No. _____

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

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

QUESTION PRESENTED

Whether the mere fact of a prior drug possession conviction is admissible to show knowledge and intent in a subsequent drug distribution prosecution.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

PETITION FOR WRIT OF CERTIORARI

Jason Allen Jackson petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The decision of the Eighth Circuit (Pet. App. 1a-34a) is reported at 909 F.3d 228. The District Court's decision granting the government's motion *in limine* (Pet. App. 35a-48a) is unreported.

JURISDICTION

The judgment of the Eighth Circuit was entered on November 26, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RULE INVOLVED

Federal Rule of Evidence 404(b) provides:

(b) Crimes, Wrongs, or Other Acts.

(1) Prohibited Uses. Evidence 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.

(2) Permitted Uses; Notice in a Criminal Case. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:

(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to

offer at trial; and

(B) do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.

INTRODUCTION

Federal Rule of Evidence 404(b)(1) provides that evidence of a person's prior conviction is inadmissible "to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." In other words, Rule 404(b)(1) forbids prior convictions from being used to show that because a person has committed a crime once, that person has a propensity for committing crimes and is likely to commit a crime again. Rule 404(b)(1) "reflects" a "common-law tradition," which prohibits the admission of such evidence because "it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." *Old Chief v. United States*, 519 U.S. 172, 181 (1997) (quoting *Michelson v. United States*, 335 U.S. 469, 475-76 (1948)).

Rule 404(b)(2), however, permits the admission of prior convictions "for another purpose," including "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." *Id.* This case concerns the application of Rule 404(b)(2) to a frequently recurring set of facts: the defendant is charged with drug distribution and has a past drug possession conviction. The question presented is whether the mere fact of a prior drug possession conviction is admissible under Rule 404(b)(2)

to show knowledge and intent in a subsequent drug distribution prosecution.

The circuits are divided on that question. The Eighth Circuit applies a blanket rule 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. The Eleventh Circuit applies the same rule. Four other circuits have rejected the Eighth Circuit's rule, however, instead holding that prior possession convictions should ordinarily be excluded in drug distribution cases under Rule 404(b). Several of these decisions have explicitly acknowledged the circuit split and rejected the reasoning of the circuits on the other side of the split. The Federal Judicial Conference's Advisory Committee on Evidence Rules has recognized there is "unquestionably a dispute in the courts" on this issue. *See infra* at 27.

The Court should resolve this circuit split. This question recurs with extraordinary frequency—in the Eighth Circuit alone, there are at least 15 cases applying the blanket rule of admissibility. As catalogued below, there are numerous detailed appellate decisions addressing the question presented, making additional percolation unnecessary.

This is an ideal vehicle to resolve the split. The record is absolutely clear that the Eighth Circuit's blanket rule of admissibility was the sole basis for the District Court's decision to admit the prior conviction—and the sole basis for the Eighth Circuit's affirmance.

At the District Court stage, the government made no argument, and the District Court made no finding, that there was anything particular about the prior conviction—aside from the mere fact that it occurred—that rendered it admissible under Rule 404(b). On appeal, Petitioner made the exact argument he currently advances: that, as other circuits have held, the mere fact of a prior drug possession conviction is inadmissible to show knowledge and intent in a subsequent drug distribution prosecution. In response, the government's sole defense of the District Court's ruling was its invocation of the Eighth Circuit's blanket rule that prior drug possession convictions are admissible to show knowledge and intent in drug distribution prosecutions. The Eighth Circuit affirmed Petitioner's conviction, relying solely on that rule. Thus, this case is the perfect vehicle to decide whether the rule is correct.

Finally, the Eighth Circuit's decision warrants review because it is wrong. The Eighth Circuit's decision fundamentally misunderstands Rule 404(b). Under that rule, district courts should conduct a particularized analysis of whether the specific facts underlying a prior conviction establish a non-propensity basis for admissibility in light of the specific circumstances of a drug distribution prosecution. The Eighth Circuit's blanket rule of admissibility is antithetical to the gatekeeping role prescribed by the Rules of Evidence.

STATEMENT

Petitioner Jason Allen Jackson and several co-defendants were charged with conspiracy to distribute

methamphetamine and possession of methamphetamine with intent to distribute. Pet. App. 13a. Petitioner and two co-defendants went to trial. *Id.* Before trial, the government filed a motion *in limine*, seeking permission to offer evidence under Rule 404(b) that Petitioner and his co-defendants had prior drug convictions. Pet. App. 57a-61a. These prior convictions included Petitioner's 2008 conviction for conspiracy to distribute and possess with intent to distribute methamphetamine and—relevant here—his 2009 conviction for second-degree possession of methamphetamine. Pet. App. 58a. The government's theory for admissibility was that "[b]y going to trial, Defendants are placing their knowledge and intent in issue," thus making the prior convictions admissible under Rule 404(b)(2). Pet. App. 59a. Specifically, the government asserted: "This investigation involved a Federal wiretap. Because Defendants are disputing the meaning of the calls, they are directly placing their knowledge and intent at issue." *Id.*

But the government offered no evidence about the particular circumstances of any of those prior convictions showing that they would be relevant to knowledge or intent. Indeed, the government did not distinguish between any of the defendants' prior convictions—rather, it included a list of prior convictions and made a single omnibus argument for the admissibility of those prior convictions. Pet. App. 57a-61a. The government's theory was that "Defendants' prior narcotics convictions rebut any claim of accident or mistake and shows their familiarity with drug dealing." Pet. App. 59a.

Petitioner opposed the motion, arguing that the government had no legitimate basis for introducing those prior convictions. Pet. App. 61a-64a. He also filed his own motion *in limine* seeking to exclude them. D. Ct. Dkt. # 560.

The District Court granted the government's motion *in limine*. Like the government, the District Court offered no particularized explanation about how any of the prior convictions were relevant under Rule 404(b). Instead, the District Court merely asserted that the prior convictions were collectively "relevant and probative in this matter to establish motive, intent, and knowledge, among other matters." Pet. App. 37a.

Having prevailed on the motion *in limine*, the government introduced the prior convictions into evidence at trial. Pet. App. 52a. Petitioner's counsel expressly preserved his objection to the admissibility of those convictions. Pet. App. 52a. The District Court overruled the objection. Pet. App. 52a.

In presenting the prior convictions to the jury, the government provided no evidence of the events surrounding the prior convictions and drew no particularized connection between the prior convictions and the drug distribution conspiracy. Rather, it simply inserted the convictions in the record. In particular, the government presented Petitioner's drug possession conviction to the jury as follows:

> Q. Now I'm going to have you look at Exhibit 125. Would I be accurate to describe that as a criminal complaint in Ramsey County, Minnesota?

A. Yes.

Q. Charging Mr. Jason Jackson, do you see that?

A. Yes.

Q. And based on your investigation and understanding, is this the same Jason Allen Jackson in court here today?

A. Yes.

Q. And in this complaint in Ramsey County is Mr. Jackson charged with second-degree drugs, possess 6 or more grams of and then there's several drugs there, cocaine, heroin, or meth?

A. Yes.

Q. Ultimately, showing you the second document, did Mr. Jackson enter a petition to enter a plea of guilty in the felony case?

A. Yes.

Q. And did he plead guilty to second-degree possession of methamphetamine?

A. Yes.

Pet. App. 54a-55a.

The District Court instructed the jury that it "may consider" the evidence "to help you in deciding whether" Petitioner had "knowledge or intent." Pet. App. 52a. It further instructed the jury that "even if you find that any defendant may have committed a similar act or acts, this is not evidence that he committed such an act in this case." *Id.* Neither the government nor the District Court gave the jury any

additional guidance on how the prior convictions could be helpful in deciding whether Petitioner had the requisite knowledge or intent.

Petitioner was convicted on counts of conspiracy to distribute methamphetamine and possession of methamphetamine with intent to distribute. Pet. App. 13a, 15a. On appeal, Petitioner renewed his objection to the admission of the prior drug possession conviction, arguing that "admitting the 2009 simple possession conviction as 404(b) evidence to prove Mr. Jackson's intent was an abuse of discretion because personal use and intent to distribute are substantially and prejudicially different" and urging the Eighth Circuit to follow decisions from other circuits under which the conviction would have been inadmissible. Pet. App. 68a-69a. In response, the government relied exclusively on circuit precedent establishing a blanket rule of admissibility in drug distribution cases for prior drug possession convictions. Pet. App. 79a-80a.

The Eighth Circuit affirmed, applying its rule 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. The Eighth Circuit noted that the Rule 404(b) evidence was relevant both to the conspiracy charge, and to the charge for possession with intent to distribute. Pet. App. 22a.

REASONS FOR GRANTING THE WRIT

I. There is a Circuit Split on the Question Presented.

As several courts of appeals have recognized, there is a circuit split on whether the mere fact of a prior drug possession conviction is admissible to show knowledge and intent in a subsequent drug distribution prosecution. The Eighth and Eleventh Circuits apply a virtually *per se* rule of admissibility for any prior drug conviction, including drug possession convictions. Those circuits do not require the government to identify any particularized connection between the prior drug possession conviction and the charged crime supporting a non-propensity inference—if the defendant is charged with distribution, the defendant's prior possession convictions are admissible. The Fifth Circuit has an intra-circuit conflict on this issue. The Third, Fourth, Sixth, and Seventh Circuits reject this blanket rule, instead holding that prior drug possession convictions should ordinarily be excluded. The Court should grant certiorari to resolve the split.

A. The Eighth and Eleventh Circuits apply a blanket rule of admissibility for prior drug possession convictions.

In the Eighth and Eleventh Circuits, there is a virtually automatic rule of admissibility for prior possession convictions in distribution prosecutions.

Eighth Circuit. The Eighth Circuit applies a blanket rule that any drug distribution or possession conviction is admissible under Rule 404(b) in a drug

distribution prosecution.[1] The decision below is illustrative of the Eighth Circuit's approach: The court conducted no analysis of whether the particular circumstances of the prior conviction were relevant to knowledge or intent for any non-propensity reason. Instead, it merely applied its rule 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.

The Eighth Circuit has repeatedly applied this rule. In the decision below, the court cited two prior Eighth Circuit decisions which similarly characterized the blanket rule of admissibility for prior drug possession convictions as settled circuit precedent. *See* Pet. App. 24a; *United States v. Robinson*, 639 F.3d 489, 494 (8th Cir. 2011) ("It is settled in this circuit 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." (quotation marks omitted)); *United States v. Frazier*, 280 F.3d 835, 847 (8th Cir. 2002) ("We

---

[1] The sole exception to this rule is when the prior convictions are too remote in time. The Eighth Circuit "ha[s] generally been reluctant to uphold the introduction of evidence relating to acts or crimes which occurred more than thirteen years prior to the conduct challenged." Pet. App. 23a. In this case, the Eighth Circuit held that Petitioner's convictions were "not too remote in time" because they occurred "within the 13-year period." Pet. App. 24a.

have held on numerous occasions 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."). Over the past 25 years, a steady stream of Eighth Circuit cases have articulated the same rule. *See, e.g.*, *United States v. Patino*, 912 F.3d 473, 476 (8th Cir. 2019); *United States v. Valerio*, 731 F. App'x 551, 553 (8th Cir. 2018), *cert. denied*, No. 18-5898, 2019 WL 113237 (U.S. Jan. 7, 2019); *United States v. Davis*, 867 F.3d 1021, 1029 (8th Cir. 2017), *cert. denied*, 138 S. Ct. 1441 (2018); *United States v. Horton*, 756 F.3d 569, 579 (8th Cir. 2014); *United States v. Lee*, 687 F.3d 935, 944 (8th Cir. 2012); *United States v. Benitez*, 531 F.3d 711, 716 (8th Cir. 2008); *United States v. Ironi*, 525 F.3d 683, 687-88 (8th Cir. 2008); *United States v. Carmickel*, 263 F.3d 829, 830 (8th Cir. 2001); *United States v. Hardy*, 224 F.3d 752, 757 (8th Cir. 2000); *United States v. Davidson*, 195 F.3d 402, 408 (8th Cir. 1999); *United States v. Oates*, 173 F.3d 651, 660 (8th Cir. 1999); *United States v. Logan*, 121 F.3d 1172, 1178 (8th Cir. 1997); *United States v. Powell*, 39 F.3d 894, 896 (8th Cir. 1994).

Typically, the Eighth Circuit conducts no analysis of either the facts underlying the prior conviction or the facts of the prosecution itself, and does not explain how the prior conviction could support a non-propensity inference. Prior drug possession is simply *per se* admissible in drug distribution prosecutions in the Eighth Circuit. Here is a typical example of the Eighth Circuit's reasoning:

> Evidence of a defendant's prior possession of drugs in amounts consistent with personal use is admissible to show her knowledge and intent when intent is an element of the offense charged. This evidence is admissible even if the defendant has not raised a defense based on lack of knowledge or lack of intent. A necessary element of conspiracy to manufacture methamphetamine is knowingly joining such a conspiracy, and Davidson's recent convictions for possession of methamphetamine were relevant to prove that.

Davidson, 195 F.3d at 408 (quotation marks omitted). This reasoning would permit *any* prior drug conviction to be admitted in *any* drug distribution case—and indeed, the Eighth Circuit applies its rule mechanically in virtually every case. Thus, in this case, the Eighth Circuit simply asserted that Petitioner's prior drug possession conviction was admissible as evidence of knowledge or intent, without analyzing either the facts of that conviction or the facts of Petitioner's prosecution.

The Eighth Circuit's rule applies even if the defendant does not contest knowledge or intent. So long as a defendant is "charged with a crime in which intent to distribute drugs is an element," "evidence of prior possession of drugs, even in an amount consistent only with personal use, is admissible." *Logan*, 121 F.3d at 1178. "This is so even if the defendant has not raised a defense based on lack of knowledge or lack of intent." *Id.*; *accord Robinson*, 639 F.3d at 494 (same); *Davidson*, 195 F.3d at 408 (same).

Petitioner is aware of only a single case in which the Eighth Circuit held that the admission of a prior drug conviction violated Rule 404 (although it held that the error was harmless). *See United States v. Turner*, 781 F.3d 374 (8th Cir. 2015). In that case the government offered literally *no* non-propensity explanation for the admission of the evidence. *Id.* at 390-91. Subsequent cases have held that the government satisfies its burden under Rule 404(b) with *any* explanation. Crucially, even in those subsequent cases, the Eighth Circuit has not required the explanation to be based on the particular facts of the prior conviction; explanations that could apply to any prior conviction are sufficient. *See United States v. Wright*, 866 F.3d 899, 905 (8th Cir. 2017) (explanation that defendant had the "motive to commit these types of offenses, that he ha[d] the knowledge to do so, and that he was not mistaken in his handling of controlled substances" was sufficient); *Valerio*, 731 F. App'x at 553 (explanation that defendant's counsel had cross-examined prosecution witnesses about knowledge and intent was sufficient).

Eleventh Circuit. The Eleventh Circuit applies the same rule as the Eighth Circuit: prior drug possession convictions are *per se* admissible in subsequent drug distribution prosecutions.

The Eleventh Circuit first addressed this issue in *United States v. Butler*, 102 F.3d 1191 (11th Cir. 1997). The government sought to introduce evidence of "prior personal drug use in a subsequent, unrelated prosecution for the distribution of drugs." *Id.* at 1195. As the Eleventh Circuit observed, the "circuits are not unanimous on this issue." *Id.* The Eleventh Circuit

noted that under Fifth Circuit precedent, "'[a] prior conviction for possession of cocaine is probative of a defendant's intent when the charge is conspiracy to distribute.'" *Id.* at 1196 (quoting *United States v. Gadison*, 186, 192 (5th Cir. 1993)). But it observed that "other circuits have reached a contrary conclusion." *Id.* "After considering the rationales enunciated by the various courts of appeals," the court "conclude[d] that the logical extension of our current jurisprudence is to admit evidence of prior personal drug use to prove intent in a subsequent prosecution for distribution of narcotics." *Id.* The court reasoned that "[i]ntent is clearly at issue in a conspiracy prosecution; thus, we follow the Fifth Circuit's conclusion that evidence of prior use is relevant to proof of intent." *Id.*

Based on *Butler*, the Eleventh Circuit now applies the same rule as the Eighth Circuit: "circuit precedent regards virtually any prior drug offense as probative of the intent to engage in a drug conspiracy." *United States v. Matthews*, 431 F.3d 1296, 1311 (11th Cir. 2005). The Eleventh Circuit routinely applies that rule to reject challenges to the admission of prior drug crimes, including possession crimes. *See, e.g.*, *United States v. Smith*, 741 F.3d 1211, 1226 (11th Cir. 2013) ("Our precedent similarly contradicts Smith's argument that evidence of his earlier *possession* convictions ought not to have been admitted as probative of his later intent to *distribute*. This Court has specifically rejected that argument." (emphasis in original)); *accord, e.g.*, *United States v. Hunter*, No. 18-12116, -- F. App'x --, 2018 WL 6721773, at *5 (11th Cir. Dec. 21, 2018); *United States v. Jarriel*, 499 F. App'x 860, 861 (11th Cir. 2012); *United*

States v. Sawyer, 361 F. App'x 96, 99 (11th Cir. 2010).

Not all Eleventh Circuit judges agree with the Eleventh Circuit's rule, however. In *Matthews*, Judge Tjoflat filed a lengthy concurring opinion expressing his view that "the circuit's doctrine with respect to admission of Rule 404(b) evidence in conspiracy cases has evolved into one that undermines Rule 404(b) itself and represents a perversion of the origins of the circuit's doctrine in this context." 431 F.3d at 1313 (Tjoflat, J., concurring). Judge Tjoflat rejected the view "that the intent involved in a small-scale drug transaction (not to mention personal drug use) is somehow probative of one's intention to conspire with others to commit a drug offense." *Id.* (citation omitted). As Judge Tjoflat explained, "[t]he 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." *Id.* at 1318. "Its only relevance is sheer propensity: the theory being that the defendant acted illegally then, and is likely to be acting illegally now. This is precisely the inference the law does not allow." *Id.*

B. The Fifth Circuit has conflicting case law, but has acknowledged the circuit split on this issue.

The Fifth Circuit's law on this issue is unsettled. In *United States v. Gadison*, 8 F.3d 186 (5th Cir. 1993), the Fifth Circuit held that a "prior conviction for possession of cocaine is probative of a defendant's intent when the charge is conspiracy to distribute," because the defendant "put his intent at issue when he entered his plea of not guilty to the conspiracy charge

in the indictment." *Id.* at 192. In *United States v. McDonald*, 905 F.2d 871 (5th Cir. 1990), however, the court took the contrary view: "[T]here is a large leap from evidence that McDonald in the past used cocaine and speed to an inference that he therefore likely knew his car contained marijuana that day. The leap is too large. We think this evidence was only truly probative of McDonald's character—i.e., a drug user is more likely to be involved in a deal like this than a non-drug user. It was therefore inadmissible." *Id.* at 875.

Recently, the Fifth Circuit concluded that "the threshold question of whether personal drug use, standing alone, is relevant to show motive, intent, or knowledge in a drug importation or trafficking case has received unsettled treatment by our court," citing *Gadison* and *McDonald*. *United States v. Muniz-Saavedra*, 694 F. App'x 216, 217 (5th Cir. 2017). It observed that "[o]ther circuits have also split on the issue," and catalogued the courts on both sides of the split. *Id.* The court declined to reach the issue because "any error here was harmless," but concluded that "down the line, however, this apparent conflict will require resolution." *Id.* at 218.

C. The Third, Fourth, Sixth, and Seventh Circuits ordinarily exclude prior drug possession convictions.

The Third, Fourth, Sixth, and Seventh Circuits apply a far more restrictive rule. Those circuits hold that prior possession convictions are ordinarily inadmissible in drug distribution cases. Such convictions are admissible only if the government can show that the facts underlying the prior conviction—

not the mere fact that it occurred—are tied to the facts of the charged crimes in a way that supports a non-propensity inference.

Third Circuit. In *United States v. Davis*, 726 F.3d 434 (3d Cir. 2013), the Third Circuit reversed the defendant's conviction for cocaine distribution, on the basis of the district court's erroneous admission of his prior convictions for cocaine possession. In a lengthy opinion, the court emphasized the longstanding tradition of excluding evidence of prior bad acts, which "reflects a fear that the jury will place too much weight on past crimes and prior misdeeds." *Id.* at 440. The court explained that for a prior conviction to be admissible, "the government must explain how it fits into a chain of inferences—a chain that connects the evidence to a proper purpose, no link of which is a forbidden propensity inference." *Id.* at 442. The court held that the mere fact of a prior possession conviction, with no particularized facts *about* the prior conviction to link it to the crime being prosecuted, was insufficient to satisfy this burden.

The court first held that the prior conviction was irrelevant to proving knowledge. It explained: "Possession and distribution are different in ways that matter—something that both the District Court and the government failed to appreciate. As to knowledge, one who possesses a drug might not recognize the same drug when prepared for distribution. The packaging or quantity might be different, and objects in greater quantities often have an appearance or smell of their own." *Id.* at 443. The critical point was that the jury was not told any information about the prior conviction

that could make it relevant to establishing knowledge: "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." *Id.* at 443-44.

The court further held that the prior conviction was irrelevant to proving intent. The court explained: "Possession and distribution are distinct acts—far more people use drugs than sell them—and these acts have different purposes and risks. A prior conviction for possessing drugs by no means suggests that the defendant intends to distribute them in the future." *Id.* at 444. The court pointed to the "ever-present danger that jurors will infer that the defendant's character made him more likely to sell the drugs in his possession. But that is precisely the type of inference that Rule 404(b) forbids." *Id.*

The court expressly noted that it was taking sides in a circuit split. Citing cases from the Fifth, Eighth, and Eleventh Circuits it held that "[o]ther circuits have reached the opposite result, but we are not persuaded." *Id.* at 445.

Fourth Circuit. In *United States v. Hall*, 858 F.3d 254 (4th Cir. 2017), the Fourth Circuit reversed the defendant's conviction for possession with intent to distribute drugs based on the improper admission of prior convictions for drug possession and drug distribution.

The court first addressed the prior drug possession conviction, holding that it was inadmissible for

purposes of showing both intent and knowledge. *Id.* at 267. As to intent, the court found the prior conviction to be irrelevant, pointing to the significant differences between possession and distribution. *Id.* at 267-68. Quoting a leading evidence treatise, the court explained: "'[I]f the act of possessing or using marijuana is to be admissible to prove intent to transport and sell marijuana, . . . then there is no reason why participation in any drug-related crime could not be used to prove intent to engage in any other drug-related crime, or why any robbery could not be used to prove the requisite intent with respect to any other robbery. A rule allowing such evidence would eviscerate almost entirely the character evidence rule.'" *Id.* at 267 (alterations in original) (quoting David P. Leonard, *The New Wigmore, A Treatise on Evidence: Evidence of Other Misconduct & Similar Events* § 7.5.2). The court further observed: "Because Defendant's prior possession conviction did not require a finding of specific intent, the only relevance that conviction could have to his intent to distribute marijuana on a later, unrelated occasion is that it tends to suggest that Defendant is, in general, more likely to distribute drugs because he was involved with drugs in the past. This is precisely the propensity inference Rule 404(b) prohibits." *Id.*

The court also noted that "several of our sister circuits have held that evidence of a defendant's prior conviction for possession of drugs for personal use is inadmissible under Rule 404(b) to prove a defendant's intent to distribute a controlled substance on a later, unrelated occasion." *Id.* at 267-68. The court agreed

with that out-of-circuit law and concluded that "a defendant's prior conviction for possession of a drug is not relevant to establishing the defendant's intent to distribute a drug at a later time, absent some additional connection between the prior offense and the charged offense." *Id.* at 268. In an apparent acknowledgment of the circuit split, the court added a "*But see, e.g.*," signal in its citation to the Eleventh Circuit's decision in *Butler*. *Id.*

The court then turned to the question of whether the defendant's prior possession conviction was admissible for purposes of establishing knowledge. Citing the Third Circuit's *Davis* decision, the court held that a "defendant's prior conviction for possession of a particular drug will not always be relevant to establishing the defendant's knowledge of the same drug when prepared for distribution." *Id.* at 268 (quotation marks omitted). In the specific marijuana case at issue, the court held that "prior experience with the smell of unburnt marijuana, as evidenced by a prior marijuana-related conviction, is relevant to establishing that the defendant knew, based on smell, of the presence of unburnt marijuana on a later occasion." *Id.* at 268 (emphasis omitted). Nonetheless, the court held that the conviction was inadmissible to prove knowledge. It concluded that the prior conviction had minimal probative value because the defendant did not contest that marijuana was present, and "Defendant's knowledge of the odor of marijuana was minimally probative of the crucial issue regarding his knowledge: whether Defendant knew that there was marijuana *inside the locked bedroom*." *Id.* at 269 (emphasis in

original). It further found that the admission of the conviction was "highly prejudicial." *Id.* at 270. It explained: "Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened." *Id.* (quoting Fed. R. Evid. 404(a) advisory committee note).

The court went on to hold, even more broadly, that the district court abused its discretion in admitting prior convictions for possession with intent to distribute. *Id.* at 271-76. The court first held that these prior convictions were irrelevant for purposes of proving intent, because "[t]he government did not put forward any evidence before or during trial that Defendant's prior intent to distribute convictions were related in manner or arose from the same 'pattern of conduct' as the instant offense." *Id.* at 272. The court explained that "the government introduced the fact of Defendant's prior possession with intent to distribute convictions without providing *any* evidence linking the prior convictions to the charged offense." *Id.* at 274 (emphasis in original). It observed that the District Court therefore could not have determined "whether there was a sufficient 'linkage' or 'nexus' between the prior offenses and the charged conduct to render the prior convictions relevant and warrant their admission under Rule 404(b) to establish Defendant's intent." *Id.* at 275. The court then held that the prior conviction for

possession with intent to distribute was also inadmissible to establish knowledge. *Id.* at 275-76. The court deemed this evidence to have "minimal probative value" and be highly prejudicial. *Id.* at 275.

Sixth Circuit. In *United States v. Haywood*, 280 F.3d 715 (6th Cir. 2002), the Sixth Circuit reversed the defendant's conviction for possession with intent to distribute crack cocaine, on the ground that the district court had erroneously admitted evidence that the defendant had possessed crack cocaine on a different occasion. The court concluded that "[a]cts related to the personal use of a controlled substance are of a wholly different order than acts involving the distribution of a controlled substance. One activity involves the personal abuse of narcotics, the other the implementation of a commercial activity for profit." *Id.* at 721 (quotation marks and citation omitted) (alterations in original). The court held that the defendant's possession of cocaine "sheds no light on whether he intended to distribute crack cocaine in his possession on another occasion nearly five months earlier." *Id.* at 721. The court recognized that there were "cases from the Fifth, Eighth, and Eleventh Circuits that have 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." *Id.* (citing *Logan*, *Butler*, and *Gadison*). But the court was "unable to discern a compelling rationale for this approach." *Id.*

More recent Sixth Circuit decisions have articulated the same rule, relying on *Haywood*. *See United States v. Carter*, 779 F.3d 623, 627 (6th Cir. 2015) ("We have …

held repeatedly that mere possession of a controlled substance is not sufficiently similar to distribution to be probative of a specific intent to distribute controlled substances, even though both are obviously controlled-substance offenses."); *United States v. Miller*, 562 F. App'x 272, 283-85 (6th Cir. 2014) (holding that eight-year-old conviction for drug possession was inadmissible to establish possession with intent to distribute).[2]

Seventh Circuit. In a line of several recent cases, the Seventh Circuit has held that prior drug convictions—including both possession and distribution convictions—were inadmissible to establish drug distribution. In *United States v. Miller*, 673 F.3d 688

---

[2] There is conflicting Sixth Circuit precedent on the distinct question of whether a prior conviction for drug *distribution* can be admitted under Rule 404(b) without any specific connection between the prior conviction and the crime being prosecuted. In *United States v. Bell*, 516 F.3d 432 (6th Cir. 2008), the court held that prior drug distribution convictions were inadmissible under Rule 404(b) unless "the past and present crime are related by being part of the same scheme of drug distribution or by having the same modus operandi." *Id.* at 443 (emphasis omitted); *see id.* at 440-47. But in *United States v. Hardy*, 643 F.3d 143 (6th Cir. 2011), the Sixth Circuit held that *Bell* is "not controlling" because it was "inconsistent with prior precedent" from the Sixth Circuit that had held that "prior drug-distribution evidence is admissible under Rule 404(b) to show intent to distribute." *Id.* at 151-52 (brackets and quotation marks omitted). On the issue of prior convictions for drug *possession*, however, *Haywood* remains controlling, as Sixth Circuit decisions postdating both *Bell* and *Hardy* make clear. *United States v. Carter*, 779 F.3d 623, 627 (6th Cir. 2015); *United States v. Miller*, 562 F. App'x 272, 283-85 (6th Cir. 2014).

(7th Cir. 2012), the Seventh Circuit reversed a defendant's conviction for possession with intent to distribute, in light of the erroneous admission of a prior conviction for the same crime. The court held that "details about his prior conviction could have served only to suggest to the jury that Miller possessed drugs with intent to distribute in 2008 because he had possessed drugs with intent to distribute in 2000. Use of a prior drug distribution conviction to prove intent to distribute is often a disguised use for impermissible propensity purposes, and was so here." *Id.* at 692. Likewise, in *United States v. Lee*, 724 F.3d 968 (7th Cir. 2013), the Seventh Circuit reversed a defendant's conviction for possession with intent to distribute crack cocaine, on the ground that the district court had improperly admitted a prior conviction for cocaine possession. The court found it "clear" that "despite the label, the jury is essentially being asked to rely on the evidence as proof of the defendant's propensity to commit the charged offense." *Id.* at 978.

The Seventh Circuit returned to the issue in *United States v. Gomez*, 763 F.3d 845 (7th Cir. 2014) (en banc). Expressly endorsing *Miller* and *Lee*, *id.* at 863, the en banc court unanimously concluded that in a prosecution for large-scale cocaine distribution, evidence that the defendant possessed cocaine in his apartment was inadmissible under Rule 404(b). The court acknowledged that under Rule 404(b), prior convictions are admissible for purposes such as "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." *Id.* at 855. But it cautioned that "it's not enough for the

proponent of the other-act evidence simply to point to a purpose in the 'permitted' list and assert that the other-act evidence is relevant to it." *Id.* at 856. That is because "Rule 404(b) excludes the evidence if its relevance to 'another purpose' is established only through the forbidden propensity inference." *Id.* at 856. Thus, "a district court should not just ask whether the proposed other-act evidence is relevant to a non-propensity purpose but how exactly the evidence is relevant to that purpose—or more specifically, how the evidence is relevant without relying on a propensity inference." *Id.* at 856 (emphasis omitted).

Two Seventh Circuit cases post-dating *Gomez* illustrate *Gomez*'s rule in action—and how far that rule diverges from the Eighth Circuit's approach. In *United States v. Stacy*, 769 F.3d 969 (7th Cir. 2014), the court addressed a case factually similar to this case: the defendant was charged with conspiracy to manufacture methamphetamine, and the government introduced evidence that the defendant had previously possessed methamphetamine. *Id.* at 971. The court held that under *Gomez*, the evidence was inadmissible under Rule 404(b). *Id.* at 974. The government "maintain[ed] that the events surrounding Stacy's prior possession of methamphetamine—particularly the presence of pseudoephedrine pills—were probative of his intent to use pseudoephedrine to make methamphetamine and his knowledge of the process for making methamphetamine." *Id.* But the court found that "this argument relies on a propensity inference: that Stacy's history of involvement with methamphetamine manufacturing makes it more likely that he intended to

use the pseudoephedrine pills he collected in 2010 through 2012 to make methamphetamine." *Id.* The court held, however, that the error was harmless. *Id.* at 975-76.

In *United States v. Chapman*, 765 F.3d 720 (7th Cir. 2014), the court reversed a conviction based on *Gomez*, finding that a prior drug *distribution* conviction was inadmissible in a subsequent drug distribution prosecution because its admission rested on an impermissible propensity inference. The court explained that "the details of the prior heroin conviction are relevant to Chapman's knowledge and intent only through a paradigmatic inference about propensity: because Chapman sold heroin before he must have intended to do so again in this instance." *Id.* at 726.[3]

D. The split is widely recognized.

Thus, there is a plain circuit split on whether the mere fact of a prior drug possession conviction is admissible in subsequent drug distribution prosecutions. The Eighth and Eleventh Circuits almost invariably hold that such convictions are admissible,

---

[3] The Ninth Circuit has also indicated its agreement with this side of the split, albeit once in dicta and once with little reasoning. *See United States v. Ono*, 918 F.2d 1462, 1465 (9th Cir. 1990) (noting that "[a]cts related to the personal use of a controlled substance are of a wholly different order than acts involving the distribution of a controlled substance," but "[t]he issue in this case does not present that stark difference"); *see also United States v. Santini*, 656 F.3d 1075, 1078 (9th Cir. 2011) (stating that prior convictions for "simple possession" were "not similar to the importation of marijuana" but offering no additional explanation).

based on the bald assertion that they are relevant to knowledge or intent; those circuits do not require any particularized facts about the prior conviction supporting a non-propensity inference. By contrast, in the Third, Fourth, Sixth, and Seventh Circuits, such convictions are inadmissible absent particularized facts about the prior conviction supporting a non-propensity inference. As catalogued above, courts on both sides have acknowledged the split and repudiated the reasoning of courts taking the opposite view.

The Federal Judicial Conference's Advisory Committee on Evidence Rules has also acknowledged the circuit split. *See* Daniel J. Capra, Memorandum to Advisory Committee on Rules of Evidence (Apr. 1, 2018), https://www.uscourts.gov/sites/default/files/agenda_book_advisory_committee_on_rules_of_evidence_-_final.pdf.[4] The Advisory Committee noted that Professor Imwinkelried had "surveyed the case law in drug cases" and found that "[i]t is a commonplace observation that the courts have been very liberal in admitting uncharged misconduct evidence of other drug transactions to prove intent in drug prosecutions. . . . The opinions are replete with sweeping assertions that 'virtually any prior drug offense' is admissible to prove intent in a drug prosecution." *Id.* at 7 (quoting Edward J. Imwinkelried, *Criminal Minds: The Need to Refine the Application of the Doctrine of Objective Chances as a Justification for Introducing Uncharged Misconduct Evidence to Prove Intent*, 45 Hofstra L. Rev. 851, 871 (2017)). Conducting its own survey of the

[4] The Capra memorandum begins at page 247 of this PDF file.

relevant decisions, the Advisory Committee concluded that there is "unquestionably a dispute in the courts" on this issue. It explained that "[s]ome circuits have recently pointed out that in assessing probative value for the non-character purpose, the court must assure itself that the inferences to be derived from the act are *independent of any propensity inference*." *Id.* (emphasis in original); *see id.* at 7-9 (citing Seventh Circuit's *Gomez* decision and Third Circuit's *Davis* decision). By contrast, "many courts simply look to find probative value for the proper purpose cited by the prosecution without investigating whether the probative value for that purpose relies on a propensity inference." *Id.* at 9; *see id.* at 9-10 (citing, among others, Eleventh Circuit's *Matthews* case and Eighth Circuit's *Logan* case). The Advisory Committee concluded: "there is conflict in the courts, and significant difficulty, in how and even whether to determine if the probative value of the bad act to prove the proper purpose actually proceeds through a non-propensity inference." *Id.* at 10.

Numerous commentators, too, have acknowledged the split. *See, e.g.*, Brian Byrne, *Lost in a Maze of Character Evidence: How the Federal Courts Lack a Cohesive Approach to Applying Federal Rule of Evidence 404(B) in Drug Distribution Cases*, 36 Pace L. Rev. 624, 632-39 (2016) (cataloguing split); Deena Greenberg, *Closing Pandora's Box: Limiting the Use of 404(B) to Introduce Prior Convictions in Drug Prosecutions*, 50 Harv. C.R.-C.L. L. Rev. 519, 528-40 (2015) (same); James DeCleene, *A Prosecutor's Guide to Character Evidence: When is Uncharged Possession Evidence Probative of a Defendant's Intent to*

Distribute?, 98 Marq. L. Rev. 1383, 1400-07 (2015) (same); Ashley Hinkle, *Every Consumer Knows How to Run a Business: the Dangerous Assumptions Made When a Prior Possession Conviction Is Admitted as Evidence in a Case Involving Commercial Drug Activity*, 35 N. Ill. U. L. Rev. 401, 415-16 (2015) (same); Daniel P. Ranaldo, *Is Every Drug User A Drug Dealer? Federal Circuit Courts Are Split In Applying Fed. R. Evid. 404(B)*, 8 Fed. Cts. L. Rev. 147, 150-56 (2014) (same). The New Wigmore and Jones treatises have recognized the split as well. 3 Clifford S. Fishman & Anne T. McKenna, *Jones on Evidence* § 17:71.30, Westlaw (database updated Dec. 2017); David P. Leonard, *The New Wigmore, A Treatise on Evidence: Evidence of Other Misconduct & Similar Events* § 7.5.2, Westlaw (2018-2 Supp.). In sum, courts, the Advisory Committee, and commentators are unanimous that there is a circuit split on the question presented in this case.

II. The Court Should Resolve the Circuit Split in this Case.

The Court should grant certiorari in this case because it is an ideal vehicle to address a question of surpassing importance.

A. This case is an ideal vehicle.

This case is a perfect vehicle to address the question presented. The prior possession conviction in this case epitomizes the type of prior conviction that would have been inadmissible in the Third, Fourth, Sixth, and Seventh Circuit.

In the district court, the government offered only

the mere fact of the prior conviction; it offered no particularized facts *about* the prior conviction supporting a non-propensity inference. The government's motion *in limine* argued that the defendant's knowledge and intent were at issue in the trial: "This investigation involved a Federal wiretap. Because Defendants are disputing the meaning of the calls, they are directly placing their knowledge and intent at issue." Pet. App. 59a. But the government did not offer any facts regarding the prior conviction, identify any nexus between the prior conviction and the charged crime, and did not otherwise offer any non-propensity ground for which Petitioner's prior drug possession would be relevant to establishing knowledge or intent. Instead, it made a generic argument that could have been made for literally every single prior drug conviction: "The fact that Defendants previously committed a crime that is similar in nature demonstrates intent, absence of mistake and plan. . . . Defendants' prior narcotics convictions rebut any claim of accident or mistake and shows their familiarity with drug dealing." *Id.* Indeed, the government made this argument with regard to four different, apparently unrelated prior convictions from three different defendants without even attempting to distinguish between them. *Id.* In granting the motion *in limine*, the District Court offered only the boilerplate explanation that the prior convictions were "relevant and probative in this matter to establish motive, intent, and knowledge, among other matters." Pet. App. 37a.

Similarly, in presenting the prior convictions to the jury, the government offered no explanation of the

events underlying the prior convictions or how they could possibly be relevant, for non-propensity reasons, to the charged crimes. It simply put them into the evidentiary record. *Supra*, at 6-7. This is a classic example of the type of prior conviction that would have been inadmissible in the Third, Fourth, Sixth, and Seventh Circuits.

The Eighth Circuit proceedings confirm that this is a perfect vehicle. In the Eighth Circuit, Petitioner's brief specifically challenged the admission of the possession conviction. His brief catalogued the circuit split and offered a detailed explanation of why that conviction would have been inadmissible under the precedent of other circuits. Pet. App. 65a-76a. The government's brief did not dispute the point. It responded to this argument in a single paragraph, which pointed to the Eighth Circuit's *per se* rule of admissibility. Pet. App. 79a-80a.

Moreover, the government offered *no* other grounds for affirmance. Although Petitioner specifically challenged the admission of the possession conviction on appeal, the government did not argue that the possession conviction was cumulative or that its admission was harmless error. *Id.*

Nor could the government reasonably have done so. The government's motion *in limine* emphasized that Petitioner's recorded calls "do not explicitly state [the defendants] are discussing methamphetamine," allegedly making the prior conviction relevant to showing that the defendants were, in fact, discussing methamphetamine. Pet. App. 60a. Having explicitly told the District Court that the prior conviction was an

important part of its case, the government could not—and, appropriately, did not—argue that the conviction could be affirmed an alternative ground.

The Eighth Circuit's decision similarly relied solely on the *per se* rule of admissibility. Pet. App. 24a. It offered no alternative basis for affirming the conviction. This is therefore a perfect vehicle for deciding whether that rule is correct.

B. The question warrants this Court's review.

The question presented is important enough to warrant this Court's review. First, as this petition illustrates, it recurs constantly. This petition catalogues 15 cases from the Eighth Circuit alone applying the *per se* rule; and these cases reflect only a small fraction of the number of times district courts must apply Rule 404(b) in drug distribution trials nationwide.

This issue has also received unusually sustained attention from federal appellate judges. Rarely will the Court see an issue with so many detailed and scholarly judicial opinions on point. The writings of the Advisory Committee and other commentators similarly confirm that the question is important.

Given how frequently Rule 404 is applied, the entrenched and widely acknowledged nature of the circuit split, and the absence of guidance from this Court, certiorari is warranted.

III. The Eighth Circuit's Decision is Wrong.

The Eighth Circuit erred in upholding the admission of Petitioner's prior conviction for drug possession.

The government's boilerplate assertions fall far short of the type of showing necessary to establish that evidence is admissible under Rule 404(b).

The opinions from the Third, Fourth, Sixth, and Seventh Circuits, as well as Judge Tjoflat's concurrence in *Matthews*, are extremely thorough and persuasively explain that there should be no blanket rule of admissibility for prior drug possession convictions in drug distribution prosecutions. Without such a blanket rule, the government's case for admitting the prior conviction here is non-existent. The government's motion *in limine* adverted to the fact that Petitioner was "disputing the meaning of the calls" on a federal wiretap. Pet. App. 59a. However, the mere existence of a prior drug possession conviction from 2009 has zero non-propensity probative value for determining the meaning of those calls, Petitioner's state of mind during those calls, or anything else in this case.

It is easy to see why Rule 404(b) requires exclusion of the prior conviction in this case. There is an obvious danger that the jury made an impermissible propensity inference. The jury learned that Petitioner had possessed methamphetamine eight years before the trial. There was no evidence that this prior possession of methamphetamine had anything to do with the case, yet the jurors were expressly told that they could consider it. The sole logical inference the jurors could have drawn was that because Petitioner had possessed methamphetamine before, this must mean he was a criminal, and therefore was more likely to have engaged in the conspiracy. That is the precise type of inference Rule 404(b) is designed to prevent.

The fact that the jury learned of two prior convictions—not only Petitioner's 2009 possession conviction, but also his 2008 distribution conviction, *supra*, at 6—makes it even more likely that it drew an improper propensity inference. 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.

The District Court's rote explanation for the admission of the prior conviction further underscores that it committed reversible error. As the Seventh Circuit explained in *Lee*, "articulating the rationale for admitting other-acts evidence also helps to ensure that the district judge is genuinely exercising his discretion and observing the limits of Rule 404(b) by thinking through the relevance of and the potential prejudice posed by the proffered evidence." 724 F.3d at 977-78. There is no evidence of a "principled exercise of discretion," *id.*, here: the District Court admitted the evidence with a boilerplate explanation that could apply in any case. *Supra*, at 6. It did not properly exercise the gatekeeping role that the Rules of Evidence contemplate.

The fact that the District Court gave a limiting instruction cannot save this conviction. Rule 404 requires courts to make a threshold admissibility ruling. If evidence is irrelevant to any non-propensity purpose, a judge is supposed to exclude it, not admit it with a boilerplate limiting instruction. In virtually every appellate decision holding that evidence was

erroneously admitted under Rule 404(b), the court of appeals rejected the government's argument that the prejudice was cured by a limiting instruction. *Hall*, 858 F.3d at 279 (evidence under Rule 404(b) "cannot be rendered admissible simply because the district court provides a limiting instruction"); *Davis*, 726 F.3d at 445 ("No instruction could have eliminated the infirmity at the heart of this case: Davis's convictions were inadmissible for any purpose."); *Miller*, 673 F.3d at 702 ("[W]hen the government cannot explain how the prior conviction relates to the question of intent without resorting to a propensity inference, it would be unfair to expect the jury to do so based only on this instruction."); *Stacy*, 769 F.3d at 975 ("[W]hen, as here, the government cannot explain how the prior conviction relates to the question of intent without resorting to a propensity inference, it would be unfair to expect the jury to do so based only on a limiting instruction" (quotation marks, citation and alteration omitted)); *Haywood*, 280 F.3d at 724 (limiting instruction is not "a sure-fire panacea for the prejudice resulting from the needless admission of such evidence"); *Miller*, 562 F. App'x at 285 ("[L]imiting instructions directing the jury to regard evidence for intent when the evidence is not probative of intent does nothing to abate the evidence's prejudicial impact.").

Here, too, the limiting instruction did not cure the prejudice from the erroneously-admitted evidence. The jury was told that the evidence may "help you in deciding" whether Petitioner "had knowledge and intent," but that the fact that a defendant "committed a similar act or acts" is "not evidence that he committed

such an act in this case." Pet. App. 52a. The chances that the jury understood this distinction are virtually nil—especially given that there *was* no non-propensity basis for concluding that these prior convictions were relevant to knowledge or intent. Realistically, the sole inference the jury could possibly have drawn was a propensity inference—that because Petitioner was a career criminal, he must have been guilty of all elements of the charged offense. That inference is impermissible, so the conviction must be reversed.

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

APPENDIX

Appendix A

United States Court of Appeals

For the Eighth Circuit

No. 17-1014

United States of America

Plaintiff – Appellee

v.

Walter Ronaldo Martinez Escobar

Defendant – Appellant

No. 17-1018

United States of America

Plaintiff – Appellee

v.

Jose Manuel Rojas-Andrade

Defendant – Appellant

No. 17-1059

United States of America

Plaintiff – Appellee

v.

Jason Allen Jackson

Defendant – Appellant

No. 17-1170

United States of America

Plaintiff – Appellee

v.

Trinidad Jesus Garcia

Defendant – Appellant

No. 17-1172

United States of America

Plaintiff – Appellee

v.

Catarino Cruz, Jr.

Defendant – Appellant

Appeals from the United States District Court
for the District of Minnesota – St. Paul

Submitted: February 14, 2018
Filed: November 26, 2018

Before SMITH, Chief Judge, MURPHY and COLLOTON, Circuit Judges.[*]

SMITH, Chief Judge.

A jury convicted Walter Ronaldo Martinez Escobar, Jason Allen Jackson, and Catarino Cruz, Jr., of federal crimes related to a methamphetamine distribution operation. Jose Rojas-Andrade and Trinidad Garcia pleaded guilty to counts related to the same operation.

---

[*] Chief Judge Smith and Judge Colloton file this opinion pursuant to 8th Cir. Rule 47E.

The district court[1] imposed sentences of 137 months to 330 months. These five appellants appeal a variety of issues related to their convictions and sentences. We affirm.

I. *Background*

A. *Underlying Facts*

Following a lengthy investigation, 13 people—including the five appellants—were indicted in a large drug-trafficking conspiracy. The investigation focused on Jesse Garcia ("Jesse"), a multi-pound methamphetamine distributor.

In June 2015, the Drug Enforcement Administration (DEA) became involved in the Dakota County Drug Task Force and St. Paul Narcotics Unit's ongoing investigation of Jesse. The DEA learned that these local law enforcement agencies had conducted surveillance at Jesse's residence on approximately May 25, 2015, and stopped a vehicle believed to have recently left a residence associated with Jesse. Rojas-Andrade and Juan Noyola-Garcia ("Noyola") were in the vehicle. Law enforcement searched the vehicle and recovered $45,000 from under the passenger seat.

On June 16, 2015, law enforcement responded to a call from the Northwood Inn and Suits in Bloomington, Minnesota, relating to a customer's claim of theft. Trinidad Garcia ("Garcia"), Jesse's brother, was a maintenance worker there. A witness identified Garcia as the suspect. Law enforcement arrested Garcia for

---

[1] The Honorable Paul A. Magnuson, United States District Judge for the District of Minnesota.

an active warrant on an unrelated matter. During the booking process at the jail, law enforcement recovered 39.34 grams of methamphetamine (36.58 actual grams of methamphetamine) from Garcia's underwear. Garcia possessed the methamphetamine with the intent to distribute it to others. Authorities connected Garcia's drugs to Jesse as the supplier.

During the early stages of the investigation, law enforcement placed GPS trackers on several vehicles that Jesse used. These GPS trackers enabled law enforcement to identify a house in rural Wisconsin ("Wisconsin stash house") as a location that Jesse and other coconspirators frequented. Law enforcement installed a pole camera. It was determined that Jesse's supply came from the Wisconsin stash house operated by a Rojas-Andrade, Noyola, and a third coconspirator. These individuals worked for a Mexican man and his girlfriend, Guadalupe Garibay Sanchez, to supply Jesse and others with methamphetamine. They used the Wisconsin stash house to store drugs and money. Rojas-Andrade recruited Noyola and Escobar to assist him with the methamphetamine operation.

Law enforcement discovered that Jesse changed his phone about every 30 days. Law enforcement attempted to obtain wiretaps on four of Jesse's phones but were able to intercept only two of the phones—"TT2" and "TT4." The interception of TT2 lasted only three days—July 17 to July 19, 2015. During those days, law enforcement intercepted calls between Jesse and two of his distributors, including David Bennett. The interception of TT4 lasted about one week—August 12 to August 19, 2015. The intercept enabled

the seizure of 50 pounds of methamphetamine from Jesse and a seizure of another 30 pounds from the Wisconsin stash house, which ended the investigation.

After interceptions of TT4 began, on August 12, 2015, law enforcement intercepted a call between Jesse and Cruz, who was one of Jesse's sources of methamphetamine. In the call, Cruz explained that he was "checking" on Jesse. Appellee's App. at A-79 (Ex. 18). Jesse updated Cruz on the status of his drug trafficking, telling Cruz that it was "kind of slower right now 'cause ah, we lost some people and shit, so it's kind of slowed down a little bit." *Id.* Jesse's description of having "lost some people" referred to arrests earlier that summer of two of Jesse's distributors, John Schatz and William Chevre. Cruz replied, "That's fine. I was just checking in with you." *Id.* at A-80 (Ex. 18).[2] Based on this call, law enforcement believed that Cruz was a methamphetamine source for Jesse, and Jesse was informing Cruz that Jesse was not ready for any additional methamphetamine at that time. Additionally, surveillance and tracking devices on Jesse's vehicle confirmed that Jesse traveled to Cruz's residence on May 5 and June 11, 2015.

On August 13, 2015, law enforcement intercepted multiple calls between Jesse and Jackson, a methamphetamine distributor. During their

---

[2] At the end of this quotation appears an unintelligible statement that the transcript refers to as "[U/I]." *Id.*; *see also United States v. Dale*, 614 F.3d 942, 952 (8th Cir. 2010) (explaining "[UI]" means "unintelligible statement"). For readability, we have omitted "[U/I]" from any quotations to the record.

conversations, Jesse and Jackson discussed Jesse's recent financial losses and Jackson's repayment of his debt to Jesse. Jesse told Jackson he had to "go switch up cars," *id.* at A-87 (Ex. 26), and "grab them things," *id.* at A-86 (Ex. 26), before meeting with Jackson. This meant that Jesse was going to get a car (a Kia) that he often used when he had methamphetamine with him and get the methamphetamine before meeting Jackson. Jackson confirmed that he had all the "paper" (money) "[t]owards the whole . . . debt." *Id.* at A-88 (Ex. 26). They agreed to meet that day at a restaurant. Jesse arrived in the Kia, and Jackson arrived in another vehicle. Both vehicles thereafter left the restaurant's parking lot, with Jackson returning to his residence. He was observed exiting his vehicle with bags. Right after meeting with Jackson, Jesse contacted Cruz, stating, "I probably need to see you like tomorrow or the next day." *Id.* at A-90 (Ex. 30). Cruz responded, "Are they paying or what?" *Id.* Jesse then explained that none of them were getting paid yet and that he would only need "half of that maybe." *Id.*

On August 14, 2015, Bennett called Jesse about meeting to complete a drug transaction. Jesse asked Bennett if Bennett wanted "[j]ust the one." *Id.* at A-93 (Ex. 33). Jesse explained that he only had "three of 'em left" and that he was "just buying cash right now." *Id.* Jesse had "lost so much money [that he was] pretty much down to . . . just grabbing." *Id.* (ellipsis in original). Bennett told Jesse to "bring two, just in case," and Jesse asked that Bennet "let [him] know for sure if [Bennett] need[ed] two of them. *Id.* Later,

Jesse and Bennett completed the drug transaction in a residential neighborhood.

Jesse and Bennett met again on August 15, 2015, and conducted another drug transaction in the neighborhood. Prior to their meeting, Jesse traveled to a residence on Case Avenue, entered the residence for approximately five minutes, and exited the residence with something in his hand. Jesse then drove to meet Bennett. Following their meeting, Bennett was pulled over by the Minnesota State Patrol. Law enforcement recovered over a pound of methamphetamine and two stolen handguns from his vehicle.

After meeting with Bennett, Jesse called Cruz, telling him that he had "picked up some {cash}" and Cruz should "come grab it tomorrow." *Id.* at A-99 (Ex. 48) (alteration in original). They spoke before 6 p.m. on August 16, 2015, and agreed to meet at Jesse's residence in Coon Rapids, Minnesota. At 6:00 p.m. on August 16, 2015, law enforcement intercepted a call between Cruz and Jesse in which Cruz informed Jesse that he was outside. At the same time, a minivan arrived at Jesse's residence. Cruz's stepdaughter, Sanchez, was the driver, and Cruz was the passenger.

Within an hour of the meeting between Jesse and Cruz, Jesse spoke to his Mexican source of supply. During the call, Jesse explained that he was traveling to Duluth, Minnesota, "taking like five up there right now" and that he has been using an alternative source of supply, "working, with some other {dudes} right now." *Id.* at A-101 (Ex. 58) (alteration in original). Jesse explained to his Mexican source that he needed to buy from this alternative source (Cruz) because Jesse

"lost a lost of money and you guys had been out." *Id.* at A-102 (Ex. 58). Jesse feared that his "people [would] go somewhere else" if he did not obtain more drugs. *Id.* Jesse told the Mexican source, "[I]f I don't keep making money then shit, I'm gonna go broke, you know what I'm saying? So . . . so I been somewhere else right now. Just getting like ten at a time, cash money, you know?" *Id.* (ellipsis in original). Jesse and the Mexican source also discussed Jesse's outstanding debt to the Mexican source. Jesse stated, "I just lost a lot of {money}, but yeah, I got the twelve, you know?" *Id.* (alteration in original). Jesse asked the Mexican source to have one of the Wisconsin stash house operators, Rojas-Andrade, contact him the next day to meet at the gas station near the Wisconsin stash house to collect the money. On August 17, 2015, Jesse went to the gas station near the Wisconsin stash house and provided Escobar and Noyola approximately $6,000.

The Mexican source had indicated to Jesse that he would be able to provide Jesse with a large quantity of methamphetamine. On the morning of August 18, 2015, Rojas-Andrade called Jesse to determine when Jesse would pick up the methamphetamine. Rojas-Andrade gave the phone to Escobar, and Escobar explained to Jesse that there were "fifty special for you." *Id.* at A-106 (Ex. 67).

Following the call, Jesse contacted a number of coconspirators to inform them of the imminent arrival of 50 pounds of methamphetamine. Jesse told Cruz, "I guess those guys got the shit in now for me, so um . . . I don't know . . . when I need something next. I don't know yet. When I go check out see what they got and

shit . . . hopefully it's good." *Id.* at A-112 (Ex. 72) (ellipses in original). He also notified his distributors, Chevre and Jackson. He told Chevre, "I gotta get going here, get building back up man, but I need you on my team for sure. . . . These dudes just [expletive] came through with the other one so I gotta pick up like fifty of them." *Id.* at A-116 (Ex. 77). Jesse told Jackson, "[T]hese fools are ready to go, they got fifty of them for me man, but they want us to [expletive] get on our hustle and shit in a major way. . . . [T]hey want me to come with some paper though to grab these fifty." *Id.* at A-110 (Ex. 71). Jackson met with Jesse the evening of August 18, 2015, and provided him with just over $16,000.

Following Jesse's meeting with Jackson, Jesse spoke with the Mexican source of supply. The Mexican source wanted to know if Jesse would be able to handle receiving 50 pounds of methamphetamine. Jesse replied, "I don't know I mean I was gonna take less than that cause like right now, I'm slow as hell right now, but I just picked up some money but I'm gonna go count it right now so I don't know how much I got right now." *Id.* at A-118 (Ex. 78).

Jesse counted the money he received from Jackson on August 19, 2015. Jesse called Jackson and told him that the cash amounted to "[s]ixteen thousand, twenty dollars." *Id.* at A-125 (Ex. 82). Jackson responded that there "should've been like twenty six [thousand]." *Id.*

Earlier in the day on August 19, 2015, Cruz had called Jesse to find out whether Jesse had gone to the stash house to inspect the methamphetamine. Cruz reassured Jesse that he was still available as a

methamphetamine source if the Mexican source fell through.

While Jesse was preparing to receive 50 pounds of methamphetamine, 91 pounds arrived at the Wisconsin stash house. Escobar and Noyola met the load driver at a nearby gas station and brought the methamphetamine back to the Wisconsin stash house. Shortly thereafter, Rojas-Andrade arrived in Wisconsin and packaged the drugs. After delivering 2 of the 91 pounds to another customer, Rojas-Andrade, Escobar, and Noyola went back to the Wisconsin stash house. On their way, Martinez spoke to Jesse and told him that they had 50 pounds of methamphetamine for him.

After speaking to Martinez, Jesse drove in his Kia to the Wisconsin stash house and picked up a suitcase with 50 pounds of methamphetamine inside. After leaving the house, state troopers stopped Jesse's vehicle. Fifty pounds of methamphetamine were recovered from the trunk.

In anticipation of Jesse traveling to Wisconsin to retrieve the methamphetamine, law enforcement established a perimeter at the Wisconsin stash house and obtained an anticipatory search warrant. After hearing that Jesse had been stopped and that 50 pounds of methamphetamine were recovered, law enforcement saw Escobar and Noyola leaving the area and stopped them. Officers then executed the search warrant. During the search of the Wisconsin stash house, approximately 29 pounds of methamphetamine was recovered from a dining room freezer. One firearm was recovered from Escobar's bedroom, and the other

firearm was recovered from Noyola's bedroom. The firearm recovered from Escobar's bedroom was between the mattress and box spring and was loaded. Weeks prior, Rojas-Andrade had given Noyola a gun for protection.

Law enforcement subsequently executed additional search warrants, including at the Case Avenue residence. At that residence, law enforcement seized five more pounds of methamphetamine from a duffel bag on the garage floor. Because the Mexican source of supply had been out of drugs for some time, the five pounds of methamphetamine seized from the Case Avenue residence was supplied by Cruz.

Jackson remained a fugitive until October 26, 2015, when he was located at a residence in West St. Paul, Minnesota. Following a high-speed chase, law enforcement arrested Jackson. The rental vehicle Jackson was driving was towed to an impound lot. Shortly after Jackson's arrest, he placed a phone call from jail to his parents. In that call, he indicated that "all [his] stuff [was] in the trunk" of the vehicle. Appellee's Br. at 22 (quoting Appellee's App. at A-131 (Ex. 111)). Deputy U.S. Marshals returned to the impound lot after listening to the phone call and searched the vehicle. They seized 445.8 grams of methamphetamine (440.45 grams of actual methamphetamine) from under the carpet inside the vehicle's trunk.

B. *Procedural History*

1. *Indictment and Trial*

On September 22, 2015, an indictment was filed charging 11 individuals—including Escobar, Rojas-Andrade, Jackson, and Garcia—with a single count of conspiring to distribute methamphetamine from as early as December 2014 to on or about August 19, 2015 ("Count 1"). On October 14, 2015, a superseding indictment was filed adding two more people to the conspiracy, including Cruz. On June 13, 2016, an information was filed, charging Garcia with possessing with intent to distribute methamphetamine. On June 15, 2016, a second superseding indictment was filed continuing to charge the defendants who had not pleaded guilty, including Escobar, Jackson, and Cruz, with conspiring to distribute methamphetamine and adding two additional counts. Relevant to the present case, Count 3 charged Jackson with possessing methamphetamine with intent to distribute at the time of his arrest on October 26, 2015.

Jackson, Escobar, and Cruz proceeded to trial. Prior to trial, Jackson moved to suppress evidence obtained from the last wiretap, TT4. He argued that the wiretap affidavit failed to establish the requisite necessity, noting that some investigative techniques used during the investigation were successful. The district court denied the motion.

Escobar also moved to suppress the evidence seized as a result of the anticipatory search warrant for the Wisconsin stash house, arguing that the warrant lacked probable cause. Specifically, he argued that there was no probable cause for the triggering condition of the

warrant. The district court denied the motion, finding that probable cause existed or, in the alternative, that the good-faith exception applied.

Three weeks prior to trial, Jackson moved to sever Counts 1 and 3, arguing that joinder was not proper and that failure to sever the counts would severely prejudice him. The district court denied the motion. At the trial's conclusion, the court instructed the jury to separately consider each count.

Also prior to trial, the government provided notice to Jackson that it intended to seek admission of his prior drug convictions as evidence under Federal Rule of Evidence 404(b). Specifically, it sought to introduce a 2008 federal conviction for conspiracy to distribute and possess with intent to distribute 50 grams or more of methamphetamine and a 2009 Minnesota conviction for possession of more than six grams (in total 19 grams) of methamphetamine. Jackson objected. The district court ruled that the convictions were admissible for the limited purpose of showing motive, intent, and knowledge. During trial, before the introduction of the convictions, the court gave the jury a limiting instruction, explaining that the prior convictions could only be used to prove knowledge and intent. In its closing, the government also cautioned the jury about the limited use of the prior convictions.

The jury was provided a special verdict form as to each defendant. If it found a defendant guilty of the conspiracy charge, it had three options to determine the quantity of methamphetamine involved in the conspiracy as to each defendant: (1) less than 50 grams; (2) 60 grams or more, but less than 500 grams; or (3)

500 grams or more. Cruz did not object to submission of these three options to the jury.

At the close of the government's case, Jackson and Cruz moved for a judgment of acquittal. *See* Fed. R. Crim. P. 29. Jackson generally asserted that the government failed to meet its burden of proof. Cruz, on the other hand, argued that insufficient evidence existed that he joined the conspiracy. He also argued that he never actually provided any quantities of methamphetamine to Jesse. The court denied the motions.

The jury convicted each defendant on all counts charged. It further found each defendant responsible for 500 grams or more of methamphetamine.

2. *Sentencing*

a. *Cruz's Sentencing*

At Cruz's sentencing, he objected to the presentence report's (PSR) calculation of his base offense level. He objected to the inclusion of the methamphetamine seized at the Case Avenue residence and the 50 pounds of methamphetamine seized from Jesse in the drug quantity amount. The court overruled the objection, resulting in a Guidelines range of 292 to 365 months' imprisonment. The court considered the 18 U.S.C. § 3553(a) factors and varied downward. It sentenced Cruz to 250 months' imprisonment—42 months below the low end of the Guidelines range.

b. *Jackson's Sentencing*

Jackson's PSR classified him a career offender as a result of his prior drug convictions, but because the

adjusted offense level was higher than the career offender guidelines, the PSR used the Guidelines otherwise applicable. The parties agreed with the PSR that the Guidelines range was 360 months to life imprisonment. Jackson requested a downward variance due to his role in the conspiracy, his age, the fact he did not use a firearm, and the need to avoid disparities with similarly situated codefendants. The district court granted Jackson's request for the variance based on the § 3553(a) factors and sentenced Jackson to 330 months' imprisonment—30 months below the low end of the Guidelines range.

c. *Escobar's Sentencing*

Prior to his sentencing, Escobar objected to the PSR's recommended two-level enhancement for possessing a firearm in connection with drug-trafficking pursuant to U.S.S.G. § 2D1.1(b)(1). In support of the enhancement, the government relied on evidence adduced at trial and offered a partial transcript of Escobar's post-arrest interview. During that interview, Escobar admitted knowing Rojas-Andrade had guns at the Wisconsin stash house. The district court overruled the objection. It calculated a guidelines range of 360 months to life imprisonment. It then varied downward, sentencing Escobar to 260 months' imprisonment.

d. *Rojas-Andrade's Sentencing*

Rojas-Andrade indicated that he wanted to withdraw his guilty plea five months after the trial of his codefendants and after the final PSR was submitted to the district court. Rojas-Andrade's counsel explained that Rojas-Andrade was dissatisfied with

certain concessions made in the plea agreement as to the applicable Guidelines enhancements. The district court denied the motion and proceeded to sentencing.

Rojas-Andrade's PSR recommended a two-level enhancement for his role in the offense, an enhancement for firearms, and an enhancement for maintaining a stash house. Rojas-Andrade objected. The district court overruled Rojas-Andrade's objections. The court then calculated a Guidelines range of 360 months to life imprisonment. After hearing the arguments of counsel and considering the § 3553(a) factors, the district court varied downward and sentenced Rojas-Andrade to 300 months' imprisonment—60 months below the Guidelines range.

e. *Garcia's Sentencing*

Garcia pleaded guilty to the information charging him with possession to distribute methamphetamine stemming from his June 16, 2015 arrest. The PSR calculated a base offense level of 28 because Garcia possessed with intent to distribute 36.58 grams of actual methamphetamine. Garcia did not object to this paragraph of the PSR. The court sentenced Garcia to 137 months' imprisonment, the top of the Guidelines range.

II. *Discussion*

On appeal, the appellants raise a variety of issues related to their convictions and sentences. We consider each in turn.

A. *Escobar*

Escobar appeals the denial of his motion to suppress evidence obtained through the search of the Wisconsin

stash house. Authorities used an anticipatory search warrant to gain entry. We review legal issues de novo and factual findings for clear error. *United States v. Hudspeth*, 525 F.3d 667, 674 (8th Cir. 2008). The warrant required the following condition: a coconspirator, Jesse, would travel to the house within a specified date range to pick up 50 pounds of methamphetamine and officers would stop the car after Jesse left the house and find the drugs. Investigators learned of Jesse's plans from a wiretap, but the affidavit supporting the warrant application did not disclose the wiretap as a source. Escobar posits that because the affidavit does not disclose the information source, it does not establish probable cause that the triggering condition would occur, as required under *United States v. Grubbs*, 547 U.S. 90, 96–97 (2006). Even if there was no probable cause, we conclude the good-faith exception applies because under the totality of the circumstances, officers' reliance on the warrant was objectively reasonable. *See United States v. Proell*, 485 F.3d 427, 431 (8th Cir. 2007) ("When assessing the objective reasonableness of police officers executing a warrant, we must look to the totality of the circumstances, including any information known to the officers but not presented to the issuing judge." (cleaned up)). Therefore, we affirm the denial of Escobar's motion to suppress.

Escobar also appeals the application of a two-level sentencing enhancement for possession of a dangerous weapon in connection with a drug offense under U.S.S.G. § 2D1.1(b)(1). We review for clear error. *United States v. Payne*, 81 F.3d 759, 762 (8th Cir. 1996).

The government must prove by a preponderance of the evidence that there was "a temporal and spatial nexus among the weapon, defendant, and drug-trafficking activity." *United States v. Torres*, 409 F.3d 1000, 1003 (8th Cir. 2005). Officers found the gun between the box spring and the mattress in Escobar's bedroom in the Wisconsin stash house. It was not clear error for the district court to find this constructive possession proved temporal and spatial nexus. *See id.* Therefore, we affirm the enhancement.

B. *Rojas-Andrade*

Rojas-Andrade appeals the district court's refusal to allow him to withdraw his guilty plea prior to sentencing. "[W]e review the district court's decision to deny a motion to withdraw a plea for abuse of discretion." *United States v. Maxwell*, 498 F.3d 799, 801 (8th Cir. 2007). A defendant may withdraw a guilty plea before sentencing if he or she "can show a fair and just reason for requesting the withdrawal." Fed. R. Crim. P. 11(d)(2)(B). Rojas-Andrade requested withdrawal because he disagreed with the recommended sentencing enhancements in the PSR. A defendant's "misunderstand[ing of] how the sentencing guidelines will apply to his case" is not a "fair and just reason" to withdraw a guilty plea. *United States v. Ramirez-Hernandez*, 449 F.3d 824, 826 (8th Cir. 2006). Therefore, we affirm denial of his motion to do so.

Rojas-Andrade also argues that his "300[-]month sentence is inherently unreasonable despite the advisory guideline range." Rojas-Andrade's Br. at 8. We review this sentence for an abuse of discretion, first ensuring that the district court committed no

significant procedural error. *United States v. Feemster*, 572 F.3d 455, 461 (8th Cir. 2009) (defining procedural error). In the absence of procedural error we consider a sentence's substantive reasonableness, taking into account the totality of the circumstances. *Id.* We may presume a within-Guidelines sentence is reasonable. *Id.*

Rojas-Andrade acknowledges that his sentence "constituted a downward variance from the guideline range." Rojas-Andrade's Br. at 9. But he argues that the district court "started from an unreasonable starting point and arrived at an equally unreasonably final number." *Id.* Rojas-Andrade argues the district court erred by considering evidence admitted during the trials of his coconspirators. Relying on these facts was not error, however, because the court may consider relevant information at sentencing as long as it "has sufficient indicia of reliability to support its probable accuracy." *United States v. Woods*, 596 F.3d 445, 448 (8th Cir. 2010) (quoting U.S.S.G. § 6A1.3(a)). He maintains that the district court "made erroneous findings of fact by adopting the factual basis of the PSR, placing him near the top of the conspiracy," Rojas-Andrade's Br. at 9, but he fails to identify which factual findings were erroneous. Nor did Rojas-Andrade object to the facts in the PSR. "We rely on and accept as true the unobjected to facts in the PSR." *United States v. Betts*, 509 F.3d 441, 444 (8th Cir. 2007) (citing Fed. R. Crim. P. 32(i)(3)(A); *United States v. Wintermute*, 443 F.3d 993, 1005 (8th Cir. 2006)). Furthermore, "[a] sentencing judge who also presided over the trial, as in this case, may base his factual

findings on the trial record and is not required to hold an evidentiary hearing prior to sentencing." *United States v. Maggard*, 156 F.3d 843, 848 (8th Cir. 1998) (citing *United States v. Wiggins*, 104 F.3d 174, 178 (8th Cir. 1997)). Rojas-Andrade also argues the district court did not properly weigh the § 3553 factors and the sentence is substantively unreasonable. After reviewing the record, we conclude that the district court did not err in weighing the statutory factors and that the below-Guidelines sentence is substantively reasonable.

C. *Jackson*

First, Jackson appeals the denial of his motion to suppress wiretap evidence. We review legal issues de novo and factual findings for clear error. *United States v. Milliner*, 765 F.3d 836, 839 (8th Cir. 2014) (per curiam). "Before granting an application for a wiretap, a judge must first determine that 'normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous.'" *United States v. Thompson*, 690 F.3d 977, 986 (8th Cir. 2012) (quoting 18 U.S.C. § 2518(3)(c)). Jackson argues traditional investigative techniques were successful and therefore the wiretap was not necessary. But the wiretap affidavit explains that despite some success with traditional techniques, investigators were "unable to identify all of the members of the [drug trafficking operation], the methods which the organization uses to transport drugs to Minnesota and elsewhere, where and how the drugs are stored, the organization's drug source of supply and all of their drug customers." Appellee's App. at A-43.

The wiretap affidavit "establish[ed] that conventional investigatory techniques [were not] successful in exposing *the full extent* of the conspiracy." *Milliner*, 765 F.3d at 839 (emphasis added). We, therefore, affirm the denial of the motion to suppress.

Second, Jackson appeals the denial of his motion to sever Counts 1 (conspiracy to distribute methamphetamine) and 3 (possession of methamphetamine with intent to distribute). The court may order separate trials of counts if joinder would prejudice a party. Fed. R. Crim. P. 14(a). We review for abuse of discretion and will not reverse unless the denial of a motion to sever resulted in "severe prejudice" to the defendant. *United States v. Geddes*, 844 F.3d 983, 988 (8th Cir. 2017) (quoting *United States v. Steele*, 550 F.3d 693, 702 (8th Cir. 2008)). Severe prejudice requires a showing that the denial deprived the defendant of "an appreciable chance for an acquittal." *Id.* (quoting *United States v. Scott*, 732 F.3d 910, 916 (8th Cir. 2013)). There was no severe prejudice here. Overwhelming evidence supported conviction on Count 1, not even considering the events underlying Count 3. And evidence supporting Count 1 "would be properly admissible in a separate trial for [Count 3]." *Id.* (quoting *United States v. Erickson*, 610 F.3d 1049, 1055 (8th Cir. 2010)); *see also United States v. Robinson*, 639 F.3d 489, 494 (8th Cir. 2011) (explaining that prior drug distribution convictions are relevant under Rule 404(b) to demonstrate intent to distribute). Thus, it was not an abuse of discretion to deny the motion to sever.

Third, Jackson appeals the admission of his 2008 federal conviction for conspiracy to distribute 50 grams or more of methamphetamine and his 2009 state conviction for second-degree possession of six grams or more of methamphetamine. We review the admission evidence under Federal Rule of Evidence 404(b) for abuse of discretion. *United States v. Walker*, 428 F.3d 1165, 1169 (8th Cir. 2005). 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.* Jackson claims the district court abused its discretion in admitting evidence of his prior drug convictions under Rule 404(b) because (1) they were too remote in time; and (2) his possession conviction was not similar in kind to the drug trafficking charges in this case.

Jackson claims the convictions were too remote in time. "To determine if a crime is too remote in time to be admissible under Rule 404(b), we apply a reasonableness standard, evaluating the facts and circumstances of each case." *United States v. Walker*, 470 F.3d 1271, 1275 (8th Cir. 2006). "[T]here is no fixed period within which the prior acts must have occurred." *United States v. Baker*, 82 F.3d 273, 276 (8th Cir. 1996). But "[w]e have generally been reluctant to uphold the introduction of evidence relating to acts or crimes which occurred more than thirteen years prior to the conduct challenged. Nevertheless, our reluctance does not constitute a definitive rule." *United States v. Halk*, 634 F.3d 482, 487 (8th Cir. 2011) (citation omitted).

"The *Halk* decision, however, recognizes that the 13-year rule does not apply where the defendant spent part of that time in prison." *United States v. Aldridge*, 664 F.3d 705, 714 (8th Cir. 2011) (citing *Halk*, 634 F.3d at 488–89 (allowing evidence of a 19-year-old conviction where the defendant spent more than 12 of those years in prison); *United States v. Williams*, 308 F.3d 833, 837 (8th Cir. 2002) (allowing evidence of a 20–year–old conviction where the defendant spent 16 of those years in prison); *Walker*, 470 F.3d at 1275 (allowing evidence of an 18-year-old conviction where the defendant spent 10 of those years in prison)).

Jackson's convictions are not too remote in time. The convictions are well within the 13-year period. Further, Jackson received 80 months' imprisonment for his federal conviction during that time, reducing the time gap between the prior offenses and the present conduct.

Jackson also argues his 2009 drug possession conviction was inadmissible under Rule 404(b) in a case involving the distribution of drugs. But "[i]t is settled in this circuit 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.'" *United States v. Robinson*, 639 F.3d 489, 494 (8th Cir. 2011) (quoting *United States v. Frazier*, 280 F.3d 835, 847 (8th Cir. 2002)). Thus it was not an abuse of discretion to admit Jackson's prior convictions.

Fourth, Jackson argues the evidence was insufficient to support his convictions for Count 1

(conspiracy to distribute methamphetamine) and Count 3 (possession of methamphetamine with intent to distribute). We review de novo, viewing "the trial evidence in the light most favorable to the government, resolving evidentiary conflicts in favor of the government, and accepting all reasonable inferences draw from the evidence that support the jury's verdict." *United States v. Johnson*, 519 F.3d 816, 821 (8th Cir. 2008) (quoting *United States v. Zimmermann*, 509 F.3d 920, 925 (8th Cir. 2007)). Jackson argues his conviction under Count 1 should be vacated because there was insufficient evidence that he and Jesse had reached an agreement to distribute methamphetamine. *See United States v. Espino*, 317 F.3d 788, 792 (8th Cir. 2003) ("To establish that a defendant conspired to distribute drugs under 21 U.S.C. § 846, the government must prove: (1) that there was a conspiracy, i.e., an agreement to distribute the drugs; (2) that the defendant knew of the conspiracy; and (3) that the defendant intentionally joined the conspiracy."). Jackson is wrong. The recorded conversation between Jackson and Jesse revealed more than just Jackson's acknowledgment of a debt to Jesse. Jackson also told Jesse he would meet with Jesse to get drugs. The discussion topics included frequency of their meetings, Jackson's previous source, and the need for safety. The jury could conclude—and did conclude—that the communication involved an agreement to meet and exchange cash for drugs. In another conversation, Jesse told Jackson that he needed money for the 50 pounds of methamphetamine. Jackson replied, "I got you." Appellee's App. at A-110 (Ex. 71). The two men subsequently met, and Jackson handed Garcia $16,020

in cash. The jury could reasonably infer that Jackson gave money to Jesse as part of the agreement in the conspiracy to distribute drugs.

Jackson also claims that his conviction under Count 3 should be vacated because there was insufficient evidence that he knew the methamphetamine was in the vehicle. *See United States v. Thompson*, 686 F.3d 575, 583 (8th Cir. 2012) ("To sustain a conviction for possession with intent to distribute under 21 U.S.C. § 841, the jury must find beyond a reasonable doubt that [the defendant] (1) knowingly possessed a controlled substance and (2) intended to distribute some or all of it."). According to Jackson, "it was not unreasonable for [him] to be unaware that drugs were carefully hidden in the trunk of a car he did not own." Jackson's Br. at 46. He relies on *United States v. Pace*, 922 F.2d 451 (8th Cir. 2009).

In *Pace*, at the time of the stop, the defendant was the driver of a car that was transporting almost 200 pounds of cocaine divided among three duffle bags and a suitcase. 922 F.3d at 452–53. The defendant had either been driving the car or sleeping in the front passenger seat of the vehicle during the entire day and a half of the trip. *Id.* at 453. The drug-filled bags and suitcase were on the floor in the back seat or in the vehicle's cargo area. A codefendant testified that he did not tell the defendant what was in the luggage. *Id.* The government argued "that the street value of these drugs (estimated at between twelve and fifteen million dollars) meant that they would not be casually entrusted to an uninformed outsider" and "the extended amount of time [the defendant] spent in the

car meant that he had to have discovered what was in the luggage." *Id.* The jury convicted the defendant, but we reversed, holding the evidence insufficient to show beyond a reasonable doubt "that [the defendant] knew that he was helping carry cocaine across the country." *Id.* We concluded the evidence was insufficient because "it [was] merely conjecture to conclude [the defendant] knew what those packages contained." *Id.* There was "no evidence that [the defendant] ever explored the cargo area of the station wagon, much less that he examined or opened [the codefendant's] luggage that was stored there." *Id.*

Pace is distinguishable. Jackson's own statements led law enforcement to believe that they had missed something during their initial search. Jackson told his mother that police had impounded the rental car and that "all [his] stuff [was] in the trunk" of the vehicle. Appellee's Br. at 22 (quoting Appellee's App. at A-131 (Ex. 111)). Thus, unlike the defendant in *Pace*, Jackson acknowledged that everything in the trunk belonged to him. Jackson then stated, "I think they thought they were going to find something in the trunk, but they didn't. You know what I mean?" *Id.* A reasonable jury, knowing that police had already searched the trunk in Jackson's presence and found no contraband, could conclude that "they" referred to the police. Further, the jury could reasonably conclude that the "something" the police thought they would find would be something of interest to the police, such as contraband. After reviewing the record, we conclude there was sufficient evidence on Count 3.

Finally, Jackson argues his 330-month sentence is substantively unreasonable because the court did not give proper weight to mitigating factors. We review for abuse of discretion. *Feemster*, 572 F.3d at 461 (standard of review). Jackson presented the mitigating factors to the district court and received a below Guidelines sentence. We conclude there was no abuse of discretion and the sentence is substantively reasonable.

D. *Garcia*

Garcia notes that he pleaded guilty to an information alleging a single count of possession with intent to distribute methamphetamine. He did not plead guilty to a conspiracy charge. Consequently, according to Garcia, U.S.S.G. § 2D1.1. required the district court to exclude the portion of the methamphetamine intended for his personal use in calculating his base offense level. Garcia argues that the court knew of his drug addiction. The court knew, from the change-of-plea hearing, that he acquired methamphetamine for distribution but it also knew that he may have obtained some for himself.

Prior to sentencing, the PSR provided that Garcia was accountable for 36.58 grams of methamphetamine (actual). At sentencing, Garcia, proceeding pro se, challenged the *purity* of the drugs—not what portion of the methamphetamine was intended for his personal use, as opposed to distribution. The government then called the chemist who tested the drugs to testify. Following the chemist's testimony, the district court inquired whether the government or Garcia had "[a]nything further before the Court makes findings

with respect to the Presentence Report." Sentencing Hr'g Tr. At 19, *United States v. Garcia*, No. 0:15-cr-00260 (D. Minn. Jan. 13, 2017), ECF No. 908. After the government responded that it had nothing else, the court then specifically asked Garcia if he had "anything else," and Garcia responded, "No I do not, sir." *Id.* The court then ruled, "[T]he Court does adopt the findings of Exhibit Number 1 from the BCA lab by a preponderance of the evidence and believes that that is the *weight and purity that is involved*." *Id.* (emphasis added). Thereafter, the court asked whether Garcia had "any further objections other than that previously indicated." *Id.* at 20. Garcia replied, "Other than that, then I believe that's—you know, that was the big issue. . . . [A]s far as objections to the PSR, no, I don't believe I have any other objections." *Id.* at 21. Thus, the court "adopt[ed] the findings as [it had] just indicated." *Id.*

Our review of the record shows that Garcia objected only to drug purity—not what portion of the 36.58 grams of methamphetamine was for his personal use. And, when specifically asked if he had any further objections to the PSR, Garcia indicated that he did not. Because Garcia lodged no objection to the drug-quantity calculation, our review is for plain error. *See United States v. Hanshaw*, 686 F.3d 613, 617 (8th Cir. 2012) (per curiam) (holding appellate review is plain error when pro se defendant fails to raise objection to the district court). The district court "may accept any undisputed portion of the presentence report as a finding of fact." Fed. R. Crim. P. 32(i)(3)(A). Garcia did not object to the drug quantity listed in the PSR, both

prior to and at sentencing. By admitting to the drug quantity, Garcia cannot now on appeal assert that the district court erred by accepting an admitted fact. The district court did not err—plain or otherwise—in calculating that the 36.58 grams of methamphetamine was intended for distribution.

E. *Cruz*

Cruz first argues the district court erred in admitting recorded out-of-court statements of coconspirators as non-hearsay under Federal Rule of Evidence 801(d)(2)(E). Specifically, Cruz challenges the admission of statements that Jesse made on a recorded phone call with Cruz.

We review interpretation of the rules of evidence de novo and admission of evidence for abuse of discretion. *United States v. Cazares*, 521 F.3d 991, 998 (8th Cir. 2008).

A statement is not hearsay if it "is offered against an opposing party and . . . was made by the party's coconspirator during and in furtherance of the conspiracy." Fed. R. Evid. 801(d)(2)(E).

> It is well-established that an out-of-court declaration of a coconspirator is admissible against a defendant if the government demonstrates (1) that a conspiracy existed; (2) that the defendant and the declarant were members of the conspiracy; and (3) that the declaration was made during the course and in furtherance of the conspiracy.

United States v. Bell, 573 F.2d 1040, 1043 (8th Cir. 1978). We have held

> that an out-of-court statement is not hearsay and is admissible if on the independent evidence the district court is satisfied that it is more likely than not that the statement was made during the course and in furtherance of an illegal association to which the declarant and the defendant were parties.

Id. at 1044. A preponderance-of-the-evidence standard is sufficient proof of a conspiracy for purposes of admitting a coconspirator's statement. *Id.*

Here, Jesse's statements provide context for Cruz's responses and demonstrate the existence of an agreement. Thus, admission of these statements was proper because they are not "assertions" offered "to prove the truth of the matter asserted." Fed. R. Evid. 801(a), (c)(2) (defining hearsay). Cruz also challenges the admission of Jesse's recorded statement to the Mexican supplier that Jesse was working "ten at a time" with another supplier, presumed to refer to ten pounds of drugs Cruz sold to Jesse. Even if this statement was inadmissible hearsay, its admission was harmless because Jesse made a nearly identical statement to a distributor who was one of Cruz's coconspirators. *See United States v. Whitehead*, 238 F.3d 949, 952 (8th Cir. 2001). We affirm the district court's evidentiary rulings.

Second, Cruz argues there was insufficient evidence of drug quantity to support his conviction for conspiracy to distribute more than 500 grams of a mixture containing methamphetamine pursuant to 21 U.S.C. § 841(a)(1), (b)(1)(A). *See Johnson*, 519 F.3d at 821 (standard of review). The jury heard

circumstantial evidence that Cruz sold at least a couple pounds of methamphetamine to Jesse before Jesse traveled to Duluth. After reviewing the trial record, we conclude a reasonable jury could conclude based on this evidence that Cruz conspired to distribute more than 500 grams of a mixture containing methamphetamine. We affirm the conviction.

Third, Cruz argues the district court erred in its drug-quantity calculation under the Guidelines because it attributed to Cruz 50 pounds of methamphetamine recovered from Jesse's car. Cruz asserts that he "played no role in the acquisition, distribution, or storage of these drugs"; therefore, "these controlled substances do not constitute 'relevant conduct' under USSG § 1B1.3." Cruz's Br. at 22. He contends that because of this error, the district court increased his Guidelines range from 121 to 151 months' imprisonment to 292 to 365 months' imprisonment. We review the drug-quantity calculation for clear error. *United States v. Plancarte-Vazquez*, 450 F.3d 848, 852 (8th Cir. 2006).

Cruz's PSR found that Cruz was responsible for the 50 pounds of methamphetamine seized from Jesse's vehicle on August 19, 2015, as well as the 5 pounds of methamphetamine seized from the Case Avenue residence. This resulted in a base offense level of 38 and a Guidelines range of 292 to 365 months' imprisonment. At sentencing, Cruz objected to the inclusion of both quantities of drugs. The district court overruled Cruz's objection based upon the trial evidence and its review of the PSR.

> In the case of a jointly undertaken criminal activity, relevant conduct includes all acts and

> omissions of others that were (i) within the scope of the jointly undertaken criminal activity, (ii) in furtherance of that criminal activity, and (iii) reasonably foreseeable in connection with that criminal activity and that occurred during the commission of the offense of conviction. When determining whether acts of co-conspirators qualify as relevant conduct under the guidelines, we look to the scope of the *individual defendant's* undertaking and foreseeability in light of that undertaking, rather than the scope of the conspiracy as a whole.

United States v. Gaye, 902 F.3d 780, 789–90 (8th Cir. 2018) (cleaned up).

> For purposes of calculating drug quantity in a drug conspiracy case, the district court may consider amounts from drug transactions in which the defendant was not directly involved if those dealings were part of the same course of conduct or scheme. This includes all transactions known or reasonably foreseeable to the defendant that were made in furtherance of the conspiracy.

United States v. King, 898 F.3d 797, 809 (8th Cir. 2018) (cleaned up).

We conclude that the district court did not clearly err in finding that the 50 pounds of methamphetamine seized from Jesse's car were attributable to Cruz. Cruz belonged to the conspiracy to distribute drugs to the Minnesota/Wisconsin area. The conspiracy consisted of at least two sources of methamphetamine, of which

Cruz was one source. After the Mexican source contacted Jesse about receiving 50 pounds of methamphetamine, Jesse contacted Cruz to inform him of its imminent arrival. Thereafter, Cruz called Jesse to find out whether Jesse had gone to the stash house to inspect the methamphetamine. Cruz reassured Jesse that he was still available as a methamphetamine source if the Mexican source fell through. This evidence shows that Cruz was aware of the drug transaction, which was part of the conspiracy to distribute drugs in the Minnesota/Wisconsin area.

III. *Conclusion*

We affirm the judgment of the district court in all respects.

Appendix B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

United States of America, Plaintiff, v. Walter Ronaldo Martinez Escobar (2), Jason Allen Jackson (7), Catarino Cruz, Jr. (13), and Jesse Garcia (1), Defendants.	Case No. 15-cr-260 (PAM/TNL) **MEMORANDUM AND ORDER**

This matter is before the Court on the parties' pretrial motions.[1] Trial in this matter is set for Monday, July 11. The Court held a hearing on Thursday, July 7, 2016, but no party elected to proffer evidence in support of any Motion.

A. Government's Motions

The Government has brought five Motions in Limine[2] and an additional Motion regarding Defendants' prior convictions.

---

[1] Only Defendants Martinez Escobar, Jackson, and Cruz filed pretrial motions.

[2] The government and Defendants Jackson and Cruz seek the sequestration of witnesses. Those requests are addressed below.

1. Hearsay statements

Both the Government and Defendant Cruz ask the Court to rule that hearsay statements are inadmissible. The Court presumes all parties will abide by the Federal Rules of Evidence and these Motions are denied without prejudice.

2. Prior bad act evidence

The Government asks the Court to limit defense cross-examination regarding prior bad acts or convictions to only matters permitted by Rules 608 and 609. The Government also requests that the Court to rule on the propriety of such evidence before it is proffered to the jury.

The Court expects the parties to make proffers regarding any such evidence outside the presence of the jury. The Court will thus reserve ruling on the Government's Motion until the issue is brought forward in trial.

3. Potential penalty

The Government next asks that the Court preclude Defendants from referring to the potential penalty involved. Reference to penalty by any party is inappropriate. The Motion is granted.

4. Jurisdiction and other issues

The Government's fifth Motion in Limine asks the Court to preclude Defendants from arguing certain legal theories to the jury or otherwise challenging the Court's jurisdiction in front of the jury. The Court will address this at trial should it become necessary to do so.

5. Rule 404(b) evidence

Finally, the Government moves to admit 404(b) evidence against Garcia, Jackson, and Cruz. In particular, the Government seeks the admission of:

> (1) Jesse Garcia's 2006 Ramsey County conviction for possession of a controlled substance;
>
> (2) Jackson's 2008 federal conviction for conspiracy to distribute and possession with intent to distribute methamphetamine, and his 2009 Ramsey County conviction for second-degree possession of methamphetamine; and
>
> (3) Cruz's 2012 federal conviction for using a communication facility to facilitate a drug offense.

Rule 404(b) provides that evidence of prior crimes or other bad acts is admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b)(2). Such evidence is generally admissible unless it is offered only to prove a defendant's character. Evidence of other acts is especially probative when intent is an issue, if those other acts are material to the defendant's intent.

The prior convictions listed above are relevant and probative in this matter to establish motive, intent, and knowledge, among other matters. All of these convictions are therefore admissible.

B. Defendants' Motions in Limine

Defendants Escobar and Jackson brought separate Motions to Suppress, addressed below, and all Defendants raise some individual issues in their respective Motions in Limine. But Defendants also seek similar relief in some of their Motions, and the Court will address those portions of the Motions in Limine together.

1. Motion to Exclude Expert Witnesses

Defendants each seek to limit or preclude Government witnesses from testifying as experts on topics such as the workings of drug-trafficking conspiracies and what certain words mean in the context of such conspiracies. But Defendants have not specified any topic on which a particular witness lacks the requisite "knowledge, skill, experience, training, or education," Fed. R. Evid. 702, that would warrant that witness's exclusion.

Testimony regarding matters not generally the subject of public knowledge, such as how large-scale drug-trafficking operations work or how individuals in such organizations typically communicate with each other, is well within the scope of Rule 702. Defendants are free to make objections to specific testimony at trial if that testimony is not relevant or probative of the issues in the case, but the Court will not exclude any of the Government's expert witness testimony on the basis that the testimony violates the principles of *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

2. Sequestration

Defendants Jackson and Cruz, as well as the Government, ask the Court to sequester witnesses. This request is granted with the exception that the case agents may remain in the courtroom.

3. Nicknames and Other Information

Defendant Cruz asks the Court to preclude the Government from referring to him by his alleged nickname. The Government does not object to this request, but asks that it be allowed to address the issue with the Court if Cruz testifies and the nickname becomes relevant. Thus, Cruz's Motion is granted without prejudice to the Government raising the issue if necessary.

Defendant Jackson seeks to prohibit the Government from mentioning his nickname, tattoos, and custody status. The Government disavows any intent to introduce any evidence regarding Jackson's tattoos. His nickname, however, is mentioned in several recorded calls that the jury is likely to hear, and thus the Government must be allowed to adduce testimony regarding Jackson's nickname. And while the Government may not introduce evidence that Jackson is incarcerated merely to show that his character is bad, the fact that Jackson is incarcerated may be relevant to explain some evidence in the case, such as a telephone call Jackson made from jail after his arrest. Jackson may object if he believes the Government is improperly introducing such evidence, but the Court will not issue a blanket exclusion on this evidence.

4. Family Relationship

Defendant Cruz asks the Court to prohibit the Government from referencing any familial relationship between Cruz and fugitive co-Defendant Guadalupe Garibay Sanchez. The Government contends that this information may be relevant to explain some unusual conversations between the co-Defendants in the case.

If the familial relationship between Cruz and Sanchez is relevant to issues brought forward in the case, it is likely admissible. Cruz may offer specific objections at trial if he believes the evidence is not relevant or is more prejudicial than probative. His Motion on this point is denied without prejudice.

5. Martinez Escobar's Cross-Examination

Martinez Escobar seeks to preclude the Government from questioning him regarding his pending cocaine charge in North Carolina. Should he testify in the case, he will offer as an explanation for his abrupt departure from the alleged stash house that his presence was required in North Carolina, but he asks that the jury not be informed about the underlying criminal charge which necessitated his appearance in North Carolina.

But as the Government points out, depending on the substance of Martinez Escobar's testimony, the reason he was required to be in North Carolina may be relevant. The Government will raise the issue with the Court before delving into the subject, and thus this Motion is denied without prejudice.

6. Redacting Martinez Escobar's Statement

Martinez Escobar asks the Government to redact any portions of his statement to law enforcement that reference having a criminal conviction or being prosecuted for other crimes. The Government has agreed to make the redactions, but reserves the right to question Martinez Escobar regarding the issue should it become relevant. The Motion is therefore denied without prejudice.

7. Severance

Jackson asks the Court to sever Count 3 from Count 1 and try the Counts separately. Count 1 charges Jackson with conspiracy to distribute methamphetamine, and specifically alleges that Jackson sold methamphetamine for co-Defendant Jesse Garcia from at least December 2014 through August 2015. Count 3 charges that Jackson possessed with intent to distribute methamphetamine in October 2015. Other than seeking severance, Jackson makes no substantive argument regarding the reasons for severance.

Even if Jackson's October 2015 possession were outside the scope of the conspiracy charged in Count 1, it would still be "of the same or similar character, or [ ] based on the same act or transaction, or [ ] connected with or constitute parts of a common scheme or plan," as Rule 8 requires. Fed. R. Crim. P. 8(a). But severance is appropriate if the defendant would be prejudiced by the Counts' joinder. *Id.* R. 14.

Jackson was charged with participating in the drug conspiracy at issue in August 2015. He was not

arrested, however, until October. At that time, law enforcement apprehended Jackson after a high-speed chase in a car rented in someone else's name. Law enforcement searched the vehicle after hearing Jackson saying during a jailhouse phone call that there was "stuff in the trunk." The search revealed nearly a pound of methamphetamine. Count 3 charges Jackson with possession of that methamphetamine.

Jackson has not established that joinder of Counts 1 and 3 is improper. This Motion is denied.

8. Confidential Source Testimony

Cruz asks the Court to preclude the Government from relying on a confidential source because the Government did not give notice of its intent to do so. The Government did not oppose the Motion, and thus apparently will not rely on any confidential source with respect to Cruz. The Motion is therefore granted.

C. Motions to Suppress

1. Jackson's Motion

Jackson seeks the suppression of the search of the rental car. He contends that the search was conducted "without warrant, without probable cause and lacking in any exigent circumstances." (Def.'s Mot. (Docket No. 547) at 1.)

But the rental car did not belong to Jackson and was not rented in his name. Thus, Jackson must establish that he had the consent of the person who rented it in order to have standing to challenge the search. *United States v. Muhammad*, 58 F.3d 353, 355 (8th Cir. 1995).

At the hearing, Jackson offered no evidence regarding his authority to drive the rental vehicle. Thus, he is without standing to challenge the search and his Motion to Suppress is denied.

2. Martinez Escobar's Motion

Martinez Escobar was arrested in this case in August 2015. The arresting officers searched him and found a cell phone in his pocket. They seized the cell phone. Martinez Escobar was detained after his arrest and has remained in custody since then. Law enforcement has retained the phone.

In March 2016, more than eight months after the arrest, the Government secured a warrant for a search of Martinez Escobar's cell phone. Martinez Escobar asks the Court to suppress the results of this search, contending that the length of time between the seizure and the warrant renders the search constitutionally unreasonable.

The seizure of a person's property pending a warrant is constitutional "if the exigencies of the circumstances demand it or some other recognized exception to the warrant requirement is present." *United States v. Place*, 462 U.S. 696, 701 (1983). Thus, as Martinez Escobar recognizes, the initial seizure of his cell phone during a search incident to his arrest was proper. *Weeks v. United States*, 232 U.S. 383, 392 (1914); *Chimel v. California*, 395 U.S. 752, 763 (1969). He contends, however, that, as in *Place*, the initial seizure "became unreasonable because its length unduly intruded upon constitutionally protected

interests." *United States v. Jacobsen*, 466 U.S. 109, 124 n.25 (1984) (discussing *Place*).

"[E]ven a seizure based on probable cause is unconstitutional if police act with unreasonable delay in securing a warrant." *United States v. Martin*, 157 F.3d 46, 54 (2d Cir. 1998).

> We demand expediency in obtaining a search warrant to search seized evidence in order to avoid interfering with a continuing possessory interest for longer than reasonably necessary, in case the search reveals no evidence (or permissibly segregable evidence) of a crime and the item has no independent evidentiary value and is not otherwise forfeitable.

United States v. Sparks, 806 F.3d 1323, 1340 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 2009 (2016) (citations omitted). The reasonableness of the delay depends on the particular facts and circumstances of the case; there is no "bright line past which a delay becomes unreasonable." *United States v. Burgard*, 675 F.3d 1029, 1033 (7th Cir. 2012). However, "[w]hen police neglect to seek a warrant without any good explanation for that delay, it appears that the state is indifferent to searching the item and the intrusion on an individual's possessory interest is less likely to be justifiable." *Id.* at 1033-34.

To determine whether a delay is unreasonable, courts must "balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental

interests alleged to justify the intrusion." *Illinois v. McArthur*, 531 U.S. 326, 331 (2001).

> [C]ourts have identified several factors highly relevant to this inquiry: first, the significance of the interference with the person's possessory interest, *see United States v. Mitchell*, 565 F.3d 1347, 1353 (11th Cir. 2009); second, the duration of the delay, *see Place*, 462 U.S. at 709 (characterizing the "brevity" of the seizure as "an important factor"); third, whether or not the person consented to the seizure, *see United States v. Stabile*, 633 F.3d 219, 235 (3d Cir. 2011); and fourth, the government's legitimate interest in holding the property as evidence, *see Burgard*, 675 F.3d at 1033.

United States v. Laist, 702 F.3d 608, 613-14 (11th Cir. 2012).

Two of these factors are especially relevant here. First is that the seized item was Martinez Escobar's smart phone. A smart phone, like a computer, contains highly personal information. *See Mitchell*, 565 F.3d at 1352 ("Computers are relied upon heavily for personal and business use. Individuals may store personal letters, e-mails, financial information, passwords, family photos, and countless other items of a personal nature in electronic form on their computer hard drives."). The interference with Martinez Escobar's possessory interest in his smart phone was therefore more significant than it would be had the government seized a sheaf of papers or the like from him.

The second relevant factor is the duration of the delay here, which was more than eight months. This is far longer than any court has held reasonable under any circumstances, and does not show that law enforcement "diligently pursue[d] their investigation." *Place*, 463 U.S. at 709.

In *Mitchell*, the 11th Circuit determined that a 21-day delay in seeking a warrant to search a computer that the defendant conceded contained child pornography was unreasonable and could not be excused by the fact that the officer in charge of the investigation was out of town during the 21-day period. The court instead noted that law enforcement made "[n]o effort . . . to obtain a warrant within a reasonable time because [they] simply believed that there was no rush." *Mitchell*, 565 F.3d at 1353. This seems to be the precise situation here.

Indeed, the Government does not attempt to excuse or explain its failure to get a warrant for Martinez Escobar's phone. Rather, the Government contends that it was entitled to seize and retain the phone as evidence in the case, and thus could get a warrant any time it wanted. But the Government is not seeking to introduce the phone itself as evidence in this case. Instead, the Government wants to introduce the contents of the phone, namely text messages and other such information. This information could not be obtained from merely looking at the outside of the phone—a warrant was required to access the information. As Martinez Escobar points out, this is not the same situation as when a large amount of money or a baggie of drugs is found during an arrest.

Those items are evidence and a warrant is unnecessary to disclose their relevance to a drug case.

The Government has cited no cases finding that a cell phone is merely "evidence" and as such can be held indefinitely and searched whenever the Government gets around to securing a warrant. And given the plethora of authority regarding delays in obtaining warrants, this failure is not surprising. It is the Government's burden to establish the reasonableness of the delay, and it has failed to do so here. Without some justification for the Government waiting eight months to seek a warrant for Martinez Escobar's phone, the delay renders the search unreasonable and therefore unconstitutional. The Motion to Suppress is granted.

CONCLUSION

Accordingly, **IT IS HEREBY ORDERED that**:

1. The Government's Motions in Limine 1-4 (Docket No. 555) are **GRANTED in part** and **DENIED without prejudice in part**;
2. The Government's Motion in Limine 5 (Docket No. 556) is **DENIED without prejudice**;
3. The Government's Motions in Limine to Admit Defendants' Prior Convictions (Docket No. 557) is **GRANTED**;
4. Defendant Jason Allen Jackson's Motions in Limine (Docket No. 560) are **GRANTED in part** and **DENIED without prejudice in part**;
5. Defendant Jason Allen Jackson's Motion to Suppress (Docket No. 547) is **DENIED**;

6. Defendant Jason Allen Jackson's Motion to Sever (Docket No. 546) is **DENIED**;

7. Defendant Catarino Cruz's Motions in Limine (Docket No. 563) are **GRANTED in part** and **DENIED without prejudice in part**;

8. Defendant Walter Ronaldo Martinez Escobar's Motions in Limine (Docket No. 561) are **DENIED without prejudice**; and

9. Defendant Walter Ronaldo Martinez Escobar's Motion to Suppress (Docket No. 548) is **GRANTED**.

Dated: Thursday, July 7, 2016

s/Paul A. Magnuson
Paul A. Magnuson
United States
District Court Judge

Appendix C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

United States of America,	)	File No. 15-CR-260 (PAM/TNL)
Plaintiff,	)	
vs.	)	St. Paul, Minnesota
	)	July 12, 2016
(1) Jesse Howard Garcia,	)	9:35 a.m.
(2) Walter Ronaldo Martinez Escobar,	)	
(7) Jason Allen Jackson, and	)	
(13) Catarino Cruz, Jr.,	)	
Defendants.	)	

BEFORE THE HONORABLE PAUL A. MAGNUSON and a Jury
UNITED STATES DISTRICT COURT JUDGE

(TRIAL – VOLUME II)

Proceedings recorded by mechanical stenography; transcript produced by computer.

LORI A. SIMPSON, RMR-CRR
(651) 848-1225

* * * * *

[254] MS. BELL: Your Honor, I just wanted to approach and provide the Court with a modified jury instruction that relates to the 404(b) as it pertains to Mr. Jackson and Mr. Cruz. I'm about to put in the copies of those certified convictions and so I wanted to give the Court the instruction as modified with the information in it. I have shared it with counsel and I don't believe they have any objection to the instruction.

MR. MALACKO: That is accurate.

MR. NESTOR: That's correct. We continue to maintain our objection to the introduction of the 404(b) evidence.

THE COURT: That I understand.

MR. NESTOR: But given the Court's ruling, we do not object to the jury instruction.

THE COURT: Okay.

MS. BELL: And I didn't know if the Court wanted to read it before or after or when --

THE COURT: Let's read it right now. Let's get it over with.

[255] MS. BELL: So that would be --

THE COURT: Stay here. I think I should also mention to the jury about that summary chart, that this is a summary of voluminous materials that are in the background and that the rules permit summaries.

MS. BELL: Very good. Thank you, Your Honor.

(In open court)

THE COURT: That was an awful noise, wasn't it? It's the first time you have had the privilege of hearing that. Nevertheless, it is something that you will hear -- if it's necessary to discuss something with counsel out of the hearing of the jury, you'll hear that awful sound.

Members of the Jury, a couple of things. One is a moment ago you were shown a summary chart. You need to -- and that was received in evidence. You need to know that summary charts of this nature can be received in evidence pursuant to the rules when there's a background of voluminous material that need not be gone through just in order to obtain the summary of them. And so that's what you saw in that particular exhibit, which I think was 114. But anyway, that's a summary chart and that's what it's about.

Now, at this point you are about to hear evidence that Defendant Catarino Cruz has been convicted of using a communication facility, a cellular telephone, in committing, causing, and facilitating the distribution of 5 grams or [256] more of methamphetamine and that Jason Jackson has been convicted of conspiracy to distribute and possession with intent to distribute in excess of 50 grams or more of methamphetamine as a result [sic] of possession of a controlled substance in the second degree.

You may consider this evidence only if you unanimously find it more likely true than not true. You decide that by considering all of the evidence and deciding what evidence is more believable. This is a lower standard than proof beyond a reasonable doubt.

If you find that the evidence has been proved, then you may consider it to help you in deciding whether Defendants Cruz and Jackson had knowledge and intent. You should give it the weight and value you believe it is entitled to receive. If you find that this evidence has not been proved, you must disregard it.

Remember, even if you find that any defendant may have committed a similar act or acts, this is not evidence that he committed such an act in this case. You may not convict a person simply because you believe that he may have committed similar acts that are not charged in the indictment. The defendants are on trial only for the crimes charged in the indictment and you may consider the evidence of other acts only on the issues stated above.

With that, proceed, Counsel.

[257] MS. BELL: Thank you. I would offer Government's Exhibits 124, 125, and 126, which are certified copies of the records the Court has just referred to.

MR. MALACKO: Your Honor, I will renew my objection made previously prior to trial.

THE COURT: Okay.

MR. NESTOR: Same position for Mr. Cruz, Your Honor.

THE COURT: The objections are noted. The objections are overruled and Exhibits 124, 125, and 126 are received.

BY MS. BELL:

Q. Special Agent Wallace, have you had an opportunity to review these documents before coming to court today?

A. Yes.

Q. Let's talk about Exhibit 124. That appears to be an Indictment here in federal court, United States District Court for the District of Minnesota; is that right?

A. That's right.

Q. And I direct your attention to the fourth person listed there. Do you see that name?

A. Yes.

Q. And who is that?

A. Jason Jackson.

Q. And based on your knowledge, is that the same Jason [258] Jackson who is in court here today?

A. Yes.

Q. Now, what was Mr. Jackson charged with that's listed here under Count 1?

A. Conspiracy to distribute and possess with intent to distribute.

Q. Now, I'm going to show you the second document which is part of that record. Is that entitled Plea Agreement and Sentencing Stipulations?

A. Yes.

Q. And looking at the second page, as part of that plea agreement did Mr. Jackson agree to plead guilty to Count 1 of the indictment?

A. Yes.

Q. And specifically Count 1 charged a conspiracy to distribute and possess with intent to distribute in excess of 50 grams of methamphetamine, a controlled substance, in violation of federal law; is that right?

A. That's right.

Q. And then last, the third document which is part of that record, is that the judgment in a criminal case?

A. Yes.

Q. And looking at that document, what date was judgment or sentencing imposed in that case?

A. October 7, 2008.

[259] Q. Now I'm going to have you look at Exhibit 125. Would I be accurate to describe that as a criminal complaint in Ramsey County, Minnesota?

A. Yes.

Q. Charging Mr. Jason Jackson, do you see that?

A. Yes.

Q. And based on your investigation and understanding, is this the same Jason Allen Jackson in court here today?

A. Yes.

Q. And in this complaint in Ramsey County is Mr. Jackson charged with second-degree drugs, possess 6

or more grams of and then there's several drugs there, cocaine, heroin, or meth?

A. Yes.

Q. Ultimately, showing you the second document, did Mr. Jackson enter a petition to enter a plea of guilty in the felony case?

A. Yes.

Q. And did he plead guilty to second-degree possession of methamphetamine?

A. Yes.

Q. And then the third document showing the judgment or the warrant of commitment, as they call it?

A. Yes.

Q. And with respect to that document, can you see the [260] offense date?

A. Yes.

Q. So the date it was committed, what's that?

A. October 18, 2007.

Q. And the date that the judgment was entered, can you see that?

A. Yes, June 2, 2009.

Q. And then last, with respect to Government's Exhibit 126, is it fair to represent Exhibit 126 as an Information in federal district court here in the District of Minnesota for an individual named Catarino Cruz, Jr.?

A. Yes.

Q. And based on your investigation, is the Catarino Cruz, Jr. in this document the same Catarino Cruz, Jr. here in court?

A. Yes.

Q. And what was Mr. Cruz charged with?

A. Using a communication facility to facilitate a drug offense.

Q. And specifically what drug?

A. Methamphetamine.

Q. And what date was this filed?

A. May 22, 2015.

Q. And what time period was the offense or date of the offense?

[261] A. November 20, 2012.

Q. And I'm showing you the second document that forms Exhibit 126. Is the second document a plea agreement of Mr. Cruz to that Information that we just looked at?

A. Yes.

Q. And is Mr. Cruz pleading to Count 1, which charges him with knowing and intentionally using a communication facility, a cellular telephone, in committing, causing, and facilitating the distribution of 5 grams or more of methamphetamine?

A. Yes.

MS. BELL: I have no further questions.

Appendix D

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Criminal No. 15-260 (PAM/TNL)

UNITED STATES OF AMERICA,

Plaintiff,

v.

(1) JESSE HOWARD GARCIA, a/k/a Jesse Javier Garcia, a/k/a J, a/k/a Penguin,

(7) JASON ALLEN JACKSON, a/k/a Jigga,

(13) CATARINO CRUZ, JR., a/k/a Mito,

Defendants.

UNITED STATES' MOTION *IN LIMINE* TO ADMIT DEFENDANTS' PRIOR CONVICTIONS

The United States of America, by and through its attorneys, Andrew M. Luger, United States Attorney for the District of Minnesota, and LeeAnn K. Bell, Assistant United States Attorney, moves *in limine* to admit at trial the following convictions against the following Defendants under Rule 404(b) of the Federal Rules of Evidence:

1. Defendant Garcia's 2006 conviction in Ramsey County, MN for possession of a controlled substance;

2. Defendant Jackson's 2008 conviction in the Federal District of Minnesota for conspiracy to distribute and possess with intent to distribute methamphetamine; and his 2009 conviction in Ramsey County, MN for second degree possession of methamphetamine; and

3. Defendant Cruz's 2012 conviction in the Federal District of Minnesota for using a communication facility to facilitate a drug offense.

I. DEFENDANTS' CONVICTIONS ARE ADMISSIBLE IN THE UNITED STATES' CASE-IN-CHIEF UNDER RULE 404(b).

Defendants' prior convictions are admissible under Federal Rule of Evidence 404(b). The Eighth Circuit has clearly and repeatedly indicated that rule 404(b) is "a rule of inclusion, permitting admission of such evidence unless it tends to prove only the defendant's criminal disposition." *United States v. Adams*, 898 F.2d 1310, 1313 (8th Cir. 1989) (*quoting United States v. O'Connell*, 841 F.2d 1408, 1422 (8th Cir. 1988)). Further, "[w]here intent is an element of the crimes charged, evidence of other acts tending to establish that element is generally admissible." *Adams*, 898 F.2d at 1313. The trial court has broad discretion when deciding whether to admit or exclude prior bad act evidence. As noted above, the trial court may find that prior bad act evidence is admissible if it is (1) relevant to a material issue, (2) supported by sufficient evidence,

(3) greater in probative value than prejudicial effect, and (4) similar in kind and not overly remote in time to the offense charged. *See United States v. Green*, 151 F.3d 1111, 1114 (8th Cir. 1998) (*citing United States v. Anderson*, 879 F.2d 369, 378 (8th Cir. 1989).

By going to trial, Defendants are placing their knowledge and intent in issue, thus, evidence of prior conviction is relevant to a material issue. This investigation involved a Federal wiretap. Because Defendants are disputing the meaning of the calls, they are directly placing their knowledge and intent at issue.

The fact that Defendants previously committed a crime that is similar in nature demonstrates intent, absence of mistake and plan. *See United States v. Grimaldo*, 214 F.3d 967, 976 (8th Cir. 2000) (court did not err in admitting testimony relating to matters outside time frame of conspiracy as events demonstrated knowledge and intent necessary to crimes charged); *United States v. Jackson*, 204 F.3d 812, 814 (8th Cir. 2000) (evidence related in time and nature of later drug dealing admissible to show continuing involvement with co-conspirator in drug distribution case); *United States v. Edwards*, 159 F.3d 1117, 1128 (8th Cir. 1998) (evidence showing defendants had previously stolen machinery from scene of arson crime to buy drugs admissible). Defendants' prior narcotics convictions rebut any claim of accident or mistake and shows their familiarity with drug dealing. They are thus probative and relevant, particularly in a case requiring a showing of knowledge. *See United States v. Haukaas*, 172 F.3d 542, 544 (8th Cir. 1999)

(district court properly admitted evidence of domestic assault from two years' prior in assault case).

Defendants' prior convictions are supported by sufficient evidence. Specifically, the United States will offer certified copies of the public records of these convictions pursuant to Federal Rule of Evidence 902(4).

The probative value of this evidence outweighs any prejudicial effect. As noted above, Rule 403 is concerned with "unfair prejudice" that inflames a jury. *See Yellow*, 18 F.3d at 1442. Here, this evidence is not about a crime so heinous as to incite the jury or divert the jury's attention from material issues at trial. Further, the evidence is highly probative of Defendants' knowledge, intent, and absence of mistake or accident—key issues in the trial of this case given that the recorded calls do not explicitly state they are discussing methamphetamine.

Finally, Defendants' convictions are similar in kind to the current charges against defendants and are not overly remote. When considering proximity in time, the Eighth Circuit "applies a standard of reasonableness, as opposed to a standard comprising an absolute number of years, in determining whether a prior offense occurred within a relevant time frame for purposes of Rule 404(b)," *Green*, 151 F.3d at 1113 (*citing United States v. Burk*, 912 F.2d 225, 228 (8th Cir. 1990)). While a ten-year period has served as a guide for courts to use in weighing the relevancy of a conviction, the fact that a conviction is more than ten years old is not an absolute bar. Indeed, courts have admitted evidence of convictions older than 10 years.

See, e.g., *United States v. Strong*, 415 F.3d 902, 905 (8th Cir. 2005); (evidence of sixteen-year-old felon in possession conviction admissible to show knowledge and intent; *United States v. McCarthy*, 97 F.3d 1562 (8th Cir. 1996), *cert. denied sub nom. Thompsen v. United States*, 519 U.S. 1139 (1997) (evidence of seventeen-year-old conviction admissible); *United States v. Holmes*, 822 F.2d 802 (8th Cir. 1987) (evidence of twelve-year-old conviction admissible); *United States v. Engleman*, 648 F.2d 473 (8th Cir. 1981) (evidence of thirteen-year-old conviction admissible). In this case, the convictions are less than ten years old, and therefore, not overly remote.

* * * * *

Appendix E

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
CR 15-260 (7) (PAM/TNL)

UNITED STATES OF AMERICA,	)
	) **DEFENDANT**
Plaintiff,	) **JACKSON'S**
	) **OPPOSITION**
v.	) **TO MOTION**
	) **OF UNITED**
	) **STATES TO**
JASON ALLEN JACKSON,	) **ADMIT**
	) **JACKSON'S**
Defendant.	) **PRIOR**
	) **CONVICTIONS**

* * * * * * * * * *

The Defendant, Jason Allen Jackson, by and through his counsel, Richard J. Malacko, states as follows in Opposition to the Motion of the United States to Admit Defendant Jackson's Prior Convictions:

By motion dated June 27, 2016 (ECF #557), the Government seeks to introduce Defendant Jackson's 2008 conviction in the Federal District of Minnesota for conspiracy to distribute and possess with intent to distribute methamphetamine and his 2009 conviction in Ramsey County, Minnesota for second degree possession of methamphetamine.

In general, Rule 404(b) excludes character evidence: "Evidence 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 … intent, … knowledge, … absence of mistake, or lack of accident." In that case, evidence is admissible 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. *United States v. Green*, 151 F.3d 1111, 1113 (8th Cir. 1998).

Count I charges Defendant Jackson with conspiracy to distribute methamphetamine. The evidence against Defendant Jackson is very limited and consists of intercepted phone calls he had with his cousin, Jesse Garcia. The Government's motion argues that admitting prior narcotics convictions rebut any claim of accident or mistake and shows familiarity with drug dealing. Defendant Jackson is not claiming that his phone conversations with Mr. Garcia were an accident or a mistake. They were phone calls between relatives. The Government is alleging that the phone calls were criminal in nature and that burden is on the Government to prove.

Count III charges Mr. Jackson with possession with intent to distribute a controlled substance. The allegations are that the Hertz rental car Defendant Jackson and another person were travelling in contained methamphetamine wrapped in tape and that it was stored behind the carpet in the trunk. The vehicle was not rented by Defendant Jackson and it was beyond the rental agreement's rental period. The

government further contends that Defendant Jackson's phone conversation with his parents that his "stuff was in the trunk" means methamphetamine, although he clearly said personal shit, clothes, hygiene (products), watches. By pleading not guilty Defendant is saying the Government's evidence is insufficient as a matter of law.

Defendant Jackson opposes the Government's attempt to admit his prior convictions. Admitting Defendant's prior convictions would have no probative value in furtherance of a permitted purpose and is substantially outweighed by the prejudice to Defendant Jackson.

Dated this 5th day of July, 2016

MALACKO LAW OFFICE

s/Richard J. Malacko

Richard J. Malacko #184421
Attorney for Defendant Jackson
7449 80th Street South
P.O. Box 135
Cottage Grove, MN 55016
651 340-0488
rick@malackolaw.com

Appendix F

In the
UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 17-1059

Criminal

UNITED STATES OF AMERICA,

Appellee,

v.

JASON ALLEN JACKSON,

Appellant.

Appeal from the United States District Court for the
District of Minnesota

BRIEF OF APPELLANT

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

* * * * *

III. THE COURT ERRED IN ADMITTING EVIDENCE OF MR. JACKSON'S PRIOR CONVICTIONS PURSUANT TO FED. R. EVID. 404(b)

A. Standard of Review and Legal Standard

Under Fed. R. Evid. 404(b)(1), "[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." Such evidence may be admitted to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." *Id.* The admission of evidence of past crimes is reviewed for abuse of discretion and will not be reversed "unless the evidence clearly had no bearing on the case and was introduced solely to prove the defendant's propensity to commit criminal acts." *United States v. Williams*, 796 F.3d 951, 958 (8th Cir. 2015) (quoting *United States v. Bassett*, 762 F.3d 681, 687 (8th Cir. 2014)) (internal quotation marks omitted), *cert. denied*, --- U.S. ---, 136 S. Ct. 1450 (2016).

Although the purpose of the rule is for "inclusion rather than exclusion" and the rule allows "evidence of other crimes or acts relevant to any issue in the trial," the evidence should not be admitted if "it tends to prove only criminal disposition." *United States v. Oaks*, 606 F.3d 530, 538 (8th Cir. 2010) (quoting *United States v. Simon*, 767 F.2d 524, 526 (8th Cir. 1985)) (internal quotation marks omitted). Pursuant to *Williams*,

supra, the four-part test to determine the admissibility of 404(b) evidence is to examine whether "(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." 796 F.3d at 959 (quoting *United States v. Robinson*, 639 F.3d 489, 494 (8th Cir. 2011)) (internal quotation marks omitted).

B. Mr. Jackson's Prior Convictions Were Improper Propensity Evidence and Were More Prejudicial Than Probative

The District Court abused its discretion by admitting Exhibits 124 and 125, which were certified copies of Mr. Jackson's prior convictions from 2008 and 2009. On balance, those convictions do not meet the *Williams* test, and consequently should not have been admitted against Mr. Jackson.

The 2008 federal conviction for conspiracy to distribute methamphetamine predated the charged conduct by seven years. Consequently, it was too remote in time relative to the crime charged to be relevant to a material issue. *See, e.g.*, *United States v. Sanders*, 668 F.3d 1298, 1315 (11th Cir. 2012) (finding a 22-year-old prior conviction too old to be admissible). The 2009 second degree possession of six grams or more of Cocaine/Heroin/Meth conviction is even less relevant. Not only does that conduct predate the charged offenses by six years, but the charges are also sufficiently factually distinct—simple possession of a myriad of drugs versus conspiracy to distribute methamphetamine and possession with intent to

distribute methamphetamine—that "[a]llowing the government to admit such a remote and factually dissimilar conviction would effectively create a *per se* rule of admissibility of any prior drug conviction in drug conspiracy cases—no matter how old or how different." *Id.* (holding that "the district court abused its discretion by admitting" a "prior conviction for a street-level sale of 1.4 grams of marijuana" that "had virtually no probative value in establishing [the defendant's] intent to enter into [an international] conspiracy" "to traffic 153 kilograms of cocaine" given "the lengthy time span, extremely disparate amounts of different drugs, and the materially differing roles in the offenses").

Moreover, notwithstanding *United States v. Logan*, 121 F.3d 1172, 1178 (8th Cir. 1997) and its progeny, other circuits have held that a simple "possession conviction is inadmissible to prove intent to distribute." *See, e.g.*, *United States v. Davis*, 726 F.3d 434, 445 (3d Cir. 2013) (holding that such prior "convictions should not have been before the jury—not as evidence of knowledge, not as evidence of intent"); *United States v. Haywood*, 280 F.3d 715, 721 (6th Cir. 2002) (holding that "possession of a small quantity of crack cocaine for personal use on one occasion . . . sheds no light on whether [the defendant] intended to distribute crack cocaine in his possession on another occasion nearly five months earlier."); *United States v. Santini*, 656 F.3d 1075, 1078 (9th Cir. 2011) (holding that prior convictions "for simple possession" were "not similar to the importation of marijuana and thus lack[] probative value"); *United States v. Ono*, 918 F.2d 1462, 1465 (9th

Cir. 1990) (distinguishing between possession and distribution in *dicta*); *United States v. Monzon*, 869 F.2d 338, 344 (7th Cir. 1989) (concluding that evidence of the defendant's prior marijuana possession was not probative of his intent to distribute cocaine); *United States v. Marques*, 600 F.2d 742, 751 (9th Cir. 1979) (distinguishing between "personal use versus resale"); *cf. Enriquez v. United States*, 314 F.2d 703, 717 (9th Cir. 1963) (concluding that a trial was unfair because the court had admitted evidence of marijuana possession to show intent to sell heroin). Because the reasoning of these decisions from other circuits is strongly persuasive, the Eighth Circuit should likewise hold in this case that admitting the 2009 simple possession conviction as 404(b) evidence to prove Mr. Jackson's intent was an abuse of discretion because personal use and intent to distribute are substantially and prejudicially different. Additionally, possessing enough cocaine/heroin/meth for use six years before the charged conduct does not show that Mr. Jackson intended to distribute methamphetamine in 2015.

Most significantly, with regard to *Williams* factors (1) and (4), *i.e.*, the requirements that the proffered evidence be relevant to a material issue and that its potential prejudice does not substantially outweigh its probative value, the District Court made no record of its reasoning beyond the following: "The prior convictions listed above are relevant and probative in this matter to establish motive, intent, and knowledge, among other matters. All of these convictions are therefore admissible." (ECF 592 at 3.) So general was the District Court's ruling on this matter that it made

no effort to distinguish between or to particularly address Mr. Jackson's 2008 and 2009 convictions, let alone Mr. Garcia's 2006 Ramsey County conviction for possession of a controlled substance and co-defendant Catarino Cruz, Jr.'s 2012 federal conviction for using a communication facility to facilitate a drug offense. (*Id.* at 2-3.) Instead, by way of the foregoing two sentences, the District Court admitted wholesale all four convictions for three separate defendants facing differing counts and alleged roles in the charged offenses. Moreover, the District Court did not make any record of its reasoning addressing *Williams* factors (1) and (4) either at the July 7, 2016 status conference and motions hearing or at the time that Exhibits 124 and 125 were admitted against Mr. Jackson at trial. (*See generally* July 7, 2016 Transcript of Status Conference and Motions Hearing; T.T. at 257.)

In *United States v. Lee*, 724 F.3d 968 (7th Cir. 2013), the defendant (Lee) appealed the District Court's admission of his 2004 conviction for possessing more than 15 but less than 100 grams of cocaine at his trial for conspiring to distribute and to possess with the intent to distribute 50 or more grams of a substance containing cocaine base. 724 F.3d at 970, 973-74. Aside from the foregoing 404(b) evidence, the evidence against Lee included testimony by a co-conspirator (Hurt) that he had had engaged in multiple drug transactions with Lee, telephone records corroborating Hurt's testimony, confidential informant testimony and recordings regarding controlled buys from Hurt, video of Lee and his vehicle in the vicinity of a controlled buy, and a plastic bag—which was recovered from a vehicle

Lee had been driving that was impounded and later searched—which bore Lee's fingerprint and contained seven smaller bags with one-ounce quantities of crack cocaine (210 grams total, worth approximately $21,000) and one bag containing a smaller quantity of powder cocaine. *Id.* at 971-73. Although Lee's counsel was successful in challenging the evidence at his first trial, resulting in a hung jury on the conspiracy and possession charges, a jury convicted Lee of both charges at a second trial wherein, in addition to the balance of the evidence summarized above, the foregoing 404(b) evidence was also admitted over Lee's objection for the purpose of proving his knowledge, intent, and absence of mistake. *Id.* at 973-74.

On appeal, Lee argued that the District Court abused its discretion by admitting into evidence his 2004 conviction for the possession of crack cocaine. *Id.* at 975. Applying the essentially same four factors as set forth in *Williams*,[2] the Court noted "that admission

---

[2] The Seventh Circuit stated that evidence of a defendant's uncharged, wrongful act must satisfy four criteria in order to be properly admitted:

> (1) the evidence is directed toward establishing a matter in issue other than the defendant's propensity to commit the crime charged;
>
> (2) the evidence shows that the other act is similar enough and close enough in time to be relevant to the matter in issue;
>
> (3) the evidence is sufficient to support a jury finding that the defendant committed the other act; and
>
> (4) the probative value of the evidence is not substantially

of prior drug crimes to prove intent to commit present drug crimes has become too routine" and indicated its concern that "[c]loser attention needs to be paid to the reasons for using prior drug convictions—to lessen the danger that defendants …will be convicted because the prosecution invited, and the jury likely made, an improper assumption about propensity to commit drug crimes." *Id.* (internal citation and quotation signals omitted). "Simply because a subject like intent is formally at issue when the defendant has claimed innocence and the government is obliged to prove his intent as an element of his guilt does not automatically open the door to proof of the defendant's other wrongful acts for purposes of establishing his intent." *Id.* at 976 (internal citation and quotation signals omitted). Instead, "[t]he court still must weigh the probative worth of the evidence against its potential for prejudice" and "must consider the chain of logic by which the jury is being asked to glean the defendant's knowledge, intent, *etc.* from proof of his prior misdeeds" because, "[u]nless there is a persuasive and specific answer to th[at] question … then the real answer is almost certainly that the evidence is probative only of propensity." *Id.* at 976-77 (internal citation and quotation signals omitted).

The *Lee* Court lamented the District Court's "unfortunate" decision "not [to] engage in an on-the-

---

outweighed by the danger of unfair prejudice.

Lee, 724 F.3d at 975 (citing *United States v. Shackleford*, 738 F.2d 776, 779 (7th Cir.1984), *overruled in part on other grounds by Huddleston v. United States*, 485 U.S. 681 (1988); other citations omitted).

record evaluation of the purposes for which the government offered the evidence, the relevance of Lee's conviction to those purposes, or of the prejudice posed by the conviction as balanced against its probative worth[,]" because, *inter alia*, "articulating the rationale for admitting other-acts evidence also helps to ensure that the district judge is genuinely exercising his discretion and observing the limits of Rule 404(b) by thinking through the relevance of and the potential prejudice posed by the proffered evidence." *Id.* at 977-78. Although the Seventh Circuit acknowledged that the District Court had "identif[ied] a facially valid purpose for the admission of the evidence[,]" it nevertheless held that that "is where the court's duty begins, not where it ends" because, "[w]hen one looks beyond the purposes for which the evidence is being offered and considers what inferences the jury is being asked to draw from that evidence, and by what chain of logic, it will sometimes become clear … that despite the label, the jury is essentially being asked to rely on the evidence as proof of the defendant's propensity to commit the charged offense." *Id.* at 978 (citation omitted).

Reviewing the evidence before it, the Court of Appeals ruled that "in all three respects—knowledge, intent, and absence of mistake—the 404(b) evidence had limited relevance (and in the case of mistake, none) to begin with"[3] because "Lee's defense did not

---

[3] Noting Lee's defense that, because the impounded car was not his, the cocaine was not his either, the *Lee* Court reasoned that "Lee was not placing his knowledge or intent into specific dispute by contending, for example, that he knew there was an off-white,

specifically place his knowledge or intent in dispute by contending, for example, that he did not know anything about how the cocaine trade worked or that while he possessed the cocaine he had no intent to sell it." *Id.* at 979-80. Particularly because "Lee's prior conviction was for straight possession of crack cocaine," the Seventh Circuit found that "his conviction was relevant only in the sense of establishing his propensity to engage in cocaine-related offenses." *Ibid.* The *Lee* Court also reasoned that the District Court's limiting instruction "advis[ing] [that] the jury . . . could consider Lee's prior conviction only insofar as it bore on Lee's 'knowledge, intent, and absence of mistake'" did not cure the error because "the only sense in which the conviction was probative of those subjects was as proof of his propensity to commit the charged cocaine offenses." *Id.* at 981. Holding that "neither the nature of a charge nor the nature of a defense automatically renders proof of a defendant's other crimes or bad acts admissible[,]" the Court of Appeals ruled that admission of the prior convictions was a non-harmless abuse of discretion and that Lee was entitled to a new trial because "the jury was … asked to evaluate the case based not on what the evidence showed Lee was

---

chunky substance in the car but he did not realize that was what crack cocaine looked like, or that he knowingly possessed the cocaine but solely for his own personal use and with no intent to distribute it[,]" "[n]or was Lee claiming to have made a mistake in the usual sense[,]" *e.g.*, "that he had grabbed someone else's bag (in which the cocaine was discovered) and put it into the trunk of the car thinking it was his." 724 F.3d at 978 (citations omitted). Thus, although "Lee effectively did posit that he was in the wrong place at the wrong time, … he did not contend that he took some action inadvertently or unwittingly." *Id.* (citations omitted).

doing at the time of the charged offense, but rather based on what his conviction five years earlier showed about his propensity to commit crack cocaine offenses." *Id.* at 981-83.

Lee is highly analogous to the present matter. Here, the District Court's admission of Exhibits 124 and 125 was likewise a non-harmless abuse of discretion, especially considering that Counts 1 and 3 were tried jointly against Mr. Jackson. By allowing the admission of irrelevant, old prior convictions at the joint trial of two unrelated drug offenses, the jury was ultimately allowed to draw negative character inferences about Mr. Jackson that were prejudicial and without probative value. As in *Lee*, the District Court has left no record as to *Williams* factors (1) and (4) from which this Court can surmise that its evidentiary ruling was the result of a genuine exercise of discretion within the limits of 404(b). The District Court's overbroad reference to "motive, intent, and knowledge, among other matters" and bald, conclusory assertion that the prior convictions are "relevant" (ECF 592 at 3) appears to be no more than the identification of a facially valid purpose without consideration of what inferences the jury would be asked to draw from the evidence, the true core of which was Mr. Jackson's propensity for criminality. From the state of the record, it appears that the District Court concluded that the nature of charges and the nature of the defenses automatically and erroneously rendered proof of Mr. Jackson's other crimes or bad acts admissible. Like Lee's defenses, Mr. Jackson's rejoinder to this prosecution—that he did not enter into an agreement

with Mr. Garcia to purchase 50 pounds of methamphetamine and that he did not knowingly possess the 445 grams of methamphetamine recovered from the rental car (T.T. at 765-82)—"did not specifically place his knowledge or intent in dispute by contending, for example, that he did not know anything about how the cocaine trade worked or that while he possessed the cocaine he had no intent to sell it." *Lee*, 724 F.3d at 979-80.

Thus, as in *Lee*, Mr. Jackson's 2008 and 2009 prior convictions had limited relevance that was "outweighed by the inherent risk of prejudice that such evidence pose[d] to" Mr. Jackson, and the District Court's limiting instruction was not curative as to the stated issues of "knowledge and intent" because "the only sense in which the conviction[s were] probative of those subjects was as proof of his propensity to commit the charged … offenses." *Id.* at 976, 981. In light of this non-harmless abuse of discretion, this Court should vacate Mr. Jackson's convictions and remand the matter for a new trial.

* * * * *

Appendix G

Nos. 17-1014, 17-1018, 17-1059, 17-1170, 17-1172

In the United States Court of Appeals
For the Eighth Circuit

UNITED STATES OF AMERICA,

APPELLEE,

V.

WALTER RONALDO MARTINEZ ESCOBAR,
JOSE MANUEL ROJAS-ANDRADE,
JASON ALLEN JACKSON
TRINIDAD JESUS GARCIA,
CATARINO CRUZ, JR.,

APPELLANTS.

APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MINNESOTA

BRIEF OF APPELLEE

GREGORY R. BROOKER
Acting United States Attorney
LEEANN K. BELL
Assistant U.S. Attorney
U.S. Attorney's Office
District of Minnesota

600 U.S. Courthouse
300 South Fourth Street
Minneapolis, MN 55415
(612) 664-5600

ATTORNEYS FOR APPELLEE

* * * * *

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING JACKSON'S PRIOR DRUG CONVICTIONS UNDER RULE 404(b).

Jackson claims the District Court abused its discretion in admitting evidence of his prior drug convictions under Federal Rule of Evidence Rule 404(b) because (1) they were too remote in time; and (2) his possession conviction was not similar in kind to the drug trafficking charges in this case. This Court reviews evidentiary rulings for an abuse of discretion and even when an evidentiary ruling is improper, the Court will only reverse if the ruling affected substantial rights or had more than a slight influence on the verdict. *See United States v. Robinson*, 639 F.3d 489, 491 (8th Cir. 2011).

Pursuant to Rule 404(b), the District Court permitted evidence of Jackson's two prior drug convictions: (1) a 2008 federal conviction for conspiring to distribute 50 grams or more of methamphetamine; and (2) a 2009 state conviction for possessing of more than 6 grams (in total 19 grams) of methamphetamine.

During trial, both the Court and the United States cautioned the jury regarding the use of the prior convictions. *See* T at 255-56; 744.

This Court has repeatedly held that rule 404(b) is "a rule of inclusion, permitting admission of such evidence unless it tends to prove only the defendant's criminal disposition." *United States v. Adams*, 898 F.2d 1310, 1313 (8th Cir. 1989) (quoting *United States v. O'Connell*, 841 F.2d 1408, 1422 (8th Cir. 1988)). The trial court may find that prior bad act evidence is admissible if it is (1) relevant to a material issue, (2) supported by sufficient evidence, (3) greater in probative value than prejudicial effect, and (4) similar in kind and not overly remote in time to the offense charged. *See United States v. Green*, 151 F.3d 1111, 1114 (8th Cir. 1998) (citing *United States v. Anderson*, 879 F.2d 369, 378 (8th Cir. 1989)).

First, Jackson claims the convictions—only 8 and 6 years prior to the present offense—were too remote in time. Generally, courts have been "reluctant" to uphold admission of cases occurring more than 13 years prior to the present offense. *See United States v. Walker*, 470 F.3d 1271, 1274 (8th Cir. 2006). However, whether a conviction is too remote in time is determined on a case-by-case basis. *Id.* For example, in *Walker*, although the prior conviction was 18 years old, Walker was incarcerated for 10 years during that time, and thus, the separation between the conviction and the present offense was not as remote, and thus, was admissible. *Id.* In this case, not only are the convictions well within the 13 years, Jackson was sentenced to 80 months' imprisonment for his federal

conviction during that time, further lessening the separation of time between the prior offenses and the present conduct. *See United States v. Fang*, 844 F.3d 775, 780 (8th Cir. 2016). Thus, the District Court did not abuse its discretion admitting prior convictions that were less than 10 years old.

Second, Jackson claims his 2009 drug possession conviction was inadmissible under Rule 404(b) in a case involving the distribution of drugs. *See* Jackson Br. at 31. As he acknowledges, this argument is contrary to the precedent of this Court. *See United States v. Robinson*, 639 F.3d 489, 494 (8th Cir. 2011); *United States v. Horton*, 756 F.3d 569, 579 (8th Cir. 2014) ("It is settled in this circuit 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.'" (quoting *Robinson*)). The District Court did not abuse its discretion in admitting Jackson's prior drug possession conviction.

* * * * *