No. 18-9798

IN THE SUPREME COURT OF THE UNITED STATES

CRAIG A. LEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the District of Columbia trial court correctly interpreted the local rules of evidence to permit the admission of petitioner's prior sexual assault on a minor to show his propensity to commit the charged sexual crime against a minor.

ADDITIONAL RELATED PROCEEDINGS

District of Columbia Superior Court:

United States v. Lee, No. 12-CF1-19185 (June 17, 2016)

District of Columbia Court of Appeals:

Lee v. United States, No. 16-CF-611 (Aug. 20, 2018)

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OPINION BELOW

The memorandum opinion of the court of appeals (Pet. App. A1-A5) is unpublished, but the decision is noted at 193 A.3d 750 (Tbl.).

JURISDICTION

The judgment of the court of appeals was entered on August 20, 2018. A petition for rehearing was denied on March 29, 2019. The petition for a writ of certiorari was filed on June 21, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

STATEMENT

Following a jury trial in the Superior Court for the District of Columbia, petitioner was convicted of attempted first-degree child sexual abuse with aggravating circumstances, in violation of D.C. Code §§ 22-3018 and 22-3020(a)(5) (LexisNexis 2001). Judgment 1; Gov't C.A. Br. 1. The trial court sentenced petitioner to 18 years of imprisonment, followed by supervised release for life. Judgment 1; Gov't C.A. Br. 2. The District of Columbia Court of Appeals affirmed. Pet. App. A1-A5.

1. Petitioner was dating the older cousin of D.W., a 15-year-old girl. Gov't C.A. Br. 2. One night, petitioner met D.W. at his girlfriend's apartment. Gov't C.A. Br. 4 & n.7. D.W. went to bed in the bedroom of one of the girlfriend's sons, and the girlfriend left the apartment. Id. at 4-5; Pet. App. A1. Later that night, petitioner came to DW's room, rubbed her buttocks and vagina, and then placed his penis in her vagina and began thrusting. Pet. App. A1-A2. Afterward, petitioner told D.W. not to tell anyone and then left the room. Id. at A2.

D.W. reported the sexual assault to a school counselor shortly thereafter. Pet. App. A2. During a subsequent investigation, she identified petitioner as her assailant from a photographic lineup prepared by the police. Ibid. The police took D.W. to a hospital where she was examined by a sexual assault nurse, who swabbed her genitalia and thighs. Ibid. Testing on the swabs from D.W.'s

genitalia were negative for the presence of semen, but microscopic examination of swabs from her thighs revealed at least one sperm cell. Ibid. That sample was insufficient for traditional DNA testing, but sufficient for a special type of analysis, Y-chromosome short tandem repeat ("YSTR") testing. Gov't C.A. Br. 16-17 & n.33. Petitioner's YSTR profile was consistent with the partial YSTR profile derived from the fraction of the sample, although petitioner's male relatives could not be ruled out as possible contributors. Pet. App. A2.

2. A grand jury in the D.C. Superior Court indicted petitioner on one count of first-degree child sexual abuse with aggravating circumstances, in violation of D.C. Code §§ 22-3008 and 22-3020(a)(5) (LexisNexis 2001). Indictment 1; Gov't C.A. Br. 1. Before trial, the government moved to admit evidence that petitioner had previously committed a sexual assault against a young girl under similar circumstances. Gov't C.A. Br. 26-27. Over petitioner's objection, the trial court admitted the evidence for the purpose of demonstrating petitioner's "unusual sexual preference." Id. at 31 (citation omitted); see id. at 31-32.

At the court's direction, the parties stipulated at trial that in 1996, petitioner had vaginal intercourse with the 12-year-old daughter of petitioner's then-girlfriend. Pet. App. A3, A5. The assault occurred in the home of the then-girlfriend while other members of the household were present but asleep. Id. at A3. The

trial court instructed the jury that the evidence of petitioner's prior assault was admitted "for the limited purpose of establishing [that petitioner] had an unusual sexual preference for engaging in sexual relations with underage girls." Ibid.

For his defense at trial, petitioner presented evidence that the victim was untruthful, that she was sexually active before the assault, and that she had previously claimed to have been raped. Pet. App. A3. In addition, a witness testified that the victim had left the apartment on the night of the assault for a period of time, and that petitioner had left the apartment while the victim was awake and did not return on the night of the assault. Ibid.

The jury was unable to reach a verdict on the charged offense, but found petitioner guilty of the lesser-included offense of attempted first-degree child sexual abuse. Pet. App. A3. Because the offense involved an aggravating circumstance, the trial court sentenced petitioner to 18 years of imprisonment and life-long supervised release. Judgment 1; Gov't C.A. Br. 1-2.

3. The D.C. Court of Appeals affirmed in a per curiam memorandum opinion, rejecting petitioner's challenge to the trial court's admission of evidence regarding the 1996 sexual assault. Pet. App. A1-A5. The court of appeals noted a general presumption against propensity evidence under Drew v. United States, 331 F.2d 85 (D.C. Cir. 1964), but observed that Howard v. United States, 663 A.2d 524 (D.C. 1995), had recognized an "unusual sexual

preference" exception. Pet. App. A3-A4 (citation omitted). And applying Howard, the court of appeals determined that the trial court did not abuse its discretion by admitting the prior sexual abuse evidence, reasoning that a three-year age difference between the victims did not foreclose the trial court from finding the crimes sufficiently similar for purposes of illustrating petitioner's sexual preferences. Id. at A4.

The court of appeals also rejected petitioner's contention that the probative value of the 1996 sexual assault crime was substantially outweighed by its prejudicial impact. Pet. App. A5. The court observed that both crimes involved similar sexual assaults on young girls and that the 15-year gap between the two crimes was explained by petitioner's incarceration for ten of those years (and supervised probation for the remaining five years). Ibid. The court also stated the government "had a legitimate need" for that evidence because the government's case was "not overwhelming." Ibid. And the court approvingly observed that the trial court had minimized the prejudice to petitioner by requiring a stipulation instead of live testimony and by giving an appropriate limiting instruction to the jury. Ibid.

ARGUMENT

Petitioner contends (Pet. 5-13) that the court of appeals erred by upholding the admission of evidence that he committed a previous sexual assault on a minor to show that he had an unusual

sexual preference for underage girls. The application of local rules of evidence in the District of Columbia does not present an important question of federal law. Moreover, the court of appeals correctly decided the issue and its non-precedential, fact-bound decision does not conflict with any decision of this Court or any federal court of appeals. Further review is unwarranted.

1. The decision of the court of appeals is based on the District of Columbia rules of evidence, not the Federal Rules of Evidence that apply in the federal courts. As this Court has recognized, "the formulation of rules of evidence for the District of Columbia is a matter purely of local law to be determined -- in the absence of specific Congressional legislation -- by the highest appellate court for the District." Griffin v. United States, 336 U.S. 704, 717 (1949). The proper interpretation of decisions from the D.C. Court of Appeals regarding a common-law question of evidence applicable only in the District of Columbia implicates no significant federal issue warranting review. See Pernell v. Southall Realty, 416 U.S. 363, 366 (1974) ("This Court has long expressed its reluctance to review decisions of the courts of the District involving matters of peculiarly local concern.").[1]

[1] Although petitioner invokes the Fifth and Sixth Amendments to the Constitution as "provisions involved" in the petition, Pet. 2 (capitalization and emphasis omitted), he does not present any argument relating to those amendments. See Pet. 5-13. In any event, petitioner failed to present any constitutional argument below. The applicability of the Fifth and Sixth Amendments is thus not properly presented here. See United States v. Williams,

2. In any event, the decision below is correct and does not conflict with the decision of any federal court of appeals.

a. The D.C. Court of Appeals "is the final authority for establishing the evidentiary rules for the Superior Court of the District of Columbia." Laumer v. United States, 409 A.2d 190, 195 n.7 (D.C. 1979) (en banc). Before February 1, 1971, that role was played by the United States Court of Appeals for the D.C. Circuit. See M.A.P. v. Ryan, 285 A.2d 310, 312 (D.C. 1971). In that capacity, the D.C. Circuit decided Drew v. United States, 331 F.2d 85 (1964), in which it stated that "evidence of one crime is inadmissible to prove disposition to commit crime," but is admissible when relevant to certain enumerated purposes. Id. at 89 (emphasis omitted); see id. at 89-90; Johnson v. United States, 683 A.2d 1087, 1096 (D.C. 1996) (en banc), cert. denied, 520 U.S. 1148 (1997). After the D.C. Court of Appeals assumed its status as the highest court of the jurisdiction, that court recognized in Howard v. United States, 663 A.2d 524 (1995), that its case law contained an exception to Drew's general rule against propensity evidence. Under the "unusual sexual preference" exception, evidence of a prior sexual assault committed by a defendant is admissible "for the sole purpose of showing that a defendant had a predisposition to commit the charged offense." Id. at 529.

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504 U.S. 36, 41 (1992) (The Court's usual practice is to decline review of issues "not pressed or passed upon below.") (citation omitted).

In the decision below, the court of appeals was "bound to follow the holding of Howard," and affirmed the admission of the stipulation under the unusual-sexual-preference exception. Pet. App. A4. The court subsequently declined petitioner's invitation to reconsider the unusual-sexual-preference exception en banc. Id. at B1; see Pet. for Reh'g 1-2.

b. Petitioner argues (Pet. 9) that the decision below conflicts with Drew's general rule against propensity evidence. But the D.C. Court of Appeals has expressly recognized the unusual-sexual-preference rule as an exception to the general principle against propensity evidence stated in Drew. See Pet. App. A3-A4; Howard, 663 A.2d at 527-529. That court undoubtedly has the power to recognize exceptions to its common-law rules of evidence, and petitioner does not argue otherwise.

Petitioner also contends (Pet. 7-8) that the decision below is in tension with other decisions of the D.C. Court of Appeals. But the purportedly inconsistent decisions all pre-date the court's affirmation of the unusual-sexual-preference exception in Howard. And even assuming Howard had not fully put this tension to rest, the decision below is unpublished and lacks precedential force. See D.C. Ct. App. R. 28(g). Such a decision cannot establish an intra-court conflict and, even if it could, any intra-court inconsistency would not warrant this Court's review. Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam).

c. Petitioner errs in asserting that the decision below "conflicts with long-established precedent in federal circuits." Pet. 5 (capitalization and emphasis omitted). The only decision on which petitioner bases the claimed conflict is Drew, which, as explained above, does not conflict with the decision in this case.

In any event, the decision below does not conflict with the decisions of federal circuit courts of appeals, because those decisions would address the Federal Rules of Evidence applicable in the federal district courts. The Federal Rules of Evidence generally "do not govern proceedings in the local courts of the District of Columbia" unless specifically adopted by the D.C. Court of Appeals. Jenkins v. United States, 80 A.3d 978, 991 (D.C. 2013). The court of appeals has not adopted the applicable federal rules governing other-act evidence (Fed. R. Evid. 404(b)) or other-sexual-assault evidence in criminal cases (Fed. R. Evid. 413). See Legette v. United States, 69 A.3d 373, 379 & n.11 (D.C. 2013) (Rule 413); Holmes v. United States, 580 A.2d 1259, 1267 (D.C. 1990) (Rule 404(b)).

Furthermore, as a matter of substance, the decision below is consistent with the approach of the federal courts of appeals to the admission of other-sexual-assault evidence in sex-crime prosecutions. Applying Rule 413, federal courts routinely uphold the admission of such evidence to show a defendant's propensity to commit the charged offense. E.g., United States v. Keys, 918 F.3d

982, 986 (8th Cir. 2019); United States v. Schaffer, 851 F.3d 166, 177-178 (2d Cir.), cert. denied, 138 S. Ct. 469 (2017).

3. Petitioner's remaining contentions -- which similarly concern only application of the local evidentiary rules -- likewise do not warrant this Court's review.

Petitioner argues (Pet. 10-11) that the court of appeals misapplied its prior precedent in Roper v. United States, 564 A.2d 726 (D.C. 1989) (per curiam), by failing to subject the admission of the stipulation to certain additional requirements. But Roper did not involve sexual-assault evidence; consequently, any requirements that it imposes on other-act evidence would not necessarily extend to evidence admitted under the unusual-sexual-preference exception. See Howard, 663 A.2d at 529 & n.10 (applying only two of Roper's four factors to sexual-assault evidence in that case). Furthermore, even if the decision below could not be reconciled with Roper, the court of appeals is primarily responsible for resolving its internal conflicts. See Wisniewski, 353 U.S. at 902.

Petitioner's related contention (Pet. 12-13) that the court of appeals conflated the test for the admission of the other-sexual-assault evidence with the test for undue prejudice is also mistaken. The court's determination that the probative value of the evidence was not substantially outweighed by the risk of unfair prejudice, and its statement that the other-sexual-assault

evidence was necessary because the government's evidence was not overwhelming are fact-bound and case-specific applications of its own precedent. In any event, the factors that the court considered mirror the factors that federal circuit courts consider in the parallel context of Federal Rule of Evidence 403. See Fed. R. Evid. 403 advisory committee's note (1972 Proposed Rules); see, e.g., United States v. Ford, 839 F.3d 94, 109–110 (1st Cir. 2016); United States v. Robinson, 161 F.3d 463, 470 (7th Cir. 1998), cert. denied, 526 U.S. 1078 (1999). No further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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