No. 18-5038

IN THE SUPREME COURT OF THE UNITED STATES

NEIL SWEENEY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

JOSHUA K. HANDELL
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the district court abused its discretion in determining that evidence of petitioner's prior acts of child molestation was admissible under Federal Rules of Evidence 414 and 403.

IN THE SUPREME COURT OF THE UNITED STATES

No. 18-5038

NEIL SWEENEY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-25) is reported at 887 F.3d 529.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 2018. The petition for a writ of certiorari was filed on June 26, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted on two

counts of distribution and possession of child pornography, in violation of 18 U.S.C. 2252A. Pet. App. 5; Judgment 1. The district court sentenced petitioner to 204 months of imprisonment, to be followed by ten years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1-25.

1. In December 2014, petitioner, using the alias "irishrebble," began communicating with fellow user "localboy" on GigaTribe, an online peer-to-peer network frequently used for the exchange of child pornography. Pet. App. 2-3. In a conversation between irishrebble and localboy, petitioner expressed an interest in young boys between the ages of eight and 15. Id. at 3. Several months later, petitioner gave localboy the password to petitioner's file folder on GigaTribe, which contained explicit images and videos of children, in exchange for reciprocal access to localboy's folder. Ibid.

Unbeknownst to petitioner, localboy was in fact undercover FBI Agent Kevin Matthews. Pet. App. 2. Upon receiving access to petitioner's file folder, Agent Matthews began downloading the 239 files contained therein. Id. at 3. Agent Matthews's access was cut off about 90 seconds later -- presumably once petitioner discovered that the reciprocal password Agent Matthews had provided was unusable -- but he managed to download 30 images and videos containing child pornography. Ibid. Among the files Agent Matthews downloaded from petitioner's folder were videos that

appeared to feature boys in petitioner's preferred age group, such as "11yrpushedbj.mpg," "pthcfrominside10yo-amusthave.mpg," and "11suck13_with_cum.mpg." 9/23/16 Tr. 123-124.

In the weeks following this encounter, FBI agents identified a series of connections between petitioner and the "irishrebble" GigaTribe account. Agents traced the IP address used by irishrebble on the date of the file transfer to the boarding house in Worcester, Massachusetts, where petitioner lived. Pet. App. 3-4. Petitioner used the irishrebble handle on other social networking platforms, including LinkedIn and Twitter, and for his Yahoo email account. Id. at 4. Petitioner's email address -- irishrebble@yahoo.com -- was linked to his GigaTribe account. Ibid. And the password for the irishrebble GigaTribe account contained a number sequence corresponding to petitioner's birthday. Ibid.

Based on these connections, officers obtained a warrant and conducted a search of petitioner's residence. Pet. App. 4. They recovered a damaged Chromebook computer and a Dell laptop computer from petitioner's bedroom. Ibid. The Dell laptop, which was assigned the same IP address that irishrebble had used on the date of the GigaTribe file transfer, contained temporary internet image files depicting young boys engaged in sexual activity. Ibid. Petitioner was arrested the same day. Id. at 5.

2. A federal grand jury indicted petitioner on one count of distribution of child pornography, in violation of 18 U.S.C. 2252A(a)(2) and (b)(1); and one count of possession of child pornography including one or more images that involved a prepubescent minor, in violation of 18 U.S.C. 2252A(a)(5)(B) and (b)(2). Indictment 1-2.

a. Before trial, the government moved to admit evidence of petitioner's prior sex offenses, including his 1995 guilty plea to two counts of indecent assault and battery on two boys, ages nine and 12. The government relied, as pertinent here, on Federal Rule of Evidence 414, which provides that "[i]n a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation. The evidence may be considered on any matter to which it is relevant." Fed. R. Evid. 414(a). Petitioner filed an opposing motion in limine to preclude admission of the evidence related to his prior convictions, arguing that the evidence should be excluded under Federal Rule of Evidence 403 on the theory that it was unfairly prejudicial and could mislead the jury.

The district court granted the government's motion to admit petitioner's 1995 convictions under Rule 414 and denied petitioner's motion. See D. Ct. Doc. 150 (Sept. 28, 2016).

b. At trial, the district court overruled petitioner's renewed objection to the government's Rule 414 evidence. Pet.

App. 13 & n.5. To avoid in-court testimony on his prior acts of child molestation, petitioner stipulated to the 1995 convictions. Id. at 13. Immediately following entry of the stipulation, the court instructed the jury that the evidence was offered "for a very limited purpose" -- namely, to decide "whether or not the defendant had a propensity []or an inclination to behave in a particular way" and "to identify the defendant as irishrebble." Ibid. (brackets in original). The court specifically instructed the jury that petitioner was "on trial for the events of April 9th, 2015, only," and that he was "not on trial for any other act, conduct, or offense not charged in the indictment." Ibid.

The jury found petitioner guilty on both counts. Pet. App. 5. The district court sentenced petitioner to 204 months of imprisonment, to be followed by ten years of supervised release. Ibid.

3. The court of appeals affirmed. Pet. App. 1-25. As relevant here, the court determined that the district court had not abused its discretion in admitting the evidence of petitioner's 1995 convictions. Id. at 12-17. It explained that Rule 414 "overrides the ban on propensity inferences in [the] specific situation" of child-molestation charges, by permitting district courts to admit evidence that a defendant "committed any other child molestation" and allowing the jury to consider such evidence "on any matter to which it is relevant." Id. at 14-15 (citations

omitted). The court of appeals added that, while the admissibility of Rule 414 evidence "is still restricted by Fed. R. Evid. 403, which lets a judge exclude relevant evidence if its probative value is substantially outweighed by its unfairly prejudicial nature," Rule 414 evidence is subject to "no heightened or special test" when a court conducts the balancing that Rule 403 requires. Id. at 15 (citations and internal quotation marks omitted).

The court of appeals rejected petitioner's argument that the probative value of his 1995 convictions for sexually abusing two young boys was substantially outweighed by unfair prejudice. Pet. App. 15-17. Although the court acknowledged that petitioner's 1995 offenses were not the same as his current child-pornography offenses, it determined that the evidence was properly offered as proof of petitioner's propensity to sexualize boys between the ages of eight and 15 and his identity as GigaTribe user irishrebble, who had told Agent Matthews that he was interested in boys within that age range. Id. at 16-17. The court further determined that, although the evidence of prior convictions "was surely prejudicial," it was not "unfairly prejudicial such that it violated Fed. R. Evid. 403." Id. at 17.

ARGUMENT

Petitioner renews his contention (Pet. 4-11) that the district court abused its discretion in admitting evidence of his prior convictions for child molestation under Federal Rules of

Evidence 414 and 403. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or of another court of appeals. The Court has recently denied a petition for a writ of certiorari presenting a similar issue, Strong v. United States, 137 S. Ct. 1578 (2017) (No. 16-6861), and should do the same here.

1. The court of appeals' decision correctly applied the Federal Rules of Evidence to the circumstances of this case.

a. Federal Rule of Evidence 414 was enacted directly by Congress as part of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320935, 108 Stat. 2135-2137. It creates an exception to the general prohibition, under Federal Rule of Evidence 404(b), against admitting evidence of other acts to show a defendant's propensity to commit the charged offense. In its current form, Rule 414 provides that in a child-molestation prosecution, the court "may admit evidence that the defendant committed any other child molestation," which "may be considered on any matter to which it is relevant." Fed. R. Evid. 414(a); see also Fed. R. Evid. 413 (authorizing admission of other acts of sexual assault against criminal defendant charged with that offense); Fed. R. Evid. 415 (extending Rules 413 and 414 to civil cases).

At the same time, Federal Rule of Evidence 403 provides that a court "may exclude relevant evidence if its probative value is

substantially outweighed by a danger of * * * unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Like other courts of appeals, the court of appeals accepted that Rule 403 applies to evidence admitted pursuant to Rule 414. Pet. App. 15; see, e.g., United States v. Hawpetoss, 478 F.3d 820, 824 & n.9 (7th Cir. 2007) (citing cases).

b. The court of appeals correctly determined that the district court did not abuse its discretion in admitting evidence of petitioner's 1995 convictions under those Rules. Petitioner has not disputed that Rule 414 authorized admission of that evidence. Rule 414 defines "child molestation" to include, inter alia, "any conduct prohibited by 18 U.S.C. chapter 109A and committed with a child," and "any conduct prohibited by 18 U.S.C. chapter 110." Fed. R. Evid. 414(d)(2)(A)-(B). The statutory provision under which petitioner was charged and convicted, 18 U.S.C. 2252A, appears in Chapter 110 of Title 18. And petitioner's 1995 convictions for indecent assault and battery involved his touching of children's genitals with his hand, which is conduct punishable under Chapter 109A of Title 18. Moreover, although petitioner argued (Pet. 3) that the Rule 414 evidence should have been excluded under Rule 403, the district court did not abuse its discretion in finding that the evidence of petitioner's prior child-molestation offenses was not unfairly prejudicial on the

facts of this case. Pet. App. 17, 19; see General Elec. Co. v. Joiner, 522 U.S. 136, 141-143 (1997) (appellate court reviews evidentiary rulings for abuse of discretion).

The Rule 403 balancing test strongly favored admission of the evidence of petitioner's prior convictions. At trial, petitioner disputed through cross-examination and jury arguments that he was, in fact, GigaTribe user "irishrebble." See Gov't C.A. Br. 14 (collecting record citations). Evidence that petitioner had a history of molesting young boys in the eight-to-15-year-old age range -- the same demographic that irishrebble admitted to favoring in his conversation with Agent Matthews -- was highly probative on the question of petitioner's identity. The evidence also tended to show petitioner's propensity to engage in crimes involving the sexualization of young boys -- the very kind of proof that Congress designed Rule 414 to allow. At the same time, nothing on the other side of the Rule 403 ledger required that the evidence be excluded. The effectuation of Congress's purpose to encourage propensity evidence cannot in itself be considered unfairly prejudicial. And the district court addressed any other potential prejudice concerns by instructing the jury multiple times that the Rule 414 evidence could be considered only for the "very limited purpose" of showing petitioner's "propensity * * * to behave in a particular way" and his "identi[t]y * * * as irishrebble." Pet. App. 13, 19 n.10; see Dowling v. United States, 493 U.S. 342, 353

(1990) (affirming the admission of prior-conduct evidence as "circumstantially valuable in proving petitioner's guilt" and permissible "[e]specially in light of the limiting instructions provided by the trial judge"); cf. Weeks v. Angelone, 528 U.S. 225, 234 (2000) ("A jury is presumed to follow its instructions.").

2. Petitioner does not identify any decision of another court of appeals holding that a district court abused its discretion by admitting Rule 414 evidence under circumstances similar to those here.

To the contrary, in virtually every decision petitioner cites (Pet. 5-9), the court of appeals affirmed the admission of evidence under Rule 414 or companion Rules 413 or 415 (which provide for the admission of similar evidence). See United States v. Larson, 112 F.3d 600, 605 (2d Cir. 1997); United States v. Kelly, 510 F.3d 433, 438 (4th Cir. 2007), cert. denied, 552 U.S. 1329 (2008); United States v. Lewis, 796 F.3d 543, 548 (5th Cir. 2015); United States v. Dillon, 532 F.3d 379, 389 (5th Cir. 2008); United States v. Seymour, 468 F.3d 378, 385-386 (6th Cir. 2006); Hawpetoss, 478 F.3d at 827; United States v. Julian, 427 F.3d 471, 487 (7th Cir. 2005), cert. denied, 546 U.S. 1220 (2006); United States v. Gabe, 237 F.3d 954, 960 (8th Cir. 2001); United States v. LeMay, 260 F.3d 1018, 1030 (9th Cir. 2001), cert. denied, 534 U.S. 1166 (2002); United States v. Meacham, 115 F.3d 1488, 1495 (10th Cir. 1997); United States v. Enjady, 134 F.3d 1427, 1433 (10th Cir.),

cert. denied, 525 U.S. 887 (1998); United States v. Woods, 684 F.3d 1045, 1065 (11th Cir. 2012); United States v. McGarity, 669 F.3d 1218, 1245 (11th Cir.), cert. denied, 568 U.S. 921, and 568 U.S. 955, and 568 U.S. 989 (2012). Two cited decisions in which the court of appeals found no abuse of discretion in the district court's own decision in the first instance to exclude certain evidence likewise do not conflict with the decision below in this case. See Johnson v. Elk Lake Sch. Dist., 283 F.3d 138, 157 (3d Cir. 2002); United States v. Guardia, 135 F.3d 1326, 1332 (10th Cir. 1998).

Petitioner cites only one case (Pet. 8) in which a court of appeals reversed a district court's admission of such evidence. See United States v. Loughry, 660 F.3d 965 (7th Cir. 2011). But the circumstances of that case were significantly different from those presented here. In Loughry, the defendant was convicted of distributing "lascivious exhibition" child pornography -- images that are pornographic in nature but do not, unlike "hard core" pornography, depict sexual contact. Id. at 967. At trial, the government sought to introduce as Rule 414 evidence several uncharged hard-core pornographic videos discovered in the defendant's home depicting, for example, the raping of prepubescent girls. Id. at 967, 974. The district court refused to view the videos before admitting them into evidence, declined to explain its reasoning for admission, and failed to offer a

contemporaneous limiting instruction. Id. at 972, 975. Under those circumstances, the court of appeals found an abuse of discretion in admitting the evidence, which it deemed "highly inflammatory" and only "minimal[ly] probative," given, inter alia, that the internet forum for his alleged distribution crimes banned hard-core pornography. Id. at 975. That decision does not demonstrate that the Seventh Circuit would find an abuse of discretion in the district court's careful approach here.

3. Petitioner nevertheless contends (Pet. 4-5) that further review is warranted on the theory that the courts of appeals have developed different doctrinal approaches in applying Rule 403 to evidence offered under Rule 414 (or Rules 413 and 415). Consistent with the highly factbound and discretionary nature of a district court's application of Rule 403, however, the courts of appeals have generally rejected any mechanical or formalistic approaches to the inquiry, either by expressly endorsing a circumstance-specific approach or by providing an explicitly nonbinding list of relevant considerations. See, e.g., Kelly, 510 F.3d at 437 (identifying a nonexclusive set of factors and "defer[ring] to the district court's Rule 403 balancing using these or other factors unless it is an arbitrary or irrational exercise of discretion") (emphasis added; citation and internal quotation marks omitted); Hawpetoss, 478 F.3d at 825-826 (identifying a "flexible approach" as appropriate in light of the court's "hesitat[ion] to cabin

artificially the discretion of the district courts through the imposition of a relatively rigid multi-factor test"); Johnson, 283 F.3d at 156 (identifying particular factors as "relevant" but noting that "the Rule 403 balancing inquiry is, at its core, an essentially discretionary one that gives the trial court significant latitude"); Guardia, 135 F.3d at 1331 (identifying certain factors among "innumerable considerations" that a district court might take into account); LeMay, 260 F.3d at 1027-1028 (listing factors to be considered but noting that those factors are "not exclusive, and that district judges should consider other factors relevant to individual cases"); see also Dillon, 532 F.3d at 387 (identifying "an especially high level of deference" as appropriate) (citation omitted).

Although some courts of appeals have identified particular factors that district courts must evaluate, courts generally consider those and similar factors in the ordinary course in any event. Compare, e.g., LeMay, 260 F.3d at 1028 (instructing courts to consider "(1) the similarity of the prior acts to the acts charged, (2) the closeness in time of the prior acts to the acts charged, (3) the frequency of the prior acts, (4) the presence or lack of intervening circumstances, and (5) the necessity of the evidence beyond the testimonies already offered at trial") (citation and internal quotation marks omitted), with United States v. Luger, 837 F.3d 870, 874-875 (8th Cir. 2016) (considering

similar factors), and United States v. Majeroni, 784 F.3d 72, 76 (1st Cir. 2015) (same), and McGarity, 669 F.3d at 1243-1244 (same). In any event, petitioner does not demonstrate that, in practice, the courts of appeals' ostensibly different approaches actually produce different results. See Kelly, 510 F.3d at 437 n.3 (declining to decide whether district courts must address any specific factor because it made no difference to the result); LeMay, 260 F.3d at 1027-1028, 1030 (affirming the admission of evidence under Rule 414, despite the failure to explicitly consider the Ninth Circuit's required factors, in light of the district court's careful approach).

Petitioner posits (Pet. 9-10) that, were he tried in the Second or Fourth Circuits, his 1995 convictions "may have been" excluded based on their remoteness in time or lack of similarity to conduct charged in this case. But the Second and Fourth Circuit decisions on which he relies upheld the admission of evidence of conduct occurring between 16 and 22 years prior to the conduct charged in those cases. See Kelly, 510 F.3d at 437; Larson, 112 F.3d at 605 ("Congress meant [Rule 414's] temporal scope to be broad, allowing the court to admit evidence of Rule 414 acts that occurred more than 20 years before trial."). Moreover, although it is true that petitioner's 1995 convictions did not involve child pornography, the court of appeals correctly recognized that the relevant similarity was petitioner's apparent sexual preference in

1995 and in this case for young boys in a particular age range. Pet. App. 16. And the district court gave an instruction limiting its use to those purposes.

In any event, the deferential abuse-of-discretion review applicable to district courts' evidentiary rulings means that factual differences between cases are, in practice, likely to be far more significant than any distinctions in linguistic formulations of the proper approach to Rule 403's application. See Sprint/United Mgmt. Co. v. Mendelsohn, 552 U.S. 379, 384 (2008) ("In deference to a district court's familiarity with the details of the case and its greater experience in evidentiary matters, courts of appeals afford broad discretion to a district court's evidentiary rulings."). In the absence of a strong indication that different courts are regularly reaching different results on similar facts, review in this Court would be unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

JOSHUA K. HANDELL
Attorney

AUGUST 2018