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Possession of Reading Material and Intent to Commit a Crime in United States v. Curtin

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CASE SUMMARY

POSSESSION OF READING MATERIALS AND CRIMINAL INTENT UNDER *UNITED STATES V. CURTIN*

INTRODUCTION

The majority opinion in *United States v. Curtin* held that simple possession of reading material can be evidence of a defendant's criminal intent, even without proof that the accused ever read the materials.[1] Circuit Judge Stephen S. Trott, who wrote the majority decision, overruled prior Ninth Circuit precedent that would have made such evidence inadmissible as irrelevant under Federal Rule of Evidence 401.[2] However, the majority also found the district court judge's failure to properly analyze the evidence under Rule 403 warranted reversal and remand.[3] As a result, the remaining seven judges on the panel filed or joined concurrences, rather than dissents because even where they disagreed with the reasoning, they concurred in the result.[4] *Curtin* will have a lasting impact on how courts in the Ninth Circuit analyze relevance under Rule 401, prior bad acts under Rule 404, and how they use the Rule 403 balancing test.[5]

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[1] United States v. Curtin, 489 F.3d 935, 956 (9th Cir. 2007) (en banc).

[2] *Id.* at 948. *See* Guam v. Shymanovitz, 157 F.3d 1154, 1158 (9th Cir. 1998).

[3] United States v. Curtin, 489 F.3d at 958.

[4] United States v. Curtin, 489 F.3d at 959-66 (Kleinfeld, McKeown, Wardlaw JJ., concurring).

[5] *See infra* notes 98-111 and accompanying text.

I. FACTS AND PROCEDURAL HISTORY

In February 2004, while on the Internet posing as a fourteen year old girl with the screen name "christy13," Las Vegas Metropolitan Police Department detective Michael Castenada received an instant message from Eric Kevin Curtin.[6] Detective Castenada had logged in to a site called "itgirlssexchat" where "people go to talk sex with little girls."[7] Curtin exchanged instant messages with the Detective for the next four hours.[8] During this chat, Curtin invited "christy13" to see the Penn and Teller Show that weekend and explicitly discussed having sex after the show.[9] The pair also exchanged pictures; Curtin received a picture of a female officer when she was fourteen.[10] Before the conversation ended, Curtin made plans to meet "christy13" at a Las Vegas casino.[11]

On the day of the meeting with the officer, whose picture Detective Castenada sent to Curtin, waited in the casino in clothes "christy13" said she would wear.[12] Curtin went into the casino fifteen minutes early and walked past the officer twice, looking at her each time.[13] He then used his personal digital assistant ("PDA").[14] At the officers' request a casino security guard asked Curtin for identification.[15] Curtin provided a United States passport and subsequently left.[16] Curtin returned about five minutes after the scheduled meeting.[17] He approached the decoy police officer, and she said hello to him.[18] Curtin then left and the police detained him.[19] He waived his Miranda rights and made a voluntary statement.[20] Curtin said he was there to meet a female friend he met on

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[6] United States v. Curtin, 489 F.3d at 937.

[7] *Id.*

[8] *Id.*

[9] *Id.* at 937-938. For example, Curtin told the Detective that he wanted to rent a hotel room after the show where they could "spend the night." He also said "I want to make you happyFalseIf you were masturbating and fantasizing about sex, I'd love to have sex with you." Curtin further intoned that they "could just make out" or "I could just give you oral sex or we could just fool around." He then asked "christy13" to sleep naked and "imagine my face moving between your legs and licking you. Imagine my tongue penetrating you."

[10] United States v. Curtin, 489 F.3d at 937.

[11] *Id.* at 938.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] United States v. Curtin, 489 F.3d at 938.

[17] *Id.*

[18] *Id.* It is disputed whether he returned the greeting.

[19] *Id.* at 938.

[20] *Id.*

the internet and that he frequently goes to online chat rooms to engage in role play with adult women pretending to be young girls.[21]

The police arrested Curtin and confiscated his PDA, which contained over 140 stories covering almost 3,000 pages about adults having sex with children.[22] Curtin was later charged with violating 18 U.S.C. § 2434(b) (traveling across state lines with the intent to engage in sexual acts with a minor) and 18 U.S.C. § 2422(b) (use of an interstate facility to attempt to persuade a minor to engage in sex).[23]

Before trial, the Judge denied Curtin's motions in limine requesting that the court exclude the stories found on his PDA.[24] During trial the court admitted two stories to show Curtin's modus operandi, intent, preparation, and knowledge.[25] When the government tried to introduce the third story, the district court denied its admission and limited the prosecution to asking general questions about the story's content.[26] Upon the government's request, the court agreed to make a preliminary determination about the admissibility of the remaining stories the prosecution intended to use.[27] The Government argued that they were admissible to show intent, modus operandi, preparation, and knowledge because they had language similar to that Curtin used when he communicated with "christy13."[28]

The defense objected arguing that the stories were improper character evidence being used to show propensity in violation of Federal Rule of Evidence 404 and that they were more prejudicial than probative in violation of Federal Rule 403.[29] Rule 404(a) provides that character evidence is generally inadmissible, and Rule 404(b) articulates eight specific circumstances in which it may be admitted.[30] The district court, despite its admission that it was so disturbed by the stories that it could

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[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] United States v. Curtin, 443 F.3d 1084, 1088 (9th Cir. 2006), *reh'g en banc granted.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] Rule 404(a) provides that evidence of a person's character is "not admissible for the purpose of proving action in conformity therewith on a particular occasion" except in three situations where the defendant in a criminal case offers character evidence about himself or the victim. FED. R. EVID. 404(a) (Westlaw 2006). Rule 404(b) lays out a general prohibition on introducing evidence related to the defendant's prior behavior to prove that he committed the charged crime. The rule also provides exceptions including evidence to prove the defendant's motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. FED. R. EVID. Rule 404(b) (Westlaw 2006).

not even finish reading them, admitted five stories[31] with a limiting instruction.[32] Curtin was ultimately convicted and sentenced by the district court.[33]

A Ninth Circuit three-judge panel reversed and remanded for a new trial, holding that Curtin's possession of legal reading material should not have been admitted to demonstrate his alleged intent when he traveled across state lines.[34] The Ninth Circuit voted to rehear the case en banc, and affirmed the district court's conclusion that the stories in Curtin's possession were admissible and relevant to the issue of his intent.[35] The court remanded for a new trial, however, because it found that the district court violated Curtin's due process and fair trial rights by only reading two of the five stories.[36]

II. EN BANC NINTH CIRCUIT ANALYSIS

Both the majority and concurring opinions in *United States v. Curtin* agreed that the district court improperly analyzed the evidence

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[31] The five stories admitted by the District Court were: "My Little Sister," "Love for the World," "Restrictions," "Daddy's Lessons," and "Melanie's Busy Day." Each of the five stories involved a minor child having sex with an adult, in an incestuous situation.

[32] United States v. Curtin, 443 F.3d at 1089. The district court gave the following limiting instruction:

> A person cannot be charged nor convicted of literature that they read or that they possess. That's why I'm giving you the instruction. But the Government has the obligation to prove, beyond a reasonable doubt, that the defendant had the wrongful intent. They may offer possession of such literature to show that. You may take this kind of evidence on the question of whether the defendant actually possessed the intent. You may also take it on the additional questions which go to the question of intent, whether he practiced in this alleged conduct methodology consistent with literature that he had or tending to show that he prepared to commit the acts or that he had knowledge, that is, of how to commit the act or that the act was illegal. So, for those four reasons, only, the Government is offering to show that the defendant possessed this literature; intent, method, preparation, and knowledge. And you may only take it for that purpose. Again, you have a constitutional right. You have that right. You would want to protect the defendant's right to possess any kind of literature and to read it or not read it. You must not allow this kind of evidence to bias you, generally, against the defendant on the ultimate question of guilt or innocence. You must not do that.

Id.

[33] United States v. Curtin, 443 F.3d at 1087.

[34] United States v. Curtin, 489 F.3d at 936.

[35] Id. at 958-59.

[36] *Id.*

under Rule 403.[37] However, Judge Trott's majority opinion concluded that a defendant's reading material can be relevant as to his intent under Rule 401[38] and that there was nothing about such relevant literature that allowed its blanket exclusion under Rule 404;[39] whereas Judge Kleinfeld's concurrence found that the prior Ninth Circuit case *Guam v. Shymanovitz* required reading material to be excluded as irrelevant of a defendant's intent and inadmissible under Rule 404 or its exceptions.[40]

A. REVERSING NINTH CIRCUIT PRECEDENT IN *GUAM V. SHYMANOVITZ*: THE MAJORITY OPINION

Judge Trott's majority en banc opinion for *United States v. Curtin* began with a lengthy discussion of the district court's factual findings and legal conclusions.[41] The majority opinion also framed the major legal issues under the Federal Rules of Evidence, namely the prohibition on improper character evidence under Rule 404.[42]

The majority determined that Rule 404(b), designed to exclude circumstantial character evidence that will lead the jury to draw negative inferences about a defendant's character based on acts irrelevant to charged crimes, is actually a rule of *inclusion*, rather than one of exclusion.[43] The court found that because Rule 404(b) allows potential character evidence to prove motive, intent or knowledge, it is an inclusive rule that simply clarifies the general rule that all relevant evidence is admissible[44] and operates to admit more evidence than it excludes.[45] Based on the Advisory Committee Notes and their interpretation in *Huddleston v. United States*, the majority concluded that, "Congress was not nearly so concerned with the potential prejudicial effect of Rule 404(b) evidence as it was with ensuring that restrictions would not be placed on the admission of such evidence."[46] Thus, the court held given the inclusionary operation of Rule 404(b), the

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[37] United States v. Curtin, 489 F.3d at 958 (majority); United States v. Curtin, 489 F.3d at 959-66 (Kleinfeld, McKeown, Wardlaw JJ., concurring).

[38] United States v. Curtin, 489 F.3d at 948.

[39] United States v. Curtin, 489 F.3d 953.

[40] United States v. Curtin, 489 F.3d at 959-66 (Kleinfeld, J., concurring).

[41] United States v. Curtin, 489 F.3d at 936-43.

[42] *Id.* at 943-45.

[43] *Id.* at 943-44 (emphasis added).

[44] Federal Rule of Evidence 401 defines relevant evidence as "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probably or les probable than it would be without the evidence." FED. R. EVID. 401 (Westlaw 2008).

[45] United States v. Curtin, 489 F.3d at 943-45.

[46] *Id.* at 944-45.

only bar to admissibility of character evidence used to prove motive, intent or knowledge, is Rule 403.[47] Since this holding contradicted Ninth Circuit precedent in *Guam v. Shymanovitz*, in which the court found that the "[p]ossession of lawful reading material is simply not the type of conduct contemplated by Rule 404(b)," the majority needed to overrule *Shymanovitz* to continue.[48]

Judge Trott stated two reasons to overrule *Shymanovitz*. First, the majority claimed that it could find no support for the court's holding in *Shymanovitz* in any statute, Supreme Court case, the Constitution, or the Federal Rules of Evidence.[49] The majority then bolstered its decision to overrule *Shymanovitz* by citing two unrelated United States Supreme Court cases that admitted evidence that might generally receive First Amendment protection.[50] The majority relied on *Wisconsin v. Mitchell* where the Court held that "the First Amendment . . . does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent."[51] Additionally, the court cited *Herbert v. Lando*, in which the Court held that in a defamation action, the plaintiff was entitled to discover materials used by editorial staff to prove that the defendant acted with actual malice.[52] On the basis of these two cases, and others that admitted relevant evidence despite the First Amendment implications,[53] the majority found that *Shymanovitz* did not protect Curtin.[54] The majority limited its holding by warning that the rule should not be seen as one that allows automatic admission based on the defendant's "simple possession of any book or written materials generically similar to a charged crime."[55]

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[47] *Id.* at 944.

[48] *Id.* at 942.

[49] *Id.* at 953.

[50] *Id.* at 954.

[51] *Wisconsin v. Mitchell*, 508 U.S. 476 (1993) (finding that evidence that the defendant told his friends to attack a white person was admissible to show that he was guilty of an enhancement for intentionally selecting a victim because of that victim's race).

[52] *Herbert v. Lando*, 441 U.S. 153, 160-69 (1979) (deciding that because state of mind evidence necessary for a defamation action cannot be obtained by simply asking the defendant what he was thinking, the editorial privilege must be waived in this circumstance).

[53] The majority cited *United States v. Nixon*, 418 U.S. 683 (1974) for the principal that evidentiary privileges are not favored, as demonstrated by the fact that the President does not even have an absolute privilege against preventing the disclosure of subpoenaed materials in a court proceeding. Additionally, the court found support in other Supreme Court opinions such as *Branzburg v. Hayes*, 408 U.S. 665 (1972) (denying the creation of a free press privilege for news reporters in grand jury proceedings) and *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978) (refusing to allow officers of a newspaper exemption from a warrant search by police officers looking for relevant evidence).

[54] United States v. Curtin, 489 F.3d at 955.

[55] *Id.* at 956. Arguably, however, the court was only referring to the limitations imposed by

Finally, the majority concluded that the case must be reversed and remanded because the district court abused its discretion during its Rule 403 analysis.[56] Federal Rule of Evidence 403 provides that relevant evidence can be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[57] The district court properly determined that the stories were admissible as to Curtin's intent under Rule 404(b), but failed to properly analyze whether they were more prejudicial than probative because the district court only read two of the stories in full and "snippets" from the third.[58] The district court judge should have read every word of the stories the prosecution wanted to offer, so that it could properly determine their admissibility and redact portions if necessary, and because it failed to do so, Curtin's due process rights were violated.[59]

B. PROTECTING EITHER THE FIRST AMENDMENT RIGHT TO EXPRESSION OR THE APPELLATE COURT PROCESS: THE CONCURRENCES

The three concurrences agreed that *United States v. Curtin* should be remanded for a proper Rule 403 analysis.[60] But, where that was the extent of Judge Wardlaw's issue with the majority, Judge Kleinfeld persuasively argued that the majority was wrong to consider the stories relevant.[61] Judge McKeown, on the other hand, concluded that the stories were not relevant.[62]

1. The Freedom to Read: The Kleinfeld Concurrence

Most troubling to Judge Kleinfeld was the majority opinion's finding that the stories on Curtin's PDA were relevant to show his intent.[63] Judge Kleinfeld and the four judges who joined his

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Rule 403.

[56] *Id.* at 959. Federal Rule 403 allows relevant evidence to be excluded if the probative value is outweighed by the evidence's potential prejudicial effect.

[57] FED. R. EVID. 403 (Westlaw 1975).

[58] United States v. Curtin, 489 F.3d at 957.

[59] *Id.* at 956-59.

[60] United States v. Curtin, 489 F.3d at 959-66 (Kleinfeld, McKeown, Wardlaw, JJ., concurring).

[61] United States v. Curtin, 489 F.3d at 956-65 (Kleinfeld, J., concurring).

[62] United States v. Curtin, 489 F.3d at 965 (McKeown, J., concurring).

[63] United States v. Curtin, 489 F.3d at 956-59 (Kleinfeld, J., concurring).

concurrence,[64] stated that the consequences of allowing the government to use what a person reads against him are grave.[65] Furthermore, he determined that fantasy is constitutionally protected and as such, the government should have been prevented from using Curtin's reading material to prosecute him.[66]

Judge Kleinfeld found support in two United States Supreme Court cases: *Stanley v. Georgia* and *Jacobson v. United States*.[67] In *Stanley*, the Court held "that the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime."[68] Thus, under *Stanley*, the simple possession of obscenity, which is not protected speech, is still sheltered by the First Amendment.[69] The Court took this reasoning a step further in *Jacobson*, holding that "a person's inclinations and 'fantasies . . . are his own and beyond the reach of government.'"[70] Following this reasoning, Judge Kleinfeld's concurrence found that Curtin had the First Amendment right to download, possess, and read the "disgusting stories," and the district court should have managed the evidence so the government could prove his intent without allowing him to be convicted for his "execrable" taste and "repulsive" fantasies.[71]

Judge Kleinfeld's opinion centered around the fact that *Shymanovitz* should not have been overturned with no reason[72] because, although it would have protected Curtin, it did not create a "rigid barrier"

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[64] Judge Kleinfeld was joined by Judges Pregerson, Kozinski, Thomas, and Berzon.

[65] United States v. Curtin, 489 F.3d at 959 (Kleinfeld, J., concurring).

[66] Judge Kleinfeld relies on Rule 402, which holds that all evidence that is relevant under Rule 401 is admissible, except as otherwise provided by the Constitution. The First Amendment provides the prohibition in this case.

[67] United States v. Curtin, 489 F.3d at 960 (Kleinfeld, J. concurring).

[68] Stanley v. Georgia, 394 U.S. 557, 568 (1969).

[69] United States v. Curtin, 489 F.3d at 960 (Kleinfeld, J., concurring).

[70] Jacobson v. United States, 503 U.S. 540, 551-52 (1992) (omission in original) (quoting Paris Adult Theatre I v. Slaton, 413 U.S. 49, 67 (1973)).

[71] United States v. Curtin, 489 F.3d at 960 (Kleinfeld, J., concurring).

[72] Judge Kleinfeld challenges the authority the majority cited to overrule *Shymanovitz*. The majority relied primarily on *Wisconsin v. Mitchell*, which Judge Kleinfeld argues does not support the proposition that what a person reads demonstrates that he has criminal intent. In *Mitchell*, the defendant watched a film and then discussed it with friends. It was not the defendant's act of watching the movie that indicated he was racially motivated to commit the crime, but rather his discussion that led to that conclusion. Furthermore, the majority cites three cases related to free press that "amount to a collection of quotations out of context." The use of a reporter's materials to prove he had actual knowledge for a defamation case is unrelated to using a person's reading material to prove that they have criminal intent. Finally, the treason case cited by the majority, *Haupt v. United States* only stands for the proposition that the government can introduce the defendant's *words* to prove his treasonous intent, *not* merely what he read. *Id.* at 962-63.

prohibiting the government from introducing all reading material.[73] Reading material could be relevant under *Shymanovitz* in certain situations.[74]

Curtin's reading material was not relevant under *Shymanovitz* because it is fantasy, which is protected by the First Amendment and has no tendency to prove that the accused committed any crime.[75] In *Shymanovitz*, the defendant possessed pornography which proved *only* that he "had an interest in looking at gay male pornography, reading gay male erotica, or perhaps even, reading erotic stories about men engaging in sex with underage boys" not that he had *engaged* in these acts.[76] The *Shymanovitz* court found that "[t]he mere possession of reading material that describes a particular type of activity makes it neither more nor less likely that a defendant would intentionally engage in the conduct described and thus fails to meet the test of relevancy under Rule 401."[77] This holding was based on the fact that the link between fantasy and intent is far to tenuous to make one probative of the other because many people will fantasize about acts they have no intent to do or that they would never do.[78] Under this line of reasoning, the stories were irrelevant.[79]

Judge Kleinfeld additionally found that the stories were irrelevant under Rule 401 both because there was no evidence that Curtin read the stories and they describe a different act than what he was accused of.[80] Curtin testified that he downloaded a single zip file with 147 stories, of which, the prosecution sought to admit five, without establishing a foundation that Curtin read them.[81] It should be legal error to admit stories as evidence of a person's intent without demonstrating that he

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[73] United States v. Curtin, 489 F.3d at 961.

[74] *Id.* The judge provides two examples when such reading material would be relevant. For example, a defendant accused of planning to bomb a train who had an instruction manual and a train schedule would tend to prove his guilt. Similarly, the Fourth Circuit admitted evidence that an accused contract killer owned a book entitled *Hit Man: A Technical Manual for Independent Contractors*, which was both relevant under Rule 401 and more probative than prejudicial under Rule 403. See Rice v. Paladin Enters., 128 F.3d 233, 252 (4th Cir. 1997).

[75] United States v. Curtin, 489 F.3d at 961 (Kleinfeld, J., concurring).

[76] Guam v. Shymanovitz, 157 F.3d 1154, 1159 (9th Cir. 1998).

[77] *Id.* at 1158. Because the evidence is irrelevant, it is inadmissible under Rule 402. Even, if the evidence were relevant, it could be excluded under Rule 402 because such evidence is inadmissible when it is in contravention of the Constitution.

[78] United States v. Curtin, 489 F.3d at 961 (Kleinfeld, J., concurring).

[79] *Id.* at 962.

[80] *Id.*

[81] *Id.* Judge Kleinfeld notes that the file contained 3,000 single spaced pages (three times as long as *War and Peace*) which he believes strongly supports the inference that Curtin did not read them all.

read them.[82] Furthermore, Judge Kleinfeld took issue with the fact that all of the admitted stories described incest, whereas Curtin was accused of traveling across state lines with the intent to have sex with a minor.[83] He stated the law should not support a conclusion that reading material proves intent to act, but it is even less relevant when the act described is different from the one charged.[84]

Finally, Judge Kleinfeld argued that, even assuming the evidence were relevant, the court should have excluded it under Rule 404 and/or Rule 403.[85] Rule 404(a) was passed to prevent the government from making a defendant look so repulsive that the jury convicts when the evidence does not warrant it, and the exceptions in Rule 404(b) are not there to simply eradicate the prohibition in Rule 404(a).[86] Curtin's stories were not a guide explaining how to arrange a sexual encounter with a minor so they do not illuminate the defendant's intent, motive or plans.[87] Furthermore, *Shymanovitz* dictates that mere possession of reading material is *not* the conduct contemplated by Rule 404(b) and the majority provides no persuasive reason for overturning it.[88] Rule 403 excludes relevant evidence that is more prejudicial than probative, and Judge Kleinfeld concluded that Curtin's stories were the exact type of evidence Congress contemplated when it passed Rule 403.[89] Even if the trial court read all of the stories, they should have been excluded because they have the potential to repulse the jury to the extent that they would convict on that basis alone.[90] Because "incest has had a rare power to disgust," any probative value the stories had is definitively outweighed by such prejudice.[91]

2. *The Majority Said Too Much: The Other Concurrences*

Circuit Judges McKeown and Wardlaw each wrote a concurrence to express the idea that the only legal issue the panel needed to address was whether the district court properly conducted its analysis under Rule 403.[92] Judge McKeown, and those who joined his concurrence,[93] were

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[82] United States v. Curtin, 489 F.3d at 962 (Kleinfeld, J., concurring).

[83] *Id.*

[84] *Id.*

[85] *Id.* at 963.

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *Id.* at 964.

[90] *Id.*

[91] *Id.*

[92] United States v. Curtin, 489 F.3d at 965-66 (McKeown, Wardlaw JJ., concurring).

particularly disturbed by the majority opinion's lengthy discussion about whether to overrule *Shymanovitz*, which he viewed unnecessary dicta given that all fifteen judges agreed that because the district court did not read all five stories the case should be remanded.[94] Judge Wardlaw was not convinced that the district court abused its discretion and does not share Judge Kleinfeld's concerns, but agreed the case should be remanded for a proper balance of the stories probative value under Rule 403.[95]

III. IMPLICATIONS OF THE DECISION

Curtin's future implications are difficult to predict for a variety of reasons. Despite the fact that there were no dissents, only eight or nine of the fifteen judges agreed with the majority's reasoning and decision to overrule *Shymanovitz*.[96] Two of the three concurrences agreed only with the majority's decision to reverse on due process grounds.[97] They effectively dissented from Judge Trott's decision to reverse.[98] The effects of a close decision may not be as widespread.

Additionally, judicial ideology was not an effective forecaster of *Curtin's* outcome. Any effort to explain *Curtin* along liberal or conservative ideology is fruitless because the judges did not follow predictable lines. The panel had eight Democratic and seven Republican appointees, but the judges' opinions about whether reading material was relevant to prove criminal intent cut across party lines.[99] One of the Republican appointees, Judge Kleinfeld, who authored a concurrence

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[93] Judge McKeown was joined by Judges Pregerson, Kozinski, Thomas and Berzon.

[94] United States v. Curtin, 489 F.3d at 965 (McKeown, J., concurring).

[95] United States v. Curtin, 489 F.3d at 965-66 (Wardlaw, J., concurring).

[96] Seven judged joined Judge Trott's majority opinion, for a total of eight. Of the concurring opinions, Judge Wardlaw stated that he did not think *Shymanovitz* held "that the possession of lawful reading material is never admissible to prove intent under any circumstances." This statement, and the fact that he did not sign on to either of the other concurrences, indicates that he agreed with the majority's reasoning on the issues, and but not with the decision to reverse and remand. So, there are arguably nine judges that agree with the majority.

[97] United States v. Curtin, 489 F.3d at 965 (McKeown, J., concurring); United States v. Curtin, 489 F.3d at 969 (Kleinfeld, J., concurring).

[98] Steven Kalar refers to Judge Kleinfeld's concurrence a "dissent." Steven Kalar, Case o' The Week: En Banc Curtin Divides Right, May 26, 2007, http://circuit9.blogspot.com/2007/05/case-o-week-fre-404b- draws-curtin.html. Judge Reinhardt, who authored *Shymanovitz*, was not randomly selected to sit on the en banc panel in *Curtin*. But if he had been, given the closeness of the decision, there is a good chance that *Shymanovitz* would not have been overruled. Howard J. Bashman, Can What You're Reading Prove Intent to Commit a Crime?, May 29, 2007, http://www.law.com/jsp/article.jsp?id=1180127139666.

[99] Howard J. Bashman, Can What You're Reading Prove Intent to Commit a Crime?, May 29, 2007, http://www.law.com/jsp/article.jsp?id=1180127139666.

vigorously disagreeing with the majority, was joined by another Republican appointee, Judge Kosinski.[100] Judge Trott's majority opinion was joined by four other Republican appointees and three Democratic appointees.[101] Interestingly, all three judges on the original panel were also on the en banc panel.[102] But, in a strange turn, the two judges who disagreed with Judge Trott (who wrote a vigorous eighty-three page dissent to the three-judge panel decision) initially, *joined* his opinion to overrule *Shymanovitz*.[103] Given that a major criticism of Circuit Courts is that they are excessively ideological, it is hard to say whether this strange outcome in *Curtin* is positive or negative.[104] It is clear, however, that it breaks the norms.

Additionally, the majority concluded with a strong admonition about how far future courts should take the holding in *Curtin*.[105] Judge Trott was careful to limit the holding to the facts and cautioned "that the simple possession of any book or written materials generically similar to a charged crime is automatically admissible against the possessor defendant, or that all pornography or obscenity in the possession of a defendant in these cases is admissible without undergoing the scrutiny required of Rules 401 and 403."[106] This limitation may result in courts not applying the law in many similar factual situations, and allows courts the leeway to find that *Curtin* is limited only to those facts. A judge did just that in a recent case in California's Eastern District.[107] This admonition may continue to have similar results in other cases.

Despite this uncertainty, there are a few narrow issues of law that can be extrapolated with certainty. The entire panel agreed that in order to admit evidence under Rule 404(b), the district court must personally

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[100] Notably both of these Judges are widely viewed as Libertarians. *Id.*

[101] Howard J. Bashman, Can What You're Reading Prove Intent to Commit a Crime?, May 29, 2007, http://www.law.com/jsp/article.jsp?id=1180127139666.

[102] *Id.*

[103] *Id.*

[104] Michael Abramowicz, *En Banc Revisited*, 100 COLUM. L. REV. 1600, 1604-1605 (2000) (demonstrating that even when judicial ideology is crudely measured by political affiliation, it is a statistically significant predictor of how cases will turn out).

[105] United States v. Curtin, 489 F.3d at 956.

[106] *Id.*

[107] *See Holley v. Yarborough*, 2007 WL 2705292 at 16 (E.D. Cal. 2007) (finding that *US v. Curtin* did not apply where the defendant was charged with lewd and lascivious conduct with a minor and the state court admitted three pornographic magazines, entitled "Barely Legal," "Baby Face," and "Barely 18" to show the defendant's intent. The court found that *Curtin* should be limited to its facts and distinguished because the magazines were found in the defendant's house, not his car where the alleged acts occurred and there was no evidence to make a connection between the pornography and the alleged acts in the car with the minor).

review everything the jury will see.[108] Any failure to do so, is reversible error because it violates a defendant's due process right to a fair trial.[109] The court also intoned that in order to admit evidence under Rule 404(b), it should conduct a balancing test to ensure that the evidence is more probative than prejudicial under Rule 403.[110] Ultimately, the effect of *United States v. Curtin* is difficult to predict, but it is certain that the law to come will produce interesting results.

ANNA L. BENVENUE*

[108] United States v. Curtin, 489 F.3d 935 at 945; Steven Kalar, Case o' The Week: En Banc Curtin Divides Right, May 26, 2007, http://circuit9.blogspot.com/2007/05/case-o-week-fre-404b-draws-curtin.html.

[109] *Id.*

[110] *Id.*; Steven Kalar, Case o' The Week: En Banc Curtin Divides Right, May 26, 2007, http://circuit9.blogspot.com/2007/05/case-o-week-fre-404b- draws-curtin.html.

* J.D. Candidate, 2008, Golden Gate University School of Law, San Francisco, CA; B.A. History, 2002, University of Georgia, Athens, GA. I would like to thank Damien Jovel who called this case to my attention. I would also like to thank Kira Murray for motivating me to write this piece and for fighting for the defendants who will need her skilled representation to overcome the additional roadblocks Curtin imposes. This Summary is dedicated to Rob Connallon, without whom there would be no Volume 38 of the Golden Gate University Law Review.