelevant, with lower probative value.[167] In *Davis*, the defendant was charged with possession of cocaine with the intent to distribute.[168] At trial, the defendant denied having knowledge and intent; therefore, the prosecution was allowed to introduce two prior convictions for possession of cocaine to demonstrate the defendant's intent and/or knowledge under Rule 404(b)(2).[169] The prosecution offered to admit this evidence with the specific purpose to prove that the defendant had the knowledge and/or intent by showing the defendant knew what cocaine was and how to sell drugs.[170] The *Davis* court applied the *Huddleston* test and deemed the admission of the defendant's prior convictions to be erroneous.[171] In reaching its conclusion, the court explained that it could not find a reasonable connection as to why these two prior convictions would prove anything other than character and the prior convictions should have been excluded under part three of the *Huddleston* test.[172]

The court also sharply criticized the lower court for suggesting that a person previously convicted of possession has the same knowledge as a drug dealer.[173] Just because a person has possessed a substance, does not indicate this individual would recognize the same substance when it is prepared and packaged in greater quantities.[174] Quality of the substance like cocaine is also a complicated issue, as different purities result in different forms, such as powder or rocks.[175] In addition, the jury did not know the facts of the prior convictions in terms of quantity or quality to make the decision if the prior conviction would contribute to the defendant's knowledge.[176] Even if quantity and quality were not at issue, the act of mere possession and the act of possession with intent to distribute are distinguishable because there is not a logical nexus between the knowledge one

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167. *See Davis*, 726 F.3d at 442.

168. *Id.* at 438.

169. *Id.* The prosecution was allowed to offer multiple purposes for the purpose of the prior convictions. *See id.*

170. *See id.* at 443-44.

171. *See id.* at 441.

172. United States v. Davis, 726 F.3d 434, 442 (3d Cir. 2013) (requiring that the evidence be more helpful than prejudicial). *See* FED. R. EVID. 403 (West 2015).

173. *Davis*, 726 F.3d at 443.

174. *Id.*

175. *Id.*

176. *Id.* It could also be argued that the jury should know details of the prior possession conviction to make their own determination as to whether it would have given the defendant knowledge or the intent necessary for a charge involving commercial drug activity. *See id.*

may have from possessing cocaine and the knowledge one has in order to sell cocaine.[177] It would be simply unreasonable to suggest that just because a person has the knowledge as a consumer, they would have the necessary knowledge for activities in a commercial context.[178]

In addition, the *Davis* court found use of the prior possession convictions for intent under Rule 404(b) to be an error by the trial court.[179] This was an error because (1) the act of possession and possession with intent to sell are two entirely different acts and (2) just because a person possessed cocaine in the past, does not indicate the person has the intent to sell cocaine in the future.[180] The court was able to easily recognize that this evidence was character evidence in disguise, which is the exact inference Rule 404 prohibits.[181] Based on this analysis and the risk posed that the jury might give prior act evidence too much weight, it appears that the Third Circuit would never allow a possession conviction into evidence to infer knowledge and/or intent for a separate instance of possession with intent to sell.[182] This opinion by the Third Circuit suggests the prior possession conviction was irrelevant: Consequently, should Rule 404(b)(2) require a higher standard of relevancy than "any tendency" under Rule 401?[183] Even though the court ultimately reversed this conviction under the balancing test required under Rule 403, the court's opinion suggests that the prior conviction was irrelevant as a preliminary matter.[184]

A. SHOULD 404(B)(2) REQUIRE MORE THAN "ANY TENDENCY?"

The inconsistent application of Rule 404(b)(2) among the circuits requires a framework set in place by the United States Supreme Court, that states Rule 404(b) evidence requires a higher relevancy standard than contained in Rule 401.[185] Before reaching the *Huddleston* test, the first step for all evidence to pass is through Rule 401, which states evidence is relevant if it has "any tendency" to make a material fact more or less probable.[186] The

177. United States v. Davis, 726 F.3d 434, 443-44 (3d Cir. 2013).
178. *See id.*
179. *Id.* at 444.
180. *Id.*
181. *See id.* at 442 (citing United States v. Sampson, 980 F.2d 883, 887 (3d Cir. 1992)).
182. *See* United States v. Davis, 726 F.3d 434, 442 (3d Cir. 2013).
183. *See id.*
184. *See id.*
185. *See id.* It is important that the solution comes from the United States Supreme Court to ensure a proper application by all jurisdictions.
186. *See* FED. R. EVID. 401(a) (West 2015); Huddleston v. United States, 485 U.S. 681, 691 (1988).

"any tendency" threshold is very low and easily met.[187] This framework would use Rule 401 as a base, would set forth factors when Rule 404(b)(2) evidence is presented, and require a higher standard of relevancy.[188]

Specific guidelines within this approach would establish a higher standard of relevancy.[189] For example, in order for a prior conviction to be relevant, it must be significantly similar to the new charge or proximate in time.[190] These guidelines would direct the trier of fact in deciding whether a prior conviction is relevant to the charged crime.[191] With the current state of Rule 401, courts would most likely find a prior conviction relevant.[192] If these common law guidelines existed, it would provide an extra barrier to eliminate confusion and currently existing unfair prejudice within the circuits concerning prior possession convictions when offered for a Rule 404(b)(2) purpose in commercial drug charges.[193]

For example, the Ninth Circuit has applied its own common law test when it uses Rule 401 to determine if a prior possession conviction is relevant to a new charge of possession with intent to distribute.[194] In *United States v. Santini*, the defendant claimed he lacked knowledge of marijuana hidden in his car when he was at a border control stop coming into the United States from Mexico.[195] The defendant's defense relied heavily on a traumatic brain injury he experienced five years prior, and argued this injury made it easy for others to manipulate or trick him.[196] The defense's expert witness, a clinical psychologist, testified the defendant had permanent cognitive deficiencies and this "type of injury can cause difficulty with 'social perception of other people.'"[197] In contrast, the prosecution's expert witness was a psychiatrist who testified his evaluation did not indicate the defendant was more susceptible to manipulation than the average person.[198] However, the prosecution's expert witness made this determination based on the defendant's "rap sheet," which indicated numerous confrontations with the law.[199] This expert witness claimed that if the defendant's injury

187. *See* FED. R. EVID. 401(a) (West 2015).
188. *See id.*
189. *See id.*
190. *See id.*
191. *See id.*
192. *See* FED. R. EVID. 401(a) (West 2015). This evidence might pass the relevancy standard of Rule 401, but may be barred later by a Rule 403 objection. *See* FED. R. EVID. 403 (West 2015).
193. *See* FED. R. EVID. 401(a) (West 2015).
194. *See* United States v. Santini, 656 F.3d 1075, 1077 (9th Cir. 2011).
195. *Id.* at 1077.
196. *Id.*
197. *Id.*
198. *Id.*
199. United States v. Santini, 656 F.3d 1075, 1077 (9th Cir. 2011).

influenced the present charge, then he expected the defendant would not have any similar conduct on his "rap sheet" before the brain injury.[200]

The Ninth Circuit reviewed the testimony discussing the "rap sheet" and applied a four-part test which stated, "Such evidence may be admitted if: (1) the evidence tends to prove a material point; (2) the other act is not too remote in time; (3) the evidence is sufficient to support a finding that defendant committed the other act; and (4) (in certain cases) the act is similar to the offense charged."[201] A common law interpretation of Rule 401, similar to the one applied here by the Ninth Circuit, would provide a strict guideline for the courts, which would assist in the application of 404(b)(2).[202]

In *Santini*, the defendant's criminal history was inadmissible because it failed the third and fourth prong of this test.[203] The third prong failed because the expert witness admitted on cross-examination that the information was hard to understand and the defense argued there were multiple allegations from the same incident from different contacts.[204] The court also recognized the trial court never even examined the "rap sheet" and it was not on the record.[205] Therefore, the testimony stating that the defendant had a history of extensive contact with law enforcement should have made the testimony itself inadmissible.[206] Additionally, the testimony was inadmissible under the fourth prong of this test because the acts on the "rap sheet" were not similar enough to the alleged crime.[207] The "rap sheet" contained information concerning a prior conviction for "simple" possession and arrests for indecent exposure and assault.[208] The court concluded the "rap

200. *Id.*

201. *Id.* at 1077-78 (using the test derived from United States v. Romero, 282 F.3d 683, 688 (9th Cir. 2002)).

202. *See id.*

203. *Id.* at 1078.

204. United States v. Santini, 656 F.3d 1075, 1078 (9th Cir. 2011). The government also argued that the testimony regarding the defendant's criminal history should be admitted under Rule 703, which explains that the facts or data that the expert opinion uses to formulate their opinion does not have to be admissible for the opinion itself to be admitted. However, the court rejected this argument because the expert's opinion was not based upon sufficient facts or data (required under Rule 703) and the testimony was far more prejudicial than probative Rule 403. *Id.* at 1078-79.

205. *Id.* at 1078.

206. *See id.*

207. *Id.* The court indicated that the prior possession conviction was "simple," further demonstrating how courts are refusing to find a logical connection between possession and crimes involving drug distribution. *See* United States v. Santini, 656 F.3d 1075, 1078 (9th Cir. 2011).

208. *Id.*

sheet" consisted of acts that were not similar to the importation of marijuana, and as a result, the evidence lacked probative value.[209]

Based on the expert's testimony that the defendant engaged in similar confrontations with the law before his brain injury, a juror would conclude the defendant had imported drugs before his brain injury.[210] However, the defendant only had a prior conviction for "simple" possession, he did not have a criminal history relating to drug distribution or any commercial drug activity.[211] The court also concluded that even though there was a limiting instruction that advised the jury not to consider the testimony about the confrontations with law enforcement, the jury instruction involved evaluating the expert's testimony that stated the brain injury did not contribute to the defendant's conduct.[212] As a result, the limiting instruction did not "cure the error" and it was more probable than not that the trial court's error materially affected the verdict.[213] The analysis from the Ninth Circuit is demonstrative of the modern trend's prohibition against the use of prior possession convictions in new charges for drug crimes within a commercial context simply because it is found to be irrelevant.[214] Not only would a new framework contribute to the proper application of 404(b)(2), but also its ultimate purpose to shield the defendant from a guilty verdict solely because he has previously committed a "simple" drug crime.

This approach would prevent the outcome that occurred in *United States v. Butler*, where the Eleventh Circuit found that personal drug use was relevant to a drug crime in a commercial context.[215] In *Butler*, the trial court permitted the prosecution to enter into evidence the defendant's prior conviction for possession of cocaine, which occurred nearly a decade earlier, to prove intent for a commercial drug crime.[216] On appeal, the Eleventh Circuit, for the first time, addressed the issue of using prior personal drug use convictions in a commercial setting.[217] However, the court has allowed evidence of possession convictions in past cases concerning personal drug

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209. *See id.* The common law supplement properly prohibited the prior possession conviction because it was not similar enough to commercial drug activity. *See id.*

210. *See id.* at 1079.

211. United States v. Santini, 656 F.3d 1075, 1079 (9th Cir. 2011).

212. *See id.*

213. *Id.*

214. *See id.* When the lower court admitted the prior simple possession conviction for the new charge of importation of marijuana, the error was considered harmful. *Id.* "An error is harmless if 'it is more probable than not that the error did not materially affect the verdict.'" United States v. Liera, 585 F.3d 1237, 1244 (9th Cir. 2009) (citing United States v. Seschillie, 310 F.3d 1208, 1214 (9th Cir. 2002)).

215. United States v. Butler, 102 F.3d 1191, 1195 (11th Cir. 1997).

216. *Id.*

217. *Id.*

use during a conspiracy,[218] and to show trust between two people during a conspiracy.[219] Disregarding whether a prior conviction intimately relates to the charged conspiracy, the Eleventh Circuit decided to extend this particular use of prior convictions.[220]

The Eleventh Circuit applied a three-part test adopted from the Fifth Circuit, to determine if admitting the prior conviction was an error.[221] The test requires (1) the evidence have another purpose other than character, (2) is sufficient to conclude the defendant committed the act, and (3) the probative value must outweigh unfair prejudice.[222] The court relied on the Fifth Circuit's interpretation of Rule 404(b)(2) concerning prior convictions and stated it is logical to admit evidence of prior personal drug use to prove intent in a subsequent case for drug distribution charges.[223] Without further explanation, the court simply states with specific intent crimes, such as drug crimes, intent is at issue and prior personal drug use is relevant.[224] Lastly, the court concluded that even if there was an error, it was harmless and was highly unlikely to have influenced the outcome of the verdict due to the amount of evidence against the defendant and any error in admitting the prior conviction would not present grounds for a conviction reversal.[225] This new interpretation of Rule 401, in relation to Rule 404(b)(2), would have first analyzed whether the acts were similar enough to be relevant. Based on the outcomes of recent decisions, an outcome similar to the one in *Butler* is unlikely because personal drug use is now considered distant from drug acts involved in a commercial setting; therefore, prior possession convictions would be irrelevant.[226]

A new framework for Rule 401 when dealing with Rule 404(b) might not resolve this issue entirely, especially if there is already a large amount of evidence against the defendant.[227] For example, in *United States v. Monzon*, the Seventh Circuit applied a common law rule that (1) the prior conviction cannot relate to general character evidence, (2) the past and current acts must be similar and proximate in time, and (3) the prior act or

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218. *See id.* (citing United States v. Lehder-Rivas, 955 F.2d 1510, 1517 (11th Cir. 1992)).

219. *See Butler*, 102 F.3d at 1195 (deciding that a relationship between a drug dealer and a purchaser for personal use is enough to establish a relationship for a conspiracy) (citing United States v. Alonso, 740 F.2d 862, 869 (11th Cir. 1984)).

220. *See Butler*, 102 F.3d at 1195.

221. *Id.*

222. *See id.* (citing United States v. Miller, 959 F.2d 1535, 1538 (11th Cir. 1992)).

223. *Butler*, 102 F.3d 1196.

224. *See id.*

225. *See id.*

226. *See* United States v. Haywood, 280 F.3d 715, 721 (6th Cir. 2002) (citing United States v. Ono, 918 F.2d 1462, 1465 (9th Cir. 1990)).

227. *See* United States v. Monzon, 869 F.2d 338 (7th Cir. 1989).

conviction must be more probative than prejudicial.[228] In *Monzon*, the defendant was convicted of conspiracy to distribute cocaine, possession of cocaine with intent to distribute, and intentional distribution of cocaine.[229] The defendant was involved in a twenty thousand dollar cocaine transaction with the Drug Enforcement Agency (DEA), in which his co-conspirators took a plea deal and testified against him at trial.[230]

At trial, the arresting police officer revealed during his testimony that he found marijuana butts in the defendant's car subsequent to arrest.[231] In addition, another officer testified that he observed the defendant with a long pinky fingernail on different occasions—once after the defendant was arrested and once eight months before the arrest, which the officer suggested, "was a fad among cocaine users and traffickers."[232] The prosecution attempted to avoid Rule 404(b) in order to include this testimony and argued neither of the testimonies were for the purpose of character evidence.[233] Instead, the prosecution argued that both testimonies were evidence of the same transaction or event—the current alleged crime.[234] The court rejected this argument and stated that neither testimony intricately related to the alleged crime because the testimonies lacked a close relationship to the defendant's motive or intent, and the acts were not separate uncharged acts undertaken as part of the same transaction.[235]

The court found that the testimonial evidence did not relate to general character evidence because the marijuana butts and long pinky fingernail were proper for proving the defendant's intent.[236] However, the court concluded that the evidence failed under the similar act and close proximity requirement, because it lacked probative value—as the only probative worth was towards the defendant's character to show he was more likely than not to have committed the crimes.[237] Even though it was clear error to admit this evidence because it was only valuable for inadmissible character evidence, the court found the error to be harmless because of the other overwhelming amount of testimony against the defendant.[238] Even though

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228. *See id.*
229. *See id.* at 340.
230. *Id.* at 340-41.
231. *Id.* at 343.
232. United States v. Monzon, 869 F.2d 338, 343 (7th Cir. 1989).
233. *Id.*
234. *Id.*
235. *Id.* at 343-44 (citing United States v. Hawkins, 828 F.2d 1020, 1023 (7th Cir. 1987)).
236. *Id.* at 343.
237. *See* United States v. Monzon, 869 F.2d 338, 344-45 (7th Cir. 1989).
238. *See id.* at 335. An evidentiary error is harmless when there is an overwhelming amount of evidence against the defendant and the error was so minimal that it did not influ-

the *Monzon* court did not reverse the conviction due to an overwhelming amount of evidence, the court acknowledged the lack of similarity between personal drug use and commercial drug activity.[239] However, it is possible that the Seventh Circuit's common law rule could have resulted in a reversal of Monzon's conviction if there had not been such overwhelming evidence already against him.[240]

B. A PRIOR POSSESSION CONVICTION CAN RARELY OUTWEIGH THE RISK OF UNFAIR PREJUDICE: THE INFERENTIAL LEAP THAT IS TOO GREAT

An alternative and more straightforward approach would be to use the structure already in place and clarify that prior possession convictions in new instances of commercial drug activity charges are impermissible because the risk of unfair prejudice greatly outweighs its probative value.[241] This approach would continue to use the framework set forth in *Huddleston*, but requires clarification from the United States Supreme Court stating that prior possession convictions used for purposes under Rule 404(b)(2) can rarely outweigh the risk of unfair prejudice, becoming a majority rather than a minority admission standard.[242]

For example, as the Sixth Circuit rationalized, the accuracy of the balancing requirement is the most crucial step from *Huddleston*:

> When jurors hear that a defendant has on earlier occasions committed essentially the same crime as that for which he is on trial, the information unquestionably has a powerful and prejudicial impact. That, of course, is why the prosecution uses such evidence whenever it can. When prior acts evidence is introduced, regardless of the stated purpose, the likelihood is very great that the jurors will use the evidence precisely for the purpose it may not be considered; to suggest that the defendant is a bad person, a convicted criminal, and that if he "did it before he probably did it again." That is why the trial court's duty is to apply Rule 404(b)

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ence the jury's decision. *Id.* (citing United States v. Manganellis, 864 F.2d 528, 534 (7th Cir. 1988)).

239. *See Monzon*, 869 F.2d at 335.

240. *See id.*

241. *See* Huddleston v. United States, 485 U.S. 681 (1988).

242. *See id.* The only relevant clarification of Rule 404(b) from the United States Supreme Court was from *Huddleston*, this specific issue has yet to be heard.

> correctly and, before admitting such evidence, to decide carefully whether it will be more substantially prejudicial than probative.[243]

In most instances, evidence of a prior possession conviction is unnecessarily cumulative because there is usually a large amount of evidence already against the defendant.[244] Therefore, the probative value of a prior conviction is slight while the unfair prejudice to the defendant is significant.[245] Additionally, the probative value that a prior possession conviction has towards a commercial drug charge is insignificant because the prior conviction only stands for the fact the defendant has possessed the drug before and perhaps knows how to purchase it.[246] The knowledge of what a drug looks like and how to purchase it is a far stretch from knowing how to sell, manufacture, or transport drugs in large quantities.[247]

Conversely, a prior manufacturing conviction used for a Rule 404(b)(2) purpose for a charge for possession with intent to distribute is logical,[248] and the inferential leap is minimal.[249] A prior manufacturing conviction reveals that the defendant knows what the drug looks like, is familiar with the drug, knows how to sell the drug, and likely is part of a drug network.[250] The inference that the defendant knows how to sell the drug is simple: the manufacturer has to sell to a dealer or distributer; therefore making the inferential leap is slight.[251] When viewed in this light, it is easy to see that the inferential leap between a mere possession conviction and any commercial drug activity is too tenuous to be supported by the pol-

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243. *See* United States v. Bell, 516 F.3d 432, 444 (6th Cir. 2008) (citing United States v. Johnson, 27 F.3d 1186, 1193 (6th Cir. 1994)).

244. *See Bell*, 516 F.3d 432. Therefore, on review, the use of the prior act evidence is usually characterized as harmless error. *See id.*

245. *See id.* at 446.

246. *See* United States v. Lopez, 979 F.2d 1024, 1034-35 (5th Cir. 1992). Whether the prior conviction indicates the defendant knows how to buy drugs depends upon the circumstances. For example, if the defendant purchased drugs from a government informant, it is reasonable to infer that the defendant has the knowledge of how to buy drugs. Without evidence of the actual transaction and just being caught with possession, the knowledge of how to buy drugs may lead to controversy because the drugs could have been given to the defendant. This means that a prior act of possession or prior possession conviction only reveals knowledge in the slightest form: the defendant knows what the drug looks like. *See id.*

247. *See id.*

248. *See* United States v. Montgomery, 150 F.3d 983 (9th Cir. 1998).

249. *Id.* at 1001.

250. *See id.*

251. *See id.*

icies underlying the 404(b)(2) exceptions, and does not withstand careful reasoning.[252]

After recognizing that a logical nexus does not exist between a former conviction for mere possession and a current charge for commercial drug activity, it is clear that prosecutors use Rule 404(b)(2) to admit cumulative evidence, which would ordinarily be barred by Rule 403, to "seal the deal" when there is already an ample amount of evidence against the defendant.[253] Another reason this evidence is admitted is to have the jury infer that because a defendant previously possessed a drug, he probably committed this drug crime too, which in either of these situations still results in general propensity logic, which Rule 403 was created to guard against.[254]

VI. CONCLUSION

In order for courts to properly apply Rule 404(b)(2) in commercial drug activity cases when prior possession convictions are offered as evidence, there needs to be a supplement to the general relevancy standard or clarification by the United States Supreme Court.[255] This clarification should conclude that instances of prior possession or prior possession convictions are entirely different from commercial drug activity.[256] When these prior acts or convictions are used to help prove new instances of commercial drug activity, the heart of the argument is that, because a person previously possessed a drug, that person now has the intent or knowledge to commit a commercial drug crime.[257] This conclusion simply does not survive logical scrutiny.[258] Therefore, prior possession convictions used for commercial drug charges under Rule 404(b)(2) create an unacceptable risk of unfair prejudice against the defendant, which typically results in a conviction.[259]

As soon as the jury hears that the defendant has previously committed a drug crime of any kind, they are more likely to convict him.[260] Even though there is a limiting jury instruction, the jury is still comprised of hu-

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252. *See id.*

253. *See* United States v. Bell, 516 F.3d 432, 446 (6th Cir. 2008) (discussing the amount of deference given to trial court's discretion and that the amount of evidence against the defendant might persuade the judge to admit the evidence because it is likely that the defendant will be convicted regardless).

254. *See id.*; FED. R. EVID. 403 (West 2015).

255. *See* FED. R. EVID. 404(b)(2) (West 2015).

256. *See* United States v. Ono, 918 F.2d 1462, 1465 (9th Cir. 1990).

257. *See id.*

258. *See id.*

259. *See id.*

260. *See* Hofmeyer, *supra* note 23.

mans.[261] It is difficult to use such information for one limited purpose and avoid using it for another when there are gaps and lack of clarity in the law.[262] Therefore, prior possession convictions should have limited use in rare circumstances.[263] These rare circumstances would include instances where the prior conviction use is obviously relevant.[264] For example, if the defendant claims he has never seen marijuana before but has a ten-year-old prior marijuana conviction.[265] This is an example of evidence that supports a fact that does not include speculation: the defendant has seen marijuana before because he previously possessed it.[266]

In contrast, the use of a prior possession conviction to show knowledge or intent for a commercial drug crime requires an inferential leap that is simply too great and results in unjust results.[267] For example, inferring that the defendant has the knowledge or intent to manufacture or sell drugs simply because he previously possessed drugs.[268] The use of prior act or conviction evidence in this instance is general propensity logic in disguise.[269] Therefore, the use of prior act or possession convictions should be strictly limited to instances where the relevance of the acts or convictions is readily apparent, and its use should be removed from common practice.[270] This reinforces the idea that the defendant is found guilty because he committed the alleged crime,[271] not that he was found guilty because his prior possession meant that he would have been more likely to have committed commercial drug activity or because his prior possession conviction made him generally a bad person.[272] Thus, the *Huddleston* test should remain applicable, but the analysis should end with the balancing step requirement because the prior possession convictions have little value for commercial drug charges, while the prejudicial impact is immeasurable.[273]

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261. *See id.*
262. *See id.*
263. *See id.*
264. *See* United States v. Lopez, 979 F.2d 1024, 1034-35 (5th Cir. 1992).
265. *Id.*
266. *See id.*
267. *See* United States v. Davis, 726 F.3d 434, 442-43 (3d Cir. 2013).
268. *See id.*
269. *See id.*
270. *See id.*
271. *See id.*
272. *See* United States v. Davis, 726 F.3d 434, 443 (3d Cir. 2013).
273. *See* FED. R. EVID. 403 (West 2015); Huddleston v. United States, 485 U.S. 681, 691 (1988).