AGAINST "THE *HUDDLESTON* TEST"

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"To determine whether evidence is admissible under Rule 404(b), the Huddleston *test applies . . . ."*[2]

INTRODUCTION

Many courts—mostly federal, but also some state courts—are misapplying the United States Supreme Court's decision in the 1988 case *United States v. Huddleston*.[3] These courts have used a single paragraph of dicta from the *Huddleston* opinion to craft multipart checklist-type "tests" that displace the single requirement of Rule 404(b) of the Federal Rules of Evidence (or corresponding state rules). This displacement risks the admission of other acts evidence without determining whether the evidence is relevant for a non-character purpose by means of inferences that do not involve character. These *Huddleston* tests thus undermine Rule 404(b)'s prohibition that other acts evidence is not admissible to prove action in accordance with character.[4]

Of course, if the Supreme Court in *Huddleston* had established a test for the admissibility of other acts evidence, then federal courts would be bound to follow (and state courts might be wise to follow).[5] But in fact, the Supreme Court in *Huddleston* did not decide anything specifically about the admissibility of other acts evidence, much less establish any test of admissibility. Contrary to "the *Huddleston* test" assertions, the case was not about the substantive requirement for admitting other acts evidence for a non-character purpose but instead was about the procedural requirements for admitting conditionally

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2. United States v. Akina, No. 1:22-cr-01008-KWR-1, 2024 WL 326460, at *5 (D.N.M. Jan. 29, 2024).

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

4. *See* FED. R. EVID. 404(b)(1) ("Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.").

5. *See* Jennifer Wimsatt Pusateri, *It Is Better to Be Safe When Sorry: Advocating a Federal Rule of Evidence that Excludes Apologies*, 69 U. KAN. L. REV. 201, 239 (2020) (noting that "even though the Federal Rules of Evidence do not apply in state courts, they serve as a model for the evidentiary rules of many states").

relevant evidence.[6] Other acts evidence is one kind of conditionally relevant evidence; everything the Court in *Huddleston* said about other acts evidence applies with equal force to all other kinds of conditionally relevant evidence. Properly considered, *Huddleston* is a Rule 104(b) case, not a Rule 404(b) case.

I. THE SOLE ISSUE DECIDED IN *HUDDLESTON* WAS THE STANDARD OF PROOF FOR ADMITTING CONDITIONALLY RELEVANT EVIDENCE

A. The Trial and Circuit Court of Appeals Decisions

As anyone who has taken a law school Evidence course should recall, the *Huddleston* case is about some television sets that might have been stolen and some Memorex VCR tapes and kitchen appliances that were definitely stolen. Huddleston fenced the stolen VCR tapes, which led to criminal charges for possessing and selling stolen property. In his defense, Huddleston claimed that he did not know the VCR tapes were stolen.[7]

As part of its proof that Huddleston knew the VCR tapes were stolen, the government offered evidence that Huddleston had also fenced the television sets and appliances.[8] Huddleston had obtained the VCR tapes, television sets, and appliances from the same supplier and offered the goods for sale at prices far below their value.[9] The government's theory was that Huddleston could not have thought these goods were legitimately for sale at such unreasonably low prices.[10]

Huddleston objected to the government's attempt to use evidence of the television sets to prove his knowledge that the VCR tapes were stolen on the ground that the government did not have sufficient proof that the television sets were in fact stolen.[11] While the VCR tapes and appliances had been reported as stolen, the government's only proof that the television sets were stolen was the low price at which Huddleston had offered to sell them, combined with his inability to prove that he had purchased them.[12]

At trial, Huddleston argued that before allowing the government to use the evidence of the television sets, the court needed to make a preliminary finding that the government's evidence established that the television sets were stolen by clear and convincing proof.[13] The trial court disagreed and admitted the evidence, and Huddleston was

6. *Huddleston*, 485 U.S. at 689–90.
7. United States v. Huddleston (*Huddleston I*), 802 F.2d 874, 876 (6th Cir. 1986).
8. *Id.* at 875–76.
9. United States v. Huddleston (*Huddleston II*), 811 F.2d 974, 976 (6th Cir. 1987).
10. *Id.*
11. *Huddleston I*, 802 F.2d at 876–77.
12. *Id.* at 876.
13. *Id.* at 877.

convicted of possessing stolen property (but acquitted of selling stolen property).[14]

On appeal, the United States Court of Appeals for the Sixth Circuit initially agreed with Huddleston and adopted the clear and convincing standard for admitting evidence when its relevance depends on proof of a condition, such as that the television sets were stolen.[15] However, the court then granted the government's petition for rehearing and reversed, holding that the proper standard of proof for admitting conditionally relevant evidence is the lesser preponderance standard.[16]

The Sixth Circuit's confusion about the proper standard for admitting conditionally relevant evidence was not isolated. The standard of proof question had split the federal circuit courts of appeals, with some agreeing with Huddleston's position that clear and convincing proof of the condition is required, some deciding that the proper standard is the lesser preponderance of the evidence standard, and some deciding that the evidence is admissible so long as the proponent presents sufficient evidence for the jury to decide that the condition is satisfied.[17]

B. The Supreme Court Decision

1. What the Supreme Court Did Decide: Rule 104(b) Does Not Require a Preliminary Finding Before Conditionally Relevant Evidence Is Admitted

The Supreme Court agreed to hear Huddleston's case to resolve the split among the circuit courts of appeals regarding the proper standard of proof for admitting conditionally relevant evidence. However, the 1987 case *Bourjaily v. United States*[18] essentially rejected Huddleston's primary argument—that the government needed to prove by clear and convincing evidence that the televisions were stolen[19]—before the Supreme Court held oral argument in his case. In *Bourjaily*, the Court decided that the proper standard of proof for preliminary questions regarding the admissibility of evidence is the preponderance standard.[20]

That left only one related issue for the Court to decide in *Huddleston*: Does the trial judge need to make a preliminary finding that the government has sufficient evidence to prove the condition that would make the evidence relevant? Specifically, the Supreme Court granted certiorari to "resolve a conflict among the Courts of Appeals as to whether the trial court must make a preliminary

14. *Id.* at 875–76.
15. *Id.* at 877.
16. *Huddleston II*, 811 F.2d 974, 977 (6th Cir. 1987).
17. Huddleston v. United States, 485 U.S. 681, 685 n.2 (1988).
18. 483 U.S. 171 (1987).
19. *See* Brief for the Petitioner at 15, *Huddleston*, 485 U.S. 681 (No. 87-6).
20. Bourjaily, 483 U.S. at 175.

finding before 'similar act' and other Rule 404(b) evidence is submitted to the jury."[21]

The Supreme Court decided that a preliminary finding by the trial court is unnecessary—"such evidence should be admitted if there is sufficient evidence to support a finding by the jury that the defendant committed the similar act."[22] *Huddleston* thus presented one question and produced one holding: "This case presents the question whether the district court must itself make a preliminary finding that the Government has proved the 'other act' by a preponderance of the evidence before it submits the evidence to the jury. We hold that it need not do so."[23]

Although the Court's statement of its holding referenced only other acts evidence, the Court supported its decision not to require the trial court to make a preliminary finding by explaining that the admission of conditionally relevant evidence has not traditionally required a preliminary finding:

> When an item of evidence is conditionally relevant, it is often not possible for the offeror to prove the fact upon which relevance is conditioned at the time the evidence is offered. In such cases it is customary to permit him to introduce the evidence and 'connect it up' later. Rule 104(b) continues this practice, specifically authorizing the judge to admit the evidence 'subject to' proof of the preliminary fact.[24]

The television sets were other acts evidence, but more importantly, for purposes of the Supreme Court's decision, they were conditionally relevant evidence.

The question the Court answered in *Huddleston* was whether conditionally relevant evidence may be admitted without a preliminary finding by the trial court that the proponent of the evidence has sufficient proof of the condition.[25] But since *Huddleston* is a Rule 104(b) case, its holding—that a preliminary finding by the trial court is not necessary—applies to all conditionally relevant evidence, not just other acts evidence.[26]

2. What the Supreme Court Did Not Decide: Whether Evidence of the Television Sets Was Properly Admitted for a Non-Character

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21. *Huddleston*, 485 U.S. at 685 (citations omitted).
22. *Id.*
23. *Id.* at 682.
24. *Id.* at 690 n.7.
25. *Id.* at 685.
26. *See*, *e.g.*, United States v. Balthazard, 360 F.3d 309, 313 (1st Cir. 2004) ("When the relevancy of evidence is conditioned on the establishment of a fact—in this case, that the other marijuana growing operations were undertaken in furtherance of the charged conspiracy—the offering party need only introduce sufficient evidence to permit a rsuraeasonable jury to find the conditional fact by a preponderance of the evidence to establish that the evidence is relevant.").

Purpose Under Rule 404(b)

The government offered evidence of the (allegedly) stolen television sets to prove that Huddleston knew that the VCR tapes were stolen.[27] This could be a proper, non-character purpose for admitting the other acts evidence under Rule 404(b). As countless courts have pointed out, "knowledge" is one of the examples of non-prohibited purposes included in Rule 404(b)(2).[28] Critically, Huddleston conceded that if the television sets were stolen, then they were relevant for the non-character purpose of proving knowledge.[29]

Because of Huddleston's concession, the Supreme Court did not consider whether the television sets were properly admitted under Rule 404(b). More specifically, the Court did not decide whether the television sets were relevant to the issue of Huddleston's knowledge by means of a chain of inferences that did not include an inference about Huddleston's character.[30] Huddleston did not present a Rule 404(b) argument, and the Supreme Court did not decide anything specifically about Rule 404(b). That a case so clearly not about Rule 404(b) has been interpreted as establishing a test that replaces Rule 404(b) is surely one of the stranger twists in the evolution of evidence law.

II. THE FINAL PARAGRAPH OF THE *HUDDLESTON* OPINION—THE SOURCE OF "THE *HUDDLESTON* TEST(S)"—IS DICTUM

After deciding—*holding*—that the admission of conditionally relevant evidence is governed by Rule 104(b) and does not require a preliminary finding by the trial judge that the condition is satisfied, the Court offered some additional observations about the operation of the Federal Rules of Evidence:

> We share petitioner's concern that unduly prejudicial evidence might be introduced under Rule 404(b). We think, however, that the protection against such unfair prejudice emanates not from a requirement of a preliminary finding by the trial court, but rather from four other sources: first, from the requirement of Rule 404(b) that the evidence be offered for a proper purpose; second, from the relevancy requirement of Rule 402—as

27. *Huddleston*, 485 U.S. at 683.

28. *See, e.g.*, United States v. Proto, 91 F.4th 929, 932 (8th Cir. 2024) ("Evidence that Proto previously possessed a firearm in connection with drug trafficking is relevant to show his knowledge and intent. We routinely have affirmed the admission of similar evidence in cases involving drug trafficking and related gun charges." (citations omitted)).

29. *Huddleston*, 485 U.S. at 686 ("Petitioner acknowledges that this evidence was admitted for the proper purpose of showing his knowledge that the Memorex tapes were stolen. He asserts, however, that the evidence should not have been admitted because the Government failed to prove to the District Court that the televisions were in fact stolen.").

30. *Id.* at 689.

> enforced through Rule 104(b); third, from the assessment the trial court must make under Rule 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice; and fourth, from Federal Rule of Evidence 105, which provides that the trial court shall, upon request, instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted.[31]

Lured by the appeal of a simple, checklist-type approach to the thorny problem of character evidence, courts have spun this dictum—and surely it is dictum, as the question before the Court was about the procedural requirements for admitting conditionally relevant evidence, not about the substantive issues related to the prohibition of character evidence[32]—into a "holding" that "established" a "test"[33] for the admissibility of other acts evidence under Rule 404(b).

III. COURTS HAVE USED *HUDDLESTON*'S DICTA TO CREATE OVERLY SIMPLIFIED "TESTS" OF ADMISSIBILITY FOR OTHER ACTS EVIDENCE

Consider the following recent statements by various federal and state courts asserting that the *Huddleston* opinion established a "test" for applying Rule 404(b):

- "To determine whether evidence is admissible under Rule 404(b)(2), the *Huddleston* test applies . . . ."[34]
- "Prior bad act evidence must satisfy a four-part test—established in *Huddleston v. United States*, 485 U.S. 681 (1988)—to be admissible under Rule 404(b)."[35]
- "The Supreme Court explicated in *Huddleston v. United States* a four-part test to determine whether Rule 404(b) evidence is properly admitted."[36]
- "Interpreting the federal rule, the Virgin Islands Supreme Court adopted a four-part test established by

31. *Id.* at 691–92.

32. Scholars have debated the precise contours of what counts as dicta; however, all seem to agree that dicta includes statements not necessary to the court's holding. *See Dictum*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "obiter dictum" as a "judicial comment . . . that is unnecessary to the decision in the case and therefore not precedential"); Shawn J. Bayern, *Case Interpretation*, 36 FLA. ST. U. L. REV. 125, 129 (2009) ("The principal feature of holdings is that they are necessary to decide a case, and the principal feature of dicta is that they are not.").

33. *See, e.g.*, United States v. Cole, 26 F. App'x 45, 48 (2d Cir. 2001) ("To determine the admissibility of prior bad-acts evidence pursuant to Fed. R. Evid. 404(b), we apply the test established by the Supreme Court in *Huddleston v. United States* . . . .").

34. United States v. Candelaria, No. 1:22-CR-00767-KWR-1, 2024 WL 82845, at *2 (D.N.M. Jan. 8, 2024).

35. United States v. Houck, Crim. Action No. 22-323, 2023 WL 158730, at *2 (E.D. Pa. Jan. 11, 2023).

36. United States v. Cushing, 10 F.4th 1055, 1075 (10th Cir. 2021).

the United States Supreme Court in *Huddleston v. United States*, to evaluate whether evidence is properly admitted under Rule 404(b)."[37]

- "In determining whether evidence is properly admissible under Rule 404(b), we apply the Supreme Court's test from *Huddleston v. United States*, 485 U.S. 681 (1988) . . . ."[38]
- "In determining whether to admit evidence under Rule 404(b), the Court looks to the four-part test in *Huddleston v. United States*, 485 U.S. 681, 691-92 (1988) . . . ."[39]
- "The Michigan Supreme Court has held that a trial court's admission of other-acts evidence was not an abuse of discretion if the trial court's decision met the three-part test articulated in *Huddleston v. United States*, 485 U.S. 681, 691–692 (1988) that was adopted in *People v. VanderVliet*, 444 Mich. 52, 74 (1993)."[40]

Other courts have created similar multipart checklist-type "tests" that merge Rule 404(b) with the other rules of evidence mentioned in the *Huddleston* opinion, especially Rule 403. Recent examples include:

- "We apply a three-part test for determining whether evidence of prior crimes is admissible under Rule 404(b), asking whether 1) the evidence is 'relevant to an issue other than the defendant's character'; 2) there is sufficient evidence for the 'jury to find that the defendant committed the extrinsic act'; and 3) the undue prejudice of the evidence substantially outweighs the probative value."[41]
- "We employ a four-part test to assess the admissibility of other-act evidence: '(1) the prior-act evidence must be relevant to an issue other than character, such as intent; (2) it must be necessary to prove or disprove an element of the claim; (3) it must be reliable; and (4) its probative value must not be substantially outweighed by its prejudicial nature.'"[42]

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37. People v. Rivera, 2022 VI Super 76U, at *2 (V.I. Super. Ct. Sept. 6, 2022).

38. United States v. Bridges, No. 21-1679, 2022 WL 4244276, at *6 (3d Cir. Sept. 15, 2022).

39. United States v. Heller, No. 19-CR-00224-PAB, 2019 WL 5394177, at *1 (D. Colo. Oct. 22, 2019).

40. People v. Lawhead, No. 338063, 2018 WL 2419052, at *5 (Mich. Ct. App. May 29, 2018).

41. United States v. Gutierrez, No. 22-14125, 2024 WL 262706, at *3 (11th Cir. Jan. 24, 2024) (quoting United States v. Sterling, 738 F.3d 228, 238 (11th Cir. 2013)).

42. Howard v. City of Durham, 68 F.4th 934, 955 (4th Cir. 2023) (quoting Smith v. Baltimore City Police Dep't, 840 F.3d 193, 201 (4th Cir. 2016)).

- "In *United States v. Beechum*, this court articulated a two-part test to evaluate the admissibility of evidence under Rule 404(b): First, it must be determined that the extrinsic offense evidence is relevant to an issue other than the defendant's character. Second, the evidence must possess probative value that is not substantially outweighed by its undue prejudice and must meet the other requirements of rule 403."[43]
- "We employ a four-part test to determine whether a district court abused its discretion in admitting 404(b) evidence. Such evidence is properly admitted 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 evidence; and (4) its potential prejudice does not substantially outweigh its probative value."[44]
- "To be admissible under Rule 404 (b), other-acts evidence must satisfy a three-part test: (1) the evidence is relevant to an issue in the case other than the defendant's character, (2) the probative value is not substantially outweighed by the danger of unfair prejudice as required by OCGA § 24-4-403 ('Rule 403'), and (3) there is sufficient proof for a jury to find by a preponderance of the evidence that the defendant committed the prior act."[45]
- "[T]he Supreme Court and Second Circuit have distilled the admissibility inquiry under Rule 404(b) to a four-part test: (1) the prior act evidence was offered for a proper purpose; (2) the evidence was relevant to a disputed issue; (3) the probative value of the prior act evidence substantially outweighed the danger of its unfair prejudice; and (4) the court administered an appropriate limiting instruction."[46]
- "The Ninth Circuit has developed a four-part test to determine the admissibility of Rule 404(b) evidence: (1) the other act evidence must tend to prove a material point; (2) the other act must not be too remote in time; (3) the evidence must be sufficient to support a finding that

43. United States v. Valenzuela, 57 F.4th 518, 521 (5th Cir. 2023).

44. United States v. Brandon, 64 F.4th 1009, 1020–21 (8th Cir. 2023) (citing United States v. Williams, 796 F.3d 951, 958–59 (8th Cir. 2015)).

45. Randolph v. State, 891 S.E.2d 818, 823 (Ga. 2023) (citing Lowe v. State, 879 S.E.2d 492 (2022)).

46. United States v. Johnson, No. 21-CR-428 (ER), 2023 WL 5632473, at *17 (S.D.N.Y. Aug. 31, 2023) (citing United States v. Garcia, 291 F.3d 127, 136 (2d Cir. 2002)).

the defendant committed the other act; and (4) the other act must be similar to the offense charged."[47]

- "To determine if other bad acts evidence is admissible, the trial court should use a three-prong test: (1) Is the evidence relevant for a purpose other than criminal disposition? (2) Does it have probative value? (3) Is its probative value substantially outweighed by its prejudicial effect?"[48]
- "Under the two-part test, if the court determines that the proffered prior act evidence has 'special' relevance, i.e., a non-propensity relevance, it then must consider whether the evidence should nevertheless be excluded under Rule 403 because its probative value is substantially outweighed by a danger of unfair prejudice."[49]
- "We review a district court's decision to admit Rule 404(b) evidence with a three-part test. First, we review for clear error the factual determination that the other acts occurred. Second, we review de novo the legal determination that the acts were admissible for a permissible 404(b) purpose. Third, we review for abuse of discretion the determination that the probative value of the evidence is not substantially outweighed by unfair prejudicial effect."[50]
- "The Ninth Circuit uses a four-part test to determine the admissibility of evidence under Rule 404(b): 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."[51]
- "District courts apply a mandatory test in determining the admissibility of W.R.E. Rule 404(b) evidence: (1) the evidence must be offered for a proper purpose; (2) the evidence must be relevant; (3) the probative value of the evidence must not be substantially outweighed by its potential for unfair prejudice; and (4) upon request, the trial court must instruct the jury that the similar acts

47. United States v. Eggleston, No. CR 20-434 DSF, 2022 WL 252412, at *2 (C.D. Cal. Jan. 26, 2022) (quoting United States v. Bibo-Rodrieguez, 922 F.2d 1398, 1400 (9th Cir. 1991)).

48. Smith v. Commonwealth, 636 S.W.3d 421, 436 (Ky. 2021) (citing Purcell v. Commonwealth, 149 S.W.3d 382, 399–400 (Ky. 2004)).

49. United States v. Lindsey, 3 F.4th 32, 43 (1st Cir. 2021) (citing United States v. Henry, 848 F.3d 1, 8 (1st Cir. 2017)).

50. United States v. Serrano-Ramirez, 811 F. App'x 327, 341 (6th Cir. 2020) (citing United States v. Hardy, 228 F.3d 745, 750 (6th Cir. 2000)).

51. United States v. Cox, 963 F.3d 915, 924 (9th Cir. 2020) (citing United States v. Bailey, 696 F.3d 749, 799 (9th Cir. 2012)).

> evidence is to be considered only for the proper purpose for which it was admitted."[52]

These tests, whether explicitly invoking *Huddleston* or only mimicking the opinion's final paragraph, are illegitimate. Using the *Huddleston* opinion to decide anything about the admissibility of other acts evidence—except whether, in cases where the other act evidence is conditionally relevant, a preliminary finding by the trial court is required—is just simply wrong.

The Court in *Huddleston* did not decide anything except that a preliminary finding that a condition is satisfied is not required before conditionally relevant evidence may be admitted. It did not establish any test for the admissibility of other acts evidence for a non-character purpose. The admissibility of other acts evidence for a non-character purpose is governed by Rule 404(b), subject to—as evidence generally is—Rules 104 and 403.[53] The *Huddleston* opinion's final paragraph amounts to nothing more than that evidence is admissible when the evidence satisfies the requirements of the Rules of Evidence. A "*Huddleston* test" suggests that some work is being done by these "parts" or "prongs," when all that such a "test" has actually done is use a lot of words to say nothing of substance. At risk of being buried in all of these words is the single thing required by Rule 404(b): that a court determine whether the other acts evidence is being offered to prove action in accordance with character.

A few courts have recognized that the final paragraph of the *Huddleston* opinion merely explains that other rules of evidence—other than Rule 104, which was the rule at issue in *Huddleston*—guard against the risk of unfair prejudice inherent in other acts evidence. For example, the Supreme Court of Arizona has observed:

> In a few cases where we cited to *Huddleston*, we cited it merely to highlight the four factors that *Huddleston* identifies as safety precautions embedded within the Federal Rules of Evidence. . . . We continue to agree with these four protective provisions. They are, in essence, merely a restatement of part of the Federal Rules of Evidence.[54]

Judge Shanahan of the Nebraska Supreme Court explicitly rejected the claim that *Huddleston* established any sort of test of admissibility for other acts evidence:

> Referring to *Huddleston v. United States*, in *Ryan*, we stated, "The U.S. Supreme Court has set out the *requirements for the admissibility of evidence* under Fed. R. Evid. 404(b), the equivalent of Neb. Evid. R. 404(2)" and then expressed a four-

52. Lajeunesse v. State, 458 P.3d 1213, 1217–18 (Wyo. 2020) (citing Griggs v. State, 367 P.3d 1108, 1143 (Wyo. 2016)).

53. *See* FED. R. EVID. 404(b), 104, 403.

54. State v. Terrazas, 944 P.2d 1194, 1197 (Ariz. 1997) (en banc) (citations omitted).

> part test which included, as requirements or conditions for admissibility, the four items which the majority has today characterized as safeguards against "unfair prejudice in the admission of the ['other acts'] evidence." In fact, the *Huddleston* Court did not enunciate four "requirements for the admissibility of evidence under Fed. R. Evid. 404(b)," but did consider means to minimize possible prejudice from admission of "other acts" evidence.[55]

These rare rejections of a "*Huddleston* test" are 100 percent correct. Rule 404(b)—not any part of the Supreme Court's opinion in *Huddleston*—determines when other acts evidence is properly admitted for a non-character purpose. Creating a single amalgamated test out of multiple rules of evidence risks diluting all of the component rules. The harm in thinking that the Court's dicta established a Rule 404(b) test is that the dicta-inspired tests often displace Rule 404(b)'s prohibition of other acts evidence offered to prove action in conformity with character. None of the "tests," whether explicitly invoking *Huddleston* or not, include identifying—and excluding—evidence relevant for a non-character purpose by means of inferences about character.[56] The checklist approach invites a superficial examination of other acts evidence; so long as the prosecutor—and it almost always is the prosecutor[57]—offers up some non-character purpose for admitting the evidence, the court may consider the "relevant for a non-character purpose" part of the test to be satisfied. The Seventh Circuit recognized this risk in the 2014 case *United States v. Gomez*:

> 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.[58]

The 2020 revisions to Rule 404(b), while not explicitly blaming the *Huddleston*-inspired tests, are in part meant to focus judges on detecting propensity inferences.[59] Specifically, the revised rule now requires prosecutors to provide written notice of the other acts

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55. State v. Yager, 461 N.W.2d 741, 751 (Neb. 1990) (Shanahan, J., dissenting) (citations omitted) (quoting State v. Ryan, 444 N.W.2d 610 (Neb. 1989)).

56. *See, e.g.*, cases cited *supra* notes 34–52 (articulating a "*Huddleston* test" that does not direct a court to exclude evidence that is relevant by means of an inference about character).

57. *See* FED. R. EVID. 404 advisory committee's note to 1991 amendment ("[T]he overwhelming number of cases [addressing 404(b)(2) evidence] involve introduction of that evidence by the prosecution.").

58. United States v. Gomez, 763 F.3d 845, 853 (7th Cir. 2014).

59. *See* FED. R. EVID. 404 advisory committee's note to 2020 amendment.

evidence they intend to introduce and "articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose."[60] Even before the amendment, some courts had endorsed this more searching inquiry for propensity inferences, requiring more than the mere recitation of some non-propensity purpose. For example, the Seventh Circuit observed: "Had the court asked more specifically how the prior conviction [for distributing cocaine] tended to show intent [to distribute cocaine] eight years later, it would have recognized that it was dealing with propensity evidence all the way down."[61]

Whether the amendments will be sufficient to increase judges' attention to hidden propensity inferences is doubtful,[62] but the requirement to articulate not just the permitted purpose but also the reasoning in support of the purpose is a step in the right direction—as well as an implicit acknowledgment that the scrutiny given to prosecutors' purported reasons for admitting other acts evidence is often lacking.[63] While "*Huddleston* tests" are certainly not the only reason for courts' insufficient attention to propensity inferences, these "tests" are just as certainly not helping judges to make proper Rule 404(b) decisions. No part of any "*Huddleston* test" directs judges to consider the reasoning that makes other act evidence relevant to a non-character purpose.

CONCLUSION

Numerous scholars have urged amending Rule 404(b) to provide more explicit guidance that excluding "character evidence" means excluding other acts evidence that is relevant to a non-character purpose only by means of an inference about character.[64] In the meantime, judges can make a bad situation a little better by not invoking *Huddleston* for anything other than what the Supreme Court decided in this case: the admission of conditionally relevant evidence does not require a preliminary finding by the trial court that the condition is satisfied, but rather, a determination that the proffering party has offered (or will offer) sufficient evidence for the

60. FED. R. EVID. 404(b)(3)(B).

61. United States v. Miller, 673 F.3d 688, 699 (7th Cir. 2012).

62. Steven Goode, *It's Time to Put Character Back into the Character-Evidence Rule*, 104 MARQ. L. REV. 709, 711–12 (2021) ("The Judicial Conference's Committee on Rules of Practice and Procedure and its Advisory Committee on Evidence Rules recently undertook a multi-year effort to revise Rule 404(b). But they wound up producing amendments so trifling that nothing is likely to change." (citations omitted)).

63. *Cf*. United States v. Miller, 673 F.3d 688, 696 (7th Cir. 2012) ("[A]dmission of prior drug crimes to prove intent to commit present drug crimes has become too routine.").

64. For a recent and persuasive example, see generally Hillel J. Bavli, *Correcting Federal Rule of Evidence 404 to Clarify the Inadmissibility of Character Evidence*, 92 FORDHAM L. REV. 2441 (2024).

jury to find that the condition is satisfied.[65] That is all that the Court in *Huddleston* decided. Spinning multipart checklist-type tests out of a non-holding is definitely not helpful and quite likely harmful.

Rule 404(b) prohibits the admission of other acts evidence to prove action in accordance with character.[66] That is a difficult rule to apply. But using *Huddleston*'s dicta to make the task of applying Rule 404(b) easier comes with a cost: the possible, if not likely, admission of evidence that should be excluded.

65. Huddleston v. United States, 485 U.S. 681, 685 (1988).
66. FED. R. EVID. 404(b)(1).