No._____

In the

Supreme Court of the United States

Darnell Owens,

Petitioner,

v.

United States of America,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Relying on historical practice dating back to English cases in the seventeenth century, the courts of appeals had consistently held that relying on a person's criminal history to conclude that he or she has a propensity for criminal behavior, and so likely committed another crime, violates due process in non-sex-offense cases. In 1991, however, this Court in *Estelle v. McGuire* expressly reserved ruling on the question of whether it violates the Due Process Clause to use "prior crimes" evidence to show propensity to commit a charged crime. Since then, the lower courts have expressed uncertainty regarding whether propensity evidence violates the Due Process Clause. The court of appeals below went so far as to hold that constitutional due process does not preclude a judge from relying on a person's criminal history to conclude that he likely committed another crime and thereby violated the terms of his supervised release.

The questions presented are:

(1) In cases not involving sex offenses, does the Due Process Clause permit a judge to revoke a person's supervised release by relying on a person's criminal history to conclude that he or she likely committed another crime?

(2) In cases not involving sex offenses, does the Due Process Clause permit a factfinder to rely on a person's criminal history to conclude that he or she likely committed another crime?

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PETITION FOR WRIT OF CERTIORARI

Darnell Owens respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Sixth Circuit.

OPINION AND ORDERS BELOW

The opinion of the U.S. Court of Appeals for the Sixth Circuit in Case No. 18-3134 is unpublished and reproduced in the Appendix at 1a-11a. The court's order denying Owens's petition for rehearing en banc is unpublished and reproduced in the Appendix at 14a.

The order of the U.S. District Court for the Northern District of Ohio revoking Owens's supervised release is unpublished and reproduced in the Appendix at 12a-13a.

JURISDICTION

The court of appeals entered judgment on September 28, 2018. Owens timely filed a petition for rehearing en banc, which the court denied on November 16, 2018. Owens invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the U.S. Constitution provides, in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

STATEMENT OF THE CASE

1. *Background*. While Darnell Owens was serving a federal term of supervised release, he was charged in Pennsylvania state court with possessing a controlled substance with intent to manufacture or deliver. The federal probation office filed a supervised-release-violation report based on the state charges. In state court, the judge dismissed the charges against Owens after granting his motion to suppress. In federal court, the Government continued to attempt to revoke his supervised release.

At the revocation hearing, the Government presented the testimony of the Pennsylvania police officer who arrested Owens. According to him, he followed Owens and his son late one night while the son was driving in Farrell, Pennsylvania, looking for Owens's sister's new house. He did not stop them, and he drove by after Owens's son pulled into a driveway. Within moments, he received a report of a suspicious person at that address and drove back.

When he arrived, he saw Owens and his son walking up to the house. They told him that they were looking for family. Owens was cooperative and gave his identification to the officer.

The officer ran the ID through his dispatcher and learned that Owens was on federal supervised release. He contacted Owens's probation officer. According to the police officer, the probation officer told him that Owens had not been checking in and that he was about to issue a warrant; the probation officer said that he did not say that. 1/29/18 Hr'g Tr. at 22-23.

The police officer detained Owens and his son and requested a canine unit. After the canine alerted, he searched the car and found marijuana and a bag of fentanyl pills in the glove compartment. He then searched Owens and found $1,662, two cell phones, and other items. He arrested both Owens and his son, and neither of them said anything about who the drugs belonged to.

Based on that evidence, the Government argued that Owens committed a crime under state law—possession with intent to deliver—and thereby violated the terms of his supervised release. Owens argued that the drugs were not his, and that the Government had not met its burden of proving that he possessed the drugs found in his son's car.

Noting that it was "somewhat of a close question," the district court concluded that Owens violated the terms of his supervised release. 1/29/18 Hr'g Tr. at 28-29. The court gave three reasons: first, that Mr. Owens was a passenger and the drugs were found in the glove compartment; second, that he had money and two cell phones; and third, that because of his criminal history, it was likely that he committed this crime as well.

On the last point, the court stated: "And, candidly, the other aspect of the matter is the defendant's prior history and his record. He has a long record of drug trafficking along with other violent-related offenses." 1/29/18 Hr'g Tr. at 30.

On those bases, the district court revoked Owens's supervised release and sentenced him to the maximum two years in prison, plus three years of supervised release.

2. *Decision Below*. On appeal, Owens argued that the district court violated his due-process rights by relying on his criminal history to conclude that he committed another crime and revoke his supervised release. The Government did not dispute that a court errs when it does so, but claimed that the district court did not.

A Sixth Circuit panel rejected the Government's argument, observing that "the district court briefly but explicitly considered Owens' prior drug-dealing history in concluding that Owens had violated his supervised release conditions." App. at 1a. Nevertheless, it upheld the decision revoking Owens's supervised release. The panel concluded that "it would break new constitutional ground to hold that constitutional due process precludes the admission of prior convictions as propensity evidence, and we do not do so today." App. at 8a. "We have observed in the habeas context, for instance, that there is no clearly established Supreme Court precedent which holds that a state violates due process by permitting propensity evidence in the form of other bad acts evidence," the panel added, "and other circuits have recognized that Federal Rule of Evidence 414, which explicitly allows for the admission of certain propensity evidence [in child-molestation cases], does not violate due process." App. at 8a-9a (internal quotation marks and citations omitted).[1]

Owens filed a petition for rehearing en banc, arguing that the Sixth Circuit and other circuits have held that using a person's criminal history to conclude that he has a propensity for criminal behavior, and so likely committed another crime, violates due process. The Sixth Circuit denied his petition. App. at 14a.

1 The panel also ordered a limited remand for the district court to correct Owens's new supervised-release term so that it did not exceed the statutory maximum. App. at 10a-11a.

REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit's decision conflicts with prior decisions from the Sixth Circuit and other circuits and exhibits the lower courts' confusion regarding whether a factfinder may rely on a person's criminal history to conclude that he or she committed another crime.

The lower courts are split within and between circuits regarding whether and in what circumstances the Due Process Clause permits prior-bad-acts evidence. The decision below conflicts even with other Sixth Circuit decisions. In *Murray v. Superintendent, Ky. State Penitentiary*, 651 F.2d 451 (6th Cir. 1981), for example, the Sixth Circuit held that "it is unfair – and violative of due process – if evidence of other crimes is admitted without a limiting instruction." *Id.* at 453. The panel distinguished *Murray* on the basis that "no limiting instruction is required where there is no jury." App. at 10a n.2. But the reason for a limiting instruction is to prevent the factfinder from relying on a person's criminal history to conclude that he or she likely committed another crime. Where a judge as factfinder explicitly does just that, as the district court did here, the constitutional violation is the same.

As in *Murray*, the courts of appeals have frequently held that propensity evidence violates due process. *See, e.g.*, *Jammal v. Van de Kamp*, 926 F.2d 918, 920 (9th Cir. 1991) (holding that admission of prior bad acts violates due process "if there are *no* permissible inferences the jury may draw from the evidence"); *Panzavecchia v. Wainwright*, 658 F.2d 337, 341-42 (5th Cir. 1981) (holding that "repeated references to the defendant's criminal past without any limiting instruction" rendered "the petitioner's trial fundamentally unfair and in violation of the fourteenth amendment"); *Dawson v. Cowan*, 531 F.2d 1374, 1377 (6th Cir. 1976) (where the State introduced

evidence of prior offense, "failure of the trial court to give a limiting instruction in these circumstances requires us on constitutional grounds to give appellant relief from detention"); *see also United States v. Perez*, 526 F.3d 543, 550 (9th Cir. 2008) (reversing revocation of supervised release because district court relied on defendant's criminal history). Summarizing the state of the law 70 years ago, this Court observed that "[c]ourts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt." *Michelson v. United States*, 335 U.S. 469, 475 (1948).

At the other end of the spectrum, the courts of appeals have upheld rules allowing prior-bad-acts evidence in particular contexts. At the outermost edge, the Eighth Circuit has held that "it was within Congress's power to create exceptions to the longstanding practice of excluding prior-bad-acts evidence," without any apparent limitations. *United States v. Mound*, 149 F.3d 799, 801 (8th Cir. 1998). Other courts, though nowhere approaching the *Mound* Court's suggestion that the Due Process Clause places no limits on propensity evidence, nevertheless have rejected due-process challenges to rules permitting such evidence in cases involving sex offenses, particularly because Federal Rule of Evidence 403 protected the defendant against undue prejudice. *See United States v. Schaffer*, 851 F.3d 166, 177-81 (2d Cir. 2017); *United States v. LeMay*, 260 F.3d 1018, 1025-27 (9th Cir. 2001); *United States v. Castillo*, 140 F.3d 874, 881-83 (10th Cir. 1998).

Against this backdrop, one court of appeals has noted that this Court's decisions and its own decisions "leave open the question whether the ban on propensity evidence derives solely from the rules of evidence, or also from the Constitution." *Castillo*, 140 F.3d 874, 880 (10th Cir. 1998). Other courts have echoed that sentiment in cases arising under 28 U.S.C. § 2254, in which they have uniformly held that this Court has not clearly established that allowing prior-bad-acts evidence violates the Due Process Clause. *See Coningford v. Rhode Island*, 640 F.3d 478, 484-85 (1st Cir. 2011); *Alberni v. McDaniel*, 458 F.3d 860, 863 (9th Cir. 2006); *Bugh v. Mitchell*, 329 F.3d 496, 512 (6th Cir. 2003); *Allison v. Superintendent Waymart SCI*, 703 F. App'x 91, 97 (3d Cir. 2017); *Johnson v. Greiner*, 56 F. App'x 38, 39-40 (2d Cir. 2003).

II. The decision below is wrong because relying on propensity evidence violates fundamental conceptions of justice and fairness established by historical practice.

The panel erred by holding that the district court did not violate Owens's due-process rights by relying on his prior convictions to conclude that he likely committed another crime and revoke his supervised release. Because revoking supervised release deprives a defendant of his fundamental right to liberty, minimum due-process protections apply in supervised-release-revocation proceedings. *See Morrissey v. Brewer*, 408 U.S. 471, 482 (1972). Due process includes "those fundamental conceptions of justice which lie at the base of our civil and political institutions, and which define the community's sense of fair play and decency." *Dowling v. United States*, 493 U.S. 342, 353 (1990) (internal quotation marks and citations omitted). The

Court's "primary guide in determining whether the principle in question is fundamental is, of course, historical practice." *Montana v. Egelhoff*, 518 U.S. 37, 43 (1996).

As one lower court observed, "it seems clear that the general ban on propensity evidence has the requisite historical pedigree to qualify for constitutional status." *LeMay*, 260 F.3d at 1025. The practice in England dates back at least to 1684, in which the court in *Hampden's Trial*, 9 How. St. Tr. 1053 (K.B. 1684), observed that "a person was indicted of forgery, we would not let them give evidence of any other forgeries, but that for which he was indicted." *Id.* at 1103. Likewise, the court in *Harrison's Trial*, 12 How. St. Tr. 834 (Old Bailey 1692), halted the prosecution's attempt to introduce evidence of prior bad acts, saying, "Hold, what are you doing now? Are you going to arraign his whole life? Away, away, that ought not to be; that is nothing to the matter." *Id.*

Following the common-law tradition, courts in the United States have enforced the prohibition on propensity evidence throughout our nation's history. *See, e.g.*, *Boyd v. United States*, 142 U.S. 450, 458 (1892) (reversing convictions where prior robberies introduced in murder trial) ("Proof of [the prior robberies] only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community[.]"); *Rex v. Doaks*, Quincy's Mass. 90, 90-91 (Mass. Super. Ct. 1763) (excluding evidence of prior lascivious acts in trial of defendant accused of keeping a bawdy house). Although the historical practice in sex-offense cases is more ambiguous, *see LeMay*, 260 F.3d at 1025-26; *Castillo*, 140 F.3d at 881-82, there is no

such doubt in non-sex cases. In the federal courts, all state courts, and the District of Columbia, a factfinder may not rely on a person's criminal history to conclude that he or she likely committed another crime. *See McKinney v. Rees*, 993 F.2d 1378, 1381 n.2 (9th Cir. 1993) (collecting cases, statutes, and rules); *State v. Cox*, 781 N.W.2d 757, 767 (Iowa 2010) ("[T]here are few principles of American criminal jurisprudence more universally accepted than the rule that evidence which tends to show that the accused committed another crime independent of that for which he is on trial, even one of the same type, is inadmissible." (internal quotation marks omitted)).

Additionally, "some of [this Court's] statements regarding propensity evidence indicate that the ban on such evidence may have a constitutional dimension." *Castillo*, 140 F.3d at 880. This Court has observed that "[c]ourts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt." *Michelson*, 335 U.S. at 475 (1948); *see also Spencer v. Texas*, 385 U.S. 554, 573-75 (1967) (Warren, C.J., concurring in part and dissenting in part) ("[O]ur decisions exercising supervisory power over criminal trials in federal courts, as well as decisions by courts of appeals and of state courts, suggest that evidence of prior crimes introduced for no purpose other than to show criminal disposition would violate the Due Process Clause.") (collecting cases). The *Michelson* Court made clear that the rule is not simply an historical artifact, but instead is based on fundamental conceptions of justice and fairness—such evidence, the Court explained, "may overpersuade [the jury] to prejudge one with a bad general record *and deny him a fair*

opportunity to defend against a particular charge." *Michelson*, 335 U.S. at 476 (emphasis added); *see also Old Chief v. United States*, 519 U.S. 172, 182 (1997) (stating that there is "no question that propensity would be an improper basis for conviction").

Nevertheless, despite the historical tradition, this Court has not squarely held that propensity evidence violates the Due Process Clause. *See, e.g.*, *Estelle v. McGuire*, 502 U.S. 62, 75 n.5 (1991) ("Because we need not reach the issue, we express no opinion on whether a state law would violate the Due Process Clause if it permitted the use of 'prior crimes' evidence to show propensity to commit a charged crime."). In light of the lower courts' confusion, exemplified by the decision below, this Court should so hold.

III. This case presents an ideal vehicle for resolving an important and recurring issue of Federal law.

This case is an ideal vehicle to resolve the question presented. The district court explicitly relied on Owens's previous drug convictions to conclude that he had violated his supervised-release conditions. *See* App. at 1a. This case thus squarely presents whether, in a cases not involving a sex offense, a factfinder may rely on a person's criminal history to conclude that he or she likely committed another crime. Additionally, the government did not argue below that the error was harmless, and it was not—the district court itself said that its decision was "somewhat of a close question," 1/29/18 Hr'g Tr. at 28, and by improperly relying on Owens's criminal history as one of three reasons for concluding that the drugs in his son's glove compart-

ment were his, the error had a "substantial and injurious effect or influence" in determining the outcome. *Kotteakos v. United States*, 328 U.S. 750, 776 (1946). The question presented is thus ripe for this Court's review.

The issue is important and recurring in at least two respects. First, approximately 4.5 million people are serving some type of probation or parole, and each year, almost 350,000 peple are sent to jail or prison for violating their release conditions. *See* Pew Charitable Trusts, *Probation and Parole System Marked by High Stakes, Missed Opportunities* at 1-2 (Sep. 2018);[2] *see also* U.S. Courts, Judicial Business 2017, Table E-7A (over 16,000 people sent to federal prison each year for supervised-release and probation violations).[3] In each of those cases, a judge serves as the fact-finder. *See, e.g.*, 18 U.S.C. § 3583(e)(3). Simply by the nature of revocation hearings, the judge in every case knows that the person appearing has a criminal history. Thus, this Court's guidance is crucial regarding what the judge may consider in deciding whether the person has violated his or her supervised-release conditions, both to prevent what happened in this case and to make clear that a judge should not even silently consider the person's criminal history.

Second, and more generally, the lower courts are divided in cases on direct review, and are awaiting this Court's guidance in cases under 28 U.S.C. § 2254, regarding whether prior-bad-acts evidence violates the Due Process Clause. The 27

2 Available at: https://www.pewtrusts.org/-/media/assets/2018/09/probation_and_parole_systems_marked_by_high_stakes_missed_opportunities_pew.pdf.
3 Available at: https://www.uscourts.gov/sites/default/files/data_tables/jb_e7a_0930.2017.pdf.

years that have passed since *Estelle v. McGuire* have led to more confusion, not less. This Court should answer the question reserved in *Estelle*.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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