No. 18-1054

IN THE
Supreme Court of the United States

JASON ALLEN JACKSON,
*Petitioner*,

v.

UNITED STATES OF AMERICA,
*Respondent.*

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

# REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

KEALA C. EDE
Assistant Federal Defender
District of Minnesota
U.S. Courthouse, Suite 107
300 South Fourth Street
Minneapolis, MN 55415

ADAM G. UNIKOWSKY
*Counsel of Record*
JENNER & BLOCK LLP
1099 New York Ave., NW,
Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

SARAH A. YOUNGBLOOD
NATHANIEL K.S. WACKMAN
JENNER & BLOCK LLP
353 N. Clark St.
Chicago, IL 60654

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

CASES

In the decision below, the Eighth Circuit held that the mere fact of a prior drug possession conviction is admissible in a drug distribution prosecution, even without any particularized connection between the prior conviction and the charged conduct. The Third, Fourth, Sixth, and Seventh Circuits have reached the opposite conclusion, holding that prior drug possession convictions are inadmissible to prove drug distribution, absent such a particularized connection. Numerous courts, commentators, and the Federal Judicial Conference have recognized a circuit split on this issue.

Although the government denies the split, its brief does not actually address the holdings of cases from the Third, Fourth, Sixth, and Seventh Circuits that have excluded evidence on materially indistinguishable facts. It either quotes irrelevant non-sequiturs from these cases or fails to cite them altogether.

The government offers one purported "vehicle problem"—a harmlessness argument that was not pressed or passed upon in the Eighth Circuit, contradicts the government's own position in the District Court, and is meritless in any event. This case is an ideal vehicle to resolve the split, and the petition should be granted.

## I. There Is A Circuit Split.

The Eighth Circuit applied its oft-repeated rule that "a prior conviction" for "possession of user-quantities of a controlled substance" is "relevant under Rule 404(b) to show knowledge and intent to commit a current charge of conspiracy to distribute drugs." Pet. App. 24a (quotation marks omitted). It therefore upheld the

admission of evidence of Petitioner's 2009 drug possession conviction, even though there was no connection between that conviction and the charged conduct. As the petition demonstrated, the Eleventh Circuit applies the same rule as the Eighth Circuit. Pet. 13-15. By contrast, the Third, Fourth, Sixth, and Seventh Circuits have rejected the Eighth Circuit's rule:

- In *United States v. Davis*, 726 F.3d 434 (3d Cir. 2013), the Third Circuit reversed a distribution conviction because the district court admitted possession convictions with no particularized connection to the charged crime. The court explicitly rejected the "opposite result" reached by the Eighth Circuit. *Id.* at 445; *see* Pet. 17-18.
- In *United States v. Hall*, 858 F.3d 254 (4th Cir. 2017), the Fourth Circuit followed *Davis* and similarly reversed a distribution conviction because of the admission of possession and distribution convictions with no particularized connection to the charged crime. Pet. 18-22.
- In *United States v. Haywood*, 280 F.3d 715 (6th Cir. 2002), the Sixth Circuit reversed a distribution conviction based on the admission of evidence of drug possession. The Sixth Circuit acknowledged that other circuits, including the Eighth Circuit, had "held that a defendant's possession of drugs for personal use is relevant to prove his intent to distribute drugs found in his

possession on another occasion," but the court was "unable to discern a compelling rationale for this approach." *Id.* at 721; Pet. 22-23.

- In *United States v. Gomez*, 763 F.3d 845 (7th Cir. 2014), the en banc Seventh Circuit unanimously concluded that evidence of cocaine possession was inadmissible in a drug distribution case, finding that there was no particularized non-propensity basis for admitting that evidence. Pet. 24-25. As the petition explained, two post-*Gomez* cases illustrate how *Gomez*'s legal standard sharply diverges from the Eighth Circuit's rule. Pet. 25-26 (citing *United States v. Stacy*, 769 F.3d 969 (7th Cir. 2014), and *United States v. Chapman*, 765 F.3d 720 (7th Cir. 2014)).

The government does not substantively engage with any of the conflicting cases. It does not cite *Gomez*, *Stacy*, or *Chapman* anywhere in its brief in opposition, and its citations of the other conflicting cases completely elide their holdings and reasoning.

The government cites *Davis* and *Hall* for the tautological proposition that in "proper circumstances," prior drug convictions may be introduced. BIO 13-14. However, the government declines to address the actual holdings of those cases: "proper circumstances" does not encompass a prior possession conviction with no particularized connection to the charged crime.

The government also cites *Davis*, *Hall*, and *Haywood* in a string-cite, accompanied by the

understatement that courts have "in some cases expressed skepticism" about the admissibility of prior possession convictions in distribution cases. BIO 15. But the government declares that this disagreement is not "implicated" because "[t]he 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." BIO 16.

This makes no sense. The *whole point* of showing Petitioner's "knowledge of methamphetamine trafficking" and the "meaning of certain coded language" is to show his intent to distribute methamphetamine. And Petitioner's *whole point* is that the mere fact of a prior possession conviction is not probative of "knowledge of methamphetamine trafficking" or "the meaning of certain coded language" regarding such trafficking. And the *whole point* of the cases from other circuits is that the inference the government seeks to draw is impermissible. For instance, in *Davis*, the Third Circuit rejected the government's argument that the mere fact of a prior possession conviction could prove knowledge of trafficking: "The jury knew nothing of the packaging or quantity that led to those convictions, so it could not have known whether Davis's past helped him to recognize the nearly one kilogram of cocaine in the Jeep." 726 F.3d at 443-44. Or take *Stacy*, which Petitioner highlighted in the petition (Pet. 25-26) and which is not cited in the brief in opposition. There, the

government argued that "prior possession of methamphetamine" was "probative of [the defendant's] intent to use pseudoephedrine to make methamphetamine and his knowledge of the process for making methamphetamine," but the court held that "this argument relies on a propensity inference." Pet. 25 (quoting *Stacy*, 769 F.3d at 974). Here, the government is simply repeating the same unsuccessful argument.

In sum, although the government denies that there is a split, it does not meaningfully engage with the holdings or reasoning of any of the cases on the other side of the split. It also says nothing about the Federal Judicial Conference's express acknowledgment of the circuit split. Pet. 27-28.

Rather than grapple with the case law, the government offers a series of non-sequiturs. First, the government observes that the Eighth Circuit requires drug convictions to be admissible under Rule 403. BIO 10-12. This is irrelevant. In the decision below, the Eighth Circuit applied its oft-repeated rule that prior possession convictions are admissible under Rule 404(b) to prove distribution, even without a particularized nexus to the charged crime. Other circuits reject that rule, so there is a split.

The government's attempt to rebut the split with its discussion of *United States v. Turner*, 781 F.3d 374 (8th Cir. 2015), is similarly unavailing. BIO 11-12. In *Turner*, the Eighth Circuit "recognize[d] the ample precedent in this circuit suggesting evidence of a prior drug conviction is nearly always admissible to show a defendant's knowing participation in the charged crime

or his intent to participate in it." 781 F.3d at 390. The court did not walk back (and could not have walked back) from that binding precedent; rather, it merely held that "[s]imply asserting—without explanation—that the conviction is relevant to a material issue such as intent or knowledge is not enough to establish its admissibility under the Federal Rules." *Id.* It noted that "the government simply asserts the evidence is relevant" with "little more than a recitation of the Rule, without a careful analysis of how it applies to the prior convictions offered as evidence at trial." *Id.* at 391. But it found that "if there was any error in the admission of this evidence, that error was harmless." *Id.* Thus, *Turner* merely holds that *some* explanation is required before the prior conviction is admitted. That is a far cry from the decisions of the Third, Fourth, Sixth, and Seventh Circuits, that require a particularized connection between the prior conviction and the charged crime.

The decision below illustrates that the "ample precedent in this circuit suggesting evidence of a prior drug conviction is nearly always admissible to show a defendant's knowing participation in the charged crime or his intent to participate in it," *Turner*, 781 F.3d at 390, is still good law. The government offered only a rote explanation without establishing any such particularized connection, yet the Eighth Circuit concluded that this explanation was sufficient to establish the admissibility of the evidence. Pet. 29-31. It would have been insufficient in the Third, Fourth, Sixth, and Seventh Circuits.

Next, the government identifies two Eleventh

Circuit cases in which the court concluded that prior drug convictions lacked probative value, one where the conviction was 22 years old, *United States v. Sanders*, 668 F.3d 1298, 1315 (11th Cir. 2012) (per curiam), and one where the defendant had admitted to the underlying conduct, *United States v. Young*, 574 F. App'x 896, 901 (11th Cir. 2014) (per curiam). BIO 12-13. This is equally irrelevant. The Eleventh Circuit's rule is clear: "virtually any prior drug offense" is "probative of the intent to engage in a drug conspiracy." *United States v. Matthews*, 431 F.3d 1296, 1311 (11th Cir. 2005). This includes possession convictions. *United States v. Smith*, 741 F.3d 1211, 1226 (11th Cir. 2013). This rule conflicts with the rule of other circuits. Pet. 13-15.

The government also asserts that "[t]he evidence about petitioner's prior drug-possession conviction" included "evidence about the sale at issue in that offense." BIO 14. The government refers to the fact that, stapled to the judgment of conviction, was an investigator's statement in the criminal complaint. *Id.*; *see* BIO 4-5. The investigator stated a police officer told him that an unnamed informant told that police officer that Petitioner was selling methamphetamine. Gov't Tr. Ex. 125, at 2. To be clear, Petitioner was never charged with these alleged sales; rather, the police officer later stopped Petitioner's car, found methamphetamine, and Petitioner was charged and convicted of simple methamphetamine possession. *Id.* at 2-3.

The government has not raised this snippet of triple hearsay (informant to police officer to investigator) at any stage of this litigation. The government did not

mention it in the Eighth Circuit, instead successfully relying on the Eighth Circuit's rule that simple drug possession convictions are admissible. Pet. App. 77a-80a. Indeed, the government specifically told the Eighth Circuit that Petitioner was convicted of possessing "in total 19 grams" of methamphetamine, which, according to the criminal complaint, was the amount found in the car. *Compare* Pet. App. 78a *with* Gov't Tr. Ex. 125, at 2.

Nor did the government raise it in the District Court. When the government filed its motion *in limine*, it disclosed to the District Court that it sought to introduce Petitioner's conviction for "second degree possession of methamphetamine." Pet. App. 58a. It did not inform the Court of the investigator's statement or attach it as an exhibit. This leaves the government in the awkward position of arguing that the District Court permissibly exercised its discretion in admitting evidence based on information that the government did not disclose at the time that discretion was exercised.

At trial, government counsel told the District Court that she was "about to put in the copies of those certified convictions," again not mentioning the uncharged conduct it now relies on. Pet. App. 50a. The District Court then instructed the jury that it would hear evidence of the defendants' prior *convictions* and that it was entitled to rely on that evidence; it did not authorize the jury to consider information reflecting uncharged conduct. Pet. App. 51a-52a. Yet now, for the first time in the Supreme Court, the government suggests that this heretofore unmentioned uncharged conduct, which the jury was not even permitted to

consider, is the crucial feature distinguishing this case from other circuits' case law. BIO 14. This argument is not worthy of the government.

In addition to being waived, the government's newly-minted theory is irrelevant. The fact that an exhibit contained a stray reference to uncharged drug dealing does not actually address Petitioner's objection that the jury should not have considered Petitioner's conviction for drug possession. The stray reference did not establish a particularized connection to the charged crime, as required in the Third, Fourth, Sixth, and Seventh Circuits. Indeed, the government offers no theory of why this stray reference would be relevant beyond pure propensity: once a drug dealer, always a drug dealer. Finally, and most importantly, all of this is completely immaterial to the Eighth Circuit's decision, which held that simple possession convictions are admissible to prove distribution. That decision is squarely presented for review.

Next, after largely ignoring the decisions from the Third, Fourth, Sixth, and Seventh Circuits that are binding precedent, the government cites decisions from those circuits that are not binding precedent. Three are unpublished; the fourth is a Seventh Circuit case employing a test that the court subsequently repudiated in its en banc *Gomez* decision. BIO 14-15; *compare United States v. Moore*, 531 F.3d 496, 499 (7th Cir. 2008) (applying four-part test) *with Gomez*, 763 F.3d at 850 ("We now conclude that our circuit's four-part test should be replaced by an approach that more closely tracks the Federal Rules of Evidence.").

Even if these cases were binding precedent, they

would not undermine the split. Rather, the government has merely located cases in which there *was* a non-propensity basis for admitting the evidence. For instance, in the government's first cited case, *United States v. Jackson*, 619 F. App'x 189 (3d Cir. 2015), the prior conviction was a drug sale between the defendant *and two witnesses who testified at trial*; the court explained that because "Jackson's strategy at trial was to suggest that the two testifying witnesses attempted to pin everything on him so as to limit their criminal exposure; the Government was entitled to explain the relationship that Jackson had with those witnesses to provide context to their testimony." *Id.* at 194. That is a paradigmatic example of a non-propensity basis for admitting evidence.

Finally, the government invokes the "deferential abuse-of-discretion review applicable to district courts' evidentiary rulings." BIO 16. But in all of the cases cited in the petition from the Third, Fourth, Sixth, and Seventh Circuits, the courts of appeals found that the district courts *abused* their discretion, so it is not clear how the government's observation rebuts the split. The government also suggests that a "sufficiently long history" might result in the "channel of discretion" being "narrowed." BIO 17. But there are cases acknowledging this split from 17 and 22 years ago. *Haywood*, 280 F.3d at 721 (Sixth Circuit was "unable to discern a compelling rationale" for approaches of Fifth, Eighth, and Eleventh Circuits); *United States v. Butler*, 102 F.3d 1191, 1195-96 (11th Cir. 1997) (the "circuits are not unanimous on this issue"). Enough time has passed. The Court should grant certiorari.

## II. There is No Vehicle Problem.

As the government observes, Petitioner has focused his challenge on the admission of his prior possession conviction—the conviction for which the government's case for admissibility is the weakest. The government now contends that the admission of the possession conviction is harmless in view of the admission of his prior distribution conviction. BIO 17-18.

This argument is waived. The government did not make this argument in the Eighth Circuit, as Petitioner made clear by including the relevant portion of the government's brief in the petition appendix. Pet. App. 77a-80a. Thus, the Eighth Circuit did not consider it.

Moreover, the government took the opposite position in the District Court. The government's motion *in limine* argued that *both* the distribution conviction *and* the possession conviction were more probative than prejudicial. Pet. App. 60a. The District Court agreed, finding *both* convictions "relevant and probative." Pet. App. 37a. Having won this ruling, the government now seeks to shield it from review by flipping positions and arguing that one of those convictions is actually cumulative in light of the other conviction. The Court should reject this tactic.

In any event, the petition already explained why the admission of the distribution conviction exacerbated the prejudicial effect of the possession conviction, rather than rendering it harmless:

> Rule 404(b) is designed to prevent juries from assuming that defendants are repeat offenders. The danger that the jury will make this

> improper assumption is exacerbated when it learns that the defendant has two convictions in his past, and therefore already *is* a repeat offender.

Pet. 34. This is presumably why the government insisted on introducing both convictions. The government totally ignores this point.

## III. The Eighth Circuit's Decision Is Wrong.

The Eighth Circuit should be reversed. The government's brief only goes to show that there was no non-propensity basis for admitting Petitioner's prior possession conviction. The government asserts that "Petitioner's familiarity with the methamphetamine trade … filled in the inferential gaps" in his conversations with his alleged co-conspirators. BIO 8-9. But *why* would a prior methamphetamine possession conviction, with no connection to the charged conspiracy, fill in those inferential gaps? Neither the District Court nor the Eighth Circuit ever identified any particular fact related to the prior conviction that was relevant to the prosecution. Thus, the only possible answer is that Petitioner's prior methamphetamine use inherently supports the inference that he is talking about methamphetamine—classic propensity reasoning. Similarly, the government states that his prior conviction "demonstrated that he was familiar with the market for methamphetamine as both a consumer and a distributor." BIO 9. But again, this is classic propensity reasoning. Petitioner's "familiar[ity] with the market for methamphetamine" as a "consumer"—*i.e.*, the fact that he previously possessed

methamphetamine—inherently makes it more likely that he distributed methamphetamine. This is the precise type of inference that Rule 404(b) is designed to forbid.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

KEALA C. EDE
Assistant Federal Defender
District of Minnesota
U.S. Courthouse, Suite 107
300 South Fourth Street
Minneapolis, MN 55415

ADAM G. UNIKOWSKY
*Counsel of Record*
JENNER & BLOCK LLP
1099 New York Ave., NW,
Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

SARAH A. YOUNGBLOOD
NATHANIEL K.S. WACKMAN
JENNER & BLOCK LLP
353 N. Clark St.
Chicago, IL 60654