No. 18-1054

In the Supreme Court of the United States

JASON ALLEN JACKSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion in admitting, under Federal Rule of Evidence 404(b), evidence of petitioner's prior conviction for possession of methamphetamine as evidence of his state of mind in this prosecution for conspiring to distribute methamphetamine and possessing methamphetamine with the intent to distribute.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 909 F.3d 228.

JURISDICTION

The judgment of the court of appeals was entered on November 26, 2018. The petition for a writ of certiorari was filed on February 8, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Minnesota, petitioner was convicted on one count of conspiracy to distribute 500 grams or more of a mixture and substance containing a detectable amount of methamphetamine, in violation of 21 U.S.C. 841(a)(1), 841(b)(1)(A), and 846; and on one count of possession with intent to distribute 50 grams

or more of a mixture and substance containing a detectable amount of methamphetamine, in violation of 21 U.S.C. 841(a)(1) and 841(b)(1)(B). Judgment 1; see Pet. App. 13a, 15a. The district court sentenced petitioner to 330 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-34a.

1. Beginning in or around the summer of 2013, Jesse Howard Garcia arranged to bring large quantities of methamphetamine to the metropolitan area surrounding Minneapolis and St. Paul, Minnesota. Presentence Investigation Report (PSR) ¶ 19. Garcia's operation used two principal suppliers and a large network of other individuals to maintain stash houses, make deliveries, collect debts, and otherwise facilitate the distribution of methamphetamine in the Twin Cities area. PSR ¶¶ 20-21. Petitioner and other "high-level distributors" obtained methamphetamine directly from Garcia and then sold or re-distributed it to a group of low-level distributors participating in the conspiracy. PSR ¶ 22.

The Drug Enforcement Administration (DEA) eventually became involved in an ongoing investigation of the conspiracy being conducted by local law enforcement. Pet. App. 4a; see PSR ¶¶ 24-28. During the investigation, law enforcement intercepted several calls between various co-conspirators using veiled language to discuss their operations. On one call, Garcia told petitioner that he needed to "go switch up cars" and "grab them things" before meeting with petitioner. Pet. App. 7a (citation omitted). Petitioner assured Garcia that he had all the "paper * * * towards the whole . . . debt." *Ibid.* (brackets and citation omitted). Five days later, Garcia reached out to petitioner again, asking about "the paper." PSR ¶ 37. Garcia told petitioner, "[T]hese

fools are ready to go, they got fifty of them for me man" and "[t]hey want me to come with some paper" to "grab these fifty." Pet. App. 10a (citation omitted; first set of brackets in original). The next day, after Garcia and petitioner met, Garcia spoke with petitioner again, telling him that the money he had delivered to Garcia amounted to "[s]ixteen thousand, twenty dollars." *Ibid.* (citation omitted; brackets in original). Petitioner claimed it "should've been like twenty six." *Ibid.* (citation omitted).

On the same day as this last conversation between Garcia and petitioner, federal and local law enforcement agencies arrested Garcia and several other co-conspirators as they attempted to carry out a transaction described in the intercepted calls. Pet. App. 11a-12a; see PSR ¶¶ 39-42. Law enforcement recovered 50 pounds of methamphetamine from the trunk of Garcia's car, an additional 29 pounds from a stash house used by Garcia's primary supplier, and five more pounds from the garage of Garcia's father's home. Pet. App. 11a-12a; see PSR ¶¶ 39, 41-42.

Petitioner was apprehended two months later, following a high-speed chase. Pet. App. 12a; see PSR ¶ 44. The car he drove during the chase was impounded. *Ibid.* In a jailhouse call to his parents made shortly thereafter, petitioner stated that "all [his] stuff [was] in the trunk" of the car. Pet. App 12a (citation omitted; brackets in original); see PSR ¶ 44. A search of the impounded car discovered nearly a pound of methamphetamine under the carpet in the trunk. Pet. App. 12a, 42a; see PSR ¶ 44.

2. A federal grand jury charged petitioner, Garcia, and others with, among other things, conspiracy to distribute 500 grams or more of a mixture and substance containing a detectable amount of methamphetamine, in

violation of 21 U.S.C. 841(a)(1), 841(b)(1)(A), and 846, and charged petitioner with possession with intent to distribute 50 grams or more of a mixture and substance containing a detectable amount of methamphetamine, in violation of 21 U.S.C. 841(a)(1) and 841(b)(1)(B). Second Superseding Indictment 2, 4; see Pet. App. 13a.

Before trial, the government moved to admit into evidence petitioner's 2008 federal conviction for conspiracy to distribute and possess with intent to distribute 50 grams or more of methamphetamine and his 2009 Minnesota conviction for possession of more than six grams (19 grams) of methamphetamine, explaining that the convictions would be relevant to proving the meaning of the intercepted calls between petitioner and Garcia. Pet. App. 14a; see *id.* at 57a-61a (motion *in limine*). Petitioner objected. *Id.* at 14a; see *id.* at 62a-64a (opposition to motion *in limine*). The district court determined that evidence of the prior convictions was admissible under Federal Rule of Evidence 404(b) "for the limited purpose of showing motive, intent, and knowledge." Pet. App. 14a; see *id.* at 35a-48a (order).

In accordance with the district court's order, the government introduced at trial the indictment, plea agreement, and judgment from petitioner's 2008 conviction for conspiring to distribute and to possess with intent to distribute methamphetamine. Gov't Tr. Ex. 124; see Pet. App. 53a-54a. With respect to petitioner's 2009 conviction, the government introduced the criminal complaint describing an informant's account of petitioner "selling large amounts of methamphetamine," petitioner's petition to plead guilty to possession, and the judgment.

Gov't Tr. Ex. 125, at 2[1]; see Pet. App. 55a. Immediately before the evidence was introduced at trial, the court instructed the jury that it could consider evidence of the convictions only "if [it] unanimously f[ound] it more likely true than not true," and only in considering petitioner's knowledge and intent to commit the charged crimes. Pet. App. 51a, see *id.* at 51a-52a. The government echoed this instruction in its closing, where it "cautioned the jury about the limited use of the prior convictions." *Id.* at 14a.

The jury found petitioner guilty on both counts, and the district court sentenced him to 330 months of imprisonment, to be followed by five years of supervised release. Judgment 1-3.

3. The court of appeals affirmed. Pet. App. 1a-34a. As relevant here, the court determined that the district court had not abused its discretion in admitting evidence of petitioner's earlier methamphetamine-related convictions. *Id.* at 23a-24a. Citing circuit precedent, the court of appeals explained that evidence of a prior crime may be admissible under Rule 404(b) if it is (1) "relevant to a material issue"; (2) "proven by a preponderance of the evidence"; (3) "of greater probative value than prejudicial effect"; and (4) "similar in kind and close in time to a charged offense." *Id.* at 23a (quoting *United States* v. *Walker*, 428 F.3d 1165, 1169 (8th Cir. 2005), cert. denied, 546 U.S. 1194 (2006)). And it found those criteria to be satisfied here. *Id.* at 23a-24a.

The court of appeals rejected petitioner's contention that evidence of his prior convictions was inadmissible on the theory that the convictions "were too remote in

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[1] The document is not separately paginated. This brief treats the document as if it were paginated, with the first page as being numbered 1.

time" and that his 2009 possession conviction "was not similar in kind to the drug trafficking charges in this case." Pet. App. 23a. After considering "the facts and circumstances" of this case, *ibid.* (citation omitted), the court of appeals found that the six- and seven-year gaps between petitioner's prior convictions and conduct in this case did not make the convictions "too remote in time" to be admissible, particularly in light of the fact that petitioner "received 80 months' imprisonment for his federal conviction during that time." *Id.* at 23a-24a (citation omitted). The court further determined that the district court did not abuse its discretion in admitting evidence of petitioner's 2009 conviction for methamphetamine possession, reasoning that a prior conviction for "possession of user-quantities of a controlled substance" may be admissible "to show knowledge and intent to commit a current charge of conspiracy to distribute drugs." *Ibid.* (quoting *United States* v. *Robinson*, 639 F.3d 489, 494 (8th Cir. 2011)).

ARGUMENT

Petitioner contends (Pet. 32-36) that the district court abused its discretion in admitting evidence of his prior conviction for possession of methamphetamine on the theory that the conviction had "zero non-propensity probative value for determining * * * anything" in this case. Pet. 33. The court of appeals correctly rejected that contention, and its determination does not conflict with any decision of this Court or of another court of appeals. Furthermore, this case would be a poor vehicle for considering the question presented because any error in the admission of petitioner's prior possession of methamphetamine was harmless in light of the unchallenged admission of his prior conviction for conspiracy

to distribute and to possess with an intent to distribute methamphetamine. Further review is not warranted.

1. Under Federal Rule of Evidence 404(b), "[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." Fed. R. Evid. 404(b)(1). Such evidence may be admissible, however, "for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b)(2). Indeed, this Court has recognized that it "may be critical to the establishment of the truth as to a disputed issue, especially when that issue involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct." *Huddleston* v. *United States*, 485 U.S. 681, 685 (1988). Accordingly, evidence of a defendant's prior crimes may be admitted if it is relevant to a proper, non-propensity purpose, Fed. R. Evid. 401-402; its probative value is not "substantially outweighed" by the potential for undue prejudice, Fed. R. Evid. 403; and, upon request, the district court instructs the jury that it may consider the other-crimes evidence only for the non-propensity purposes for which it was admitted. See *Huddleston*, 485 U.S. at 691-692.

The court of appeals correctly applied those principles to the district court's determination that evidence about petitioner's prior convictions was admissible to prove that coded language in the recorded conversations between petitioner and his co-conspirator referred to methamphetamine and methamphetamine trafficking. As petitioner recognizes (Pet. 31-32), the government's theory against petitioner relied in significant part on the interpretation of those conversations. Petitioner did

not (and could not) contest that police recovered over 440 grams of methamphetamine from the trunk of the vehicle he was driving when he was arrested. Pet. App. 12a. Instead, he argued that he had never agreed to distribute methamphetamine and did not know there was any in the vehicle. See *id.* at 25a-26a (arguing on appeal that "there was insufficient evidence that [petitioner] knew the methamphetamine was in the vehicle" and "insufficient evidence that he and [Garcia] had reached an agreement to distribute methamphetamine"). To rebut these claims of ignorance, and satisfy its burden of proof, the government offered the recorded conversations in which (1) Garcia told petitioner that his source "got fifty of them for me," which, the government argued, referred to 50 pounds of methamphetamine, *id.* at 10a (citation omitted); (2) petitioner told Garcia that there "should've been like twenty six" involved in the transaction rather than, the government argued, the $16,000 that petitioner provided Garcia, *ibid.* (citation omitted); and (3) petitioner told his parents that "all [his] stuff [was] in the trunk" of the vehicle he was driving when intercepted by the police, *id.* at 12a (citation omitted; brackets in original).

Whether petitioner was discussing methamphetamine trafficking, some other narcotic or contraband, or entirely legal products and transactions was not definitively resolved by the coded language in the recorded conversations. Thus, as the court of appeals observed, the government's case relied on the jury's "reasonabl[e] infer[ences] that [petitioner] gave money to [Garcia] as part of the agreement in the conspiracy to distribute drugs" and then knowingly transported those drugs in his vehicle. Pet. App. 26a-27a. Petitioner's familiarity

with the methamphetamine trade—including the implicit quantities being discussed in his calls with Garcia and the expected pricing for those quantities—filled in the inferential gaps in these conversations. And the evidence of petitioner's prior convictions for conspiracy to distribute and to possess with intent to distribute methamphetamine and for possession of methamphetamine demonstrated that he was familiar with the market for methamphetamine as both a consumer and a distributor.

Evidence of petitioner's prior convictions was therefore relevant to contextualizing the recorded conversations and proving petitioner's state of mind during those calls, and was not introduced to "prove character as a basis for suggesting the inference that conduct on a particular occasion was in conformity with it." Fed. R. Evid. 404 advisory committee's note (1972). Petitioner does not contend that, if the evidence was relevant to a non-propensity purpose, it was nevertheless inadmissible because its relevance was "substantially outweighed" by a danger of unfair prejudice. Fed. R. Evid. 403. And the jury was properly instructed that it could consider the evidence of petitioner's prior convictions only in assessing petitioner's knowledge and intent, and not as evidence that petitioner committed the charged acts "simply because [the jury] believe[d] that he may have committed similar acts" in the past. Pet. App. 52a. The court of appeals did not err in determining that the district court did not abuse its discretion in admitting evidence of those convictions for that limited purpose, accompanied by that limiting instruction.

2. Petitioner contends (Pet. 3, 9-29) that the circuits are divided on whether a prior drug-possession conviction is admissible to show knowledge and intent in a drug-distribution prosecution. In particular, he asserts

(Pet. 9, 16) that the Eighth and Eleventh Circuits "apply a virtually *per se* rule of admissibility for any prior drug conviction," while the Third, Fourth, Sixth, and Seventh Circuits "hold that prior possession convictions are ordinarily inadmissible in drug distribution cases." But petitioner significantly overstates the level of disagreement among the courts of appeals about the scope of a district court's discretion under Rule 404(b). In any event, this case would be a poor vehicle for resolving any disagreement, because petitioner does not challenge the admission of evidence about his prior conviction for conspiring to distribute and possess with intent to distribute methamphetamine, and any error in additionally admitting his conviction for the possession of methamphetamine would accordingly be harmless.

a. Petitioner observes that the Eighth Circuit, including in the decision below, has frequently stated that "a prior conviction for distributing drugs, and even the possession of user-quantities of a controlled substance, are relevant under Rule 404(b) to show knowledge and intent to commit a current charge of conspiracy to distribute drugs." Pet. App. 24a (quoting *United States* v. *Robinson*, 639 F.3d 489, 494 (8th Cir. 2011)). Many of the decisions in which the court has repeated that statement have concerned only the relevance of "prior conviction[s] for *distributing* drugs," *ibid.* (emphasis added; citation omitted), which petitioner does not dispute. See, *e.g.*, *United States* v. *Patino*, 912 F.3d 473, 476 (8th Cir. 2019); *United States* v. *Valerio*, 731 Fed. Appx. 551, 553 (8th Cir. 2018) (per curiam), cert. denied, 139 S. Ct. 793 (2019); *United States* v. *Lee*, 687 F.3d 935, 943-944 (8th Cir. 2012), cert. denied, 569 U.S. 912 (2013); *United States* v. *Carmickel*, 263 F.3d 829, 830 (8th Cir. 2001), cert. denied, 534 U.S. 1095 (2002). But, in any event, the

Eighth Circuit does not treat "relevan[ce] under 404(b)," Pet. App. 24a (citation omitted), as the sole criterion of admissibility. Instead, it has explained that the government must also establish that the defendant's earlier conduct is "proven by a preponderance of the evidence," the extrinsic evidence is "of greater probative value than prejudicial effect" as described in Rule 403, and the prior crimes are "similar in kind and close in time to a charged offense." *Id.* at 23a (quoting *United States* v. *Walker*, 428 F.3d 1165, 1169 (8th Cir. 2005), cert. denied, 546 U.S. 1194 (2006)).

Accordingly, even where the Eighth Circuit notes the relevance of prior drug convictions, it recognizes that the government must still satisfy those other requirements in order to introduce the convictions into evidence. See, *e.g.*, *United States* v. *Horton*, 756 F.3d 569, 579-580 (separately analyzing whether the prior offenses were sufficiently similar to the current charges and whether the potential for undue prejudice substantially outweighed the probative value), cert. denied, 135 S. Ct. 122 (2014); *United States* v. *Ironi*, 525 F.3d 683, 688 (2008) (same). And it has repeatedly cautioned that evidence of prior drug offenses may not be "introduced solely to prove the defendant's propensity to commit criminal acts." *United States* v. *Davidson*, 195 F.3d 402, 408 (8th Cir. 1999) (quoting *United States* v. *Brown*, 148 F.3d 1003, 1009 (8th Cir. 1998), cert. denied, 525 U.S. 1169 (1999)), cert. denied, 528 U.S. 1180, and 529 U.S. 1093 (2000).

Petitioner is therefore incorrect in asserting (Pet. 11) that evidence of prior drug possession is "simply *per se* admissible in drug distribution prosecutions in the Eighth Circuit." Indeed, petitioner acknowledges (Pet. 13) that the Eighth Circuit recently found, in *United*

States v. *Turner*, that a district court abused its discretion in admitting evidence of a prior drug-possession conviction under Rule 404(b) in a prosecution for conspiracy to possess with intent to distribution cocaine. 781 F.3d 374, cert. denied, 136 S. Ct. 208, 136 S. Ct. 280, and 136 S. Ct. 493 (2015). In doing so, the court of appeals acknowledged the precedent on which petitioner relies, but made clear that it should not be read to "invite passive treatment of the Federal Rules of Evidence." *Id.* at 390. Rather, the court explained that the government, "as the proponent of the evidence, must be prepared to show a permissible purpose for admission of [a] prior conviction." *Ibid.* And it reiterated that, even if "the government offers a relevant, non-propensity purpose for the evidence," the district court still must "determine whether the admission of that evidence is nevertheless substantially more prejudicial than probative." *Id.* at 391.[2]

The Eleventh Circuit has likewise refused to "create a *per se* rule of admissibility of any prior drug conviction in drug conspiracy cases" of the sort that petitioner ascribes to it. *United States* v. *Sanders*, 668 F.3d 1298, 1315 (2012) (per curiam). Similar to the Eighth Circuit, the Eleventh Circuit has explained that, in addition to relevance to a non-propensity purpose, the government

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[2] The court of appeals' later decision in *United States* v. *Wright*, 866 F.3d 899 (8th Cir. 2017), cert. denied, 138 S. Ct. 2026 (2018), does not show any *per se* rule of admissibility for evidence of drug possession. In *Wright*, the Rule 404(b) evidence concerned a prior conviction for the "manufacture or delivery," not possession, of cocaine. *Id.* at 902. Petitioner does not contest that evidence of such distribution convictions may be admissible to prove knowledge or intent in a subsequent drug-distribution prosecution.

must also demonstrate that the defendant's prior conduct is "established by sufficient proof to permit a jury finding that the defendant committed the extrinsic act," and that the "probative value of the evidence not be substantially outweighed by its undue prejudice." *United States* v. *Matthews*, 431 F.3d 1296, 1310-1311 (2005) (per curiam) (citation omitted), cert. denied, 549 U.S. 811 (2006). In recent decisions, it has cited its 1997 decision in *United States* v. *Butler*, 102 F.3d 1191 (11th Cir.), cert. denied, 520 U.S. 1219 (1997), on which petitioner heavily relies, only in addressing the relevance requirement. See, *e.g.*, *United States* v. *Hunter*, 758 Fed. Appx. 817, 822-823 (11th Cir. 2018) (per curiam); *United States* v. *Jarriel*, 499 Fed. Appx. 860, 861 (11th Cir. 2012) (per curiam); *United States* v. *Sawyer*, 361 Fed. Appx. 96, 99 (11th Cir.) (per curiam), cert. denied, 562 U.S. 873 (2010); *United States* v. *McQueen*, 267 Fed. Appx. 880, 882-883 (11th Cir. 2008) (per curiam); *Matthews*, 431 F.3d at 1311. And it has found that a district court abused its discretion by admitting evidence of prior convictions where dissimilarities in the circumstances of prior drug offenses and the charged offense undermined the probative value of the proffered evidence as compared to the potential for undue prejudice. See *Sanders*, 668 F.3d at 1315; see also *United States* v. *Young*, 574 Fed. Appx. 896, 901-902 (11th Cir. 2014) (per curiam).

b. Petitioner overstates (Pet. 16-26) the extent to which the Third, Fourth, Sixth, and Seventh Circuits will exclude evidence of prior drug-possession convictions offered under Rule 404(b). As petitioner appears to recognize (Pet. 16-17), none of those courts has articulated a blanket rule of inadmissibility for evidence of previous drug possession in a subsequent drug-distribution prosecution. Rather, they have recognized that in proper

circumstances, such evidence may be introduced for non-propensity purposes. See *United States* v. *Davis*, 726 F.3d 434, 442-443 (3d Cir. 2013) ("[T]here is no question that, given a proper purpose and reasoning, drug convictions are admissible in a trial where the defendant is charged with a drug offense.") (citation omitted); *United States* v. *Hall*, 858 F.3d 254, 268 (4th Cir. 2017) (reasoning that "a prior possession conviction may be relevant to establishing a defendant's knowledge of the same type of drug for purposes of a later offense"); *United States* v. *Lattner*, 385 F.3d 947, 957 (6th Cir. 2004) ("[C]laims of innocent presence or association, such as that made by Lattner's defense, routinely open the door to 404(b) evidence of other drug acts."), cert. denied, 543 U.S. 1095 (2005); *United States* v. *Lee*, 724 F.3d 968, 980 (7th Cir. 2013) (acknowledging that juries may rely on evidence of prior drug possession to draw "permissible inferences about [a defendant's] knowledge and intent" in a drug-distribution conspiracy).

The evidence about petitioner's prior drug-possession conviction involved more than "the mere fact" (Pet. 29-30) of the conviction. It also included evidence about the sales at issue in that offense. See p. 5, *supra*. Each of the circuits petitioner identifies as forming the other side of a conflict has permitted prior-crimes evidence in circumstances similar to those here within the last several years. See, *e.g.*, *United States* v. *Jackson*, 619 Fed. Appx. 189, 193 (3d Cir. 2015) (determining that "evidence of prior drug transactions * * * went to the non-propensity purposes of showing [the defendant]'s knowledge and intent, as well as assisting the jury in understanding the narrative of the facts leading up to the offenses for which [the defendant] was indicted"), cert. denied,

136 S. Ct. 992 (2016); *United States* v. *Robinson*, 456 Fed. Appx. 283, 293 (4th Cir. 2011) (per curiam) (finding that evidence of defendant's prior drug possession "was relevant to show, at the very least, absence of mistake" in subsequent prosecution for possession with intent to distribute crack cocaine); *United States* v. *Avalos*, 458 Fed. Appx. 530, 533 (6th Cir. 2012) (concluding that evidence of defendant's past convictions for, *inter alia*, possession of methamphetamine "was material to show her knowledge that the money she retrieved for [her co-conspirator] was used to facilitate drug transactions and to infer her intent to join the conspiracy"); *United States* v. *Moore*, 531 F.3d 496, 499-500 (7th Cir. 2008) (determining that "evidence of [a] prior drug buy * * * tended to prove" the defendant's knowledge that he was dealing with drugs on a subsequent occasion). Contrary to petitioner's assertion (Pet. 31), the prior-crimes evidence in this case was not a "classic example" of evidence that would have been inadmissible in those circuits.

Those courts have in some cases expressed skepticism about the inherent relevance of prior drug possession to establishing a defendant's subsequent intent to distribute drugs. See, *e.g.*, *Davis*, 726 F.3d at 444-445 (noting disagreement with Eleventh Circuit's decision in *Butler* on whether prior possession is relevant to showing intent to distribute); *Hall*, 858 F.3d at 267-268 (same); *United States* v. *Haywood*, 280 F.3d 715, 721 (6th Cir. 2002) (same); *Lee*, 724 F.3d at 979 (noting that "it is not obvious" how a prior conviction for simple possession "would shed light on" an intent to distribute); cf. *Matthews*, 431 F.3d at 1318 (Tjoflat, J., specially concurring) ("The intent necessary to possess an illegal drug is no more relevant to the intent to either conspire to distribute illegal drugs or to distribute them than any

other criminal act."); *United States* v. *Ono*, 918 F.2d 1462, 1464-1465 (9th Cir. 1990) (questioning, in dicta, the relevance of the prior "personal use of a controlled substance" to "show intent" to distribute a controlled substance in a subsequent prosecution); David P. Leonard, *The New Wigmore, A Treatise on Evidence: Evidence of Other Misconduct and Similar Events* § 7.5.2, at 469 (2009) (expressing similar skepticism). But any disagreement on that issue is not implicated here. The government offered evidence of petitioner's prior drug convictions to establish his knowledge of methamphetamine trafficking and the meaning of certain coded language in intercepted phone calls, not simply as evidence of petitioner's intent to distribute methamphetamine.

c. Any differences among the approaches taken by the circuits, at least in the context presented here, is thus a matter of degree, not of kind. The deferential abuse-of-discretion review applicable to district courts' evidentiary rulings means that factual differences between cases are, in practice, likely to be far more significant to the outcome of appellate decisions than any differences in the way courts of appeals describe their approaches to the application of Rule 404(b). See *Sprint/United Mgmt. Co.* v. *Mendelsohn*, 552 U.S. 379, 384 (2008) ("In deference to a district court's familiarity with the details of the case and its greater experience in evidentiary matters, courts of appeals afford broad discretion to a district court's evidentiary rulings."); *United States* v. *Miller*, 673 F.3d 688, 697 (7th Cir. 2012) (recognizing that Rule 404(b), in particular, "requires a case-by-case determination, not a categorical one"). And when case-by-case determinations are committed to the experience and insight of the district courts, this Court has

recognized that, over a sufficiently long history of "discretionary [decisions] and review by appellate tribunals, 'the channel of discretion [may be] narrowed.'" *Halo Elecs., Inc.* v. *Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1932 (2016) (quoting Henry J. Friendly, *Indiscretion About Discretion*, 31 Emory L.J. 747, 772 (1982)). In the absence of a strong indication that different courts are consistently reaching different results on similar facts, intervention in that process by this Court is not warranted.[3]

3. In any event, this case would be a poor vehicle for addressing the question presented. As noted, although the petition challenges the admission of evidence about his prior drug possession conviction, petitioner does not challenge the simultaneous admission of evidence about his prior conviction for conspiring to distribute and to possess with intent to distribute methamphetamine or assert that evidence of that crime would have been excluded under another circuit's approach. Petitioner is therefore in the untenable position of arguing that, although the jury could properly consider evidence that he previously conspired to possess with an intent to distribute methamphetamine in determining his knowledge and intent to commit the charged offenses, the jury's further consideration of evidence concerning his possession of methamphetamine on a separate occasion had a "substantial and injurious effect or influence in determining the . . . verdict." *United States* v. *Dominguez Benitez*, 542 U.S. 74, 81 (2004) (citation omitted); see Fed. R. Crim. P. 52(a). That argument is unsustainable.

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[3] The petitioner's assertion (Pet. 15-16) of a division of authority within the Fifth Circuit similarly does not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

If the Court were inclined to provide further guidance on the circumstances in which evidence of prior drug possession may be introduced in a subsequent drug distribution prosecution, the Court should await a case in which any error in the introduction of that evidence likely affected the jury's verdict. Further review in this case is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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