NO.18-9798

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

CRAIG A. LEE

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

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

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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STATEMENT

In its Brief in Opposition to Petitioner's *Petition for Writ of Certiorari,* the United States asserts that (1) "The application of local rules of evidence in the District of Columbia does not present an important question of federal law;" and (2) The appellate court's "non-precedential, fact-bound decision does not conflict with any decision of this Court or any federal court of appeals." Opposition at 6. Therefore, it asserts, "[f]urther review is unwarranted." *Id*. Respondent's assertions are incorrect.

REPLY TO BRIEF IN OPPOSITION

I THE DC COURT OF APPEALS' AFFIRMANCE OF THE TRIAL COURT'S ADMISSION OF EVIDENCE OF A PRIOR SEXUAL ASSAULT ALLEGATION AGAINST PETITIONER SOLELY TO PROVE CRIMINAL PROPENSITY CONFLICTS WITH LONG-ESTABLISHED PRECEDENT IN THIS COURT, THE DCCA AND IN FEDERAL CIRCUITS.

1. Petitioner's Claim is not a matter of purely local rules of evidence.

Respondent's assertion that this is a matter of purely local rules of evidence distorts and mischaracterizes the claim. The tenet that evidence of other crimes is *never* admissible solely to prove criminal propensity is based on long-standing legal precedent established decades ago by this Court and followed by federal circuits *and the DCCA* long before *Howard v. United States*, 663 A.2d 524 (D.C. 1995). As the DCCA recognized, "[t]his exclusionary principle, sometimes referred to as the `propensity rule,' is of ancient origin." *Thompson v. United States*, 546 A.2d 414, 418 (D.C. 1988)(citation omitted here). Other crimes evidence *may* be admissible even if it shows criminal propensity but *only* "if it is so related to or connected with the crime charged as *to establish a common scheme or purpose* so associated that proof of one tends to prove the other, or if both are connected with *a single purpose and in pursuance of a single object*; [footnote omitted] as well as to establish *identity, guilty knowledge, intent* and *motive.*" *Bracey v. United States*, 142 F.2d 85 (D.C. Cir. 1944)(sexual assault). *Id*. at 88 (emphasis added); *also see, Boyer v. United States*, 132 F.2d 12, 13 (D.C. Cir. 1942) ("[W]hen the prior crime has no other relevance than [to show a disposition to commit similar crimes], it is inadmissible"); *Hodge v. United States*, 126 F.2d 849 (D.C. Cir. 1942)(evidence of prior incest admissible because

it explained the circumstances leading to charged incest with same victim). Such evidence is never admissible *solely* to prove criminal propensity, as it was admitted in the present case.

It is that tenet "of ancient origin" that provides the backdrop for Petitioner's claim that the DCCA's allowance of other crimes evidence solely to prove criminal propensity flies in the face of the basic constitutional due process concern explained by this Court in 1948—a defendant's "prior trouble with the law" "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." *Michelson v. United States*, 335 U.S. 469, 475-476 (1948).[1] *Also see Old Chief v. United States*, 519 U.S. 172 (1997) ("There is, accordingly, no question that propensity would be an `improper basis' for conviction and that evidence of a prior conviction is subject to analysis under Rule 403 for relative probative value and for prejudicial risk of misuse as propensity evidence"). As Petitioner noted below, in *Thompson* the DCCA relied on *Michelson* in recounting the importance of the exclusionary rule, and the court has numerous times relied upon *Old Chief*. *See, Thompson*, 546 A.2d at 418.

Furthermore, contrary to Respondent's claim that "generally" the federal rules of evidence do not govern in DC, the DCCA reiterated in *Johnson v. United States*, 683 A.2d 1087 (D.C. 1996), that "FRE 404(b) is consistent with District of Columbia law" and that

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[1]Respondent asserts that Petitioner failed to present any constitutional argument below. But Petitioner cited both *Michelson* and *Old Chief* in his initial brief below, and *Michelson* in his reply brief and petition for rehearing.

under FRE 403, which *Johnson* "announce[d] [it] will follow," "although relevant and otherwise admissible, [evidence] may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . ." *Id*. at 1100 and n. 17. In *Drew*, of course, the court reiterated that evidence of other crimes is prohibited unless it is admitted for "some substantial, legitimate purpose," and it must be "relevant and important" to one of the listed exceptions. *Drew v. United States*, 331 F.2d 85 (D.C. Cir. 1964). "In summary on this point," *Johnson* wrote, "then: if other crimes evidence is offered to prove propensity to commit an offense, it is inadmissible. If other crimes evidence subject to a *Drew* analysis is offered, it may be admitted only if it qualifies for an exception to the *Drew* rule restricting its use." *Johnson*, 683 A.2d at 1087.

Moreover, DCCA precedent shows that it always properly applied federal and Supreme Court tenets in cases involving other crimes evidence prior to *Howard*. For example, in *Adams v. United States*, 502 A.2d 1011 (D.C. 1986), where the trial court admitted the defendant's diary entries under the "unusual sexual preference" exception, the court found that "the disputed diary entries and the testimony" of the complainants "were highly relevant to the interpretation of sunburst symbols appearing in appellant's diary," which symbols "provided the only direct proof of the sodomy charges" and, where the meaning of the symbols was contested by the defendant, the evidence "was vital to establish that the diary accurately reported the nature and timing of appellant's sexual encounters." *Id*. at 1015-1016.

This same theme continued in *Ali v. United States*, 520 A.2d 306 (D.C. 1987), where

the DCCA held that the proponent of other crimes evidence must "(1) identify the consequential fact to which the proffered evidence of other crimes, wrongs or acts is directed. . .(2) prove the other crimes, wrongs, or acts. . .and (3) articulate precisely the evidential hypothesis by which the consequential fact may be inferred from the proffered evidence." *Id*. at 310 (quoting, 2 J.Weinstein, Evidence, ¶404 [08] (1986)).

In *Ali*, the government relied on the *Drew* exception for evidence of "common scheme or plan," but the DCCA explained that such evidence "is inadmissible unless the proponent specifically identifies the contested element of the charged crime which the common scheme or plan evidence inferentially proves." *Id*. at 310-311. The defendant "did not interpose mistaken identification or lack of intent as defenses." *Id*. at 311. Rather, "the actual occurrence of the unlawful sexual acts with S.S. was the contested issue." Therefore, the appellate court found that

> Evidence that appellant allegedly unlawfully touched F.W. on three to five occasions is relevant to charges that appellant engaged in sexual intercourse and sodomy with an entirely different individual on separate occasions only by means of one inference: because appellant did so with F.W., he did so with S.S. That is precisely the "propensity" inference forbidden by *Drew*.

Id. at 311. "[T]he ultimate inference generated by other crimes evidence must always be the defendant's greater likelihood of guilt *on a contested issue in the case*." *Id*.

The DCCA has not strayed from the *Drew* analysis in any cases to date except when it veered erroneously in *Howard*. Most recently, in *Jackson v. United States*, No. 17-CF-943 (D.C. June 27, 2019), the court reiterated "the impermissible purpose of showing

propensity to commit crime." Slip. Op. at 8. And in *Legette v. United States*, 69 A.3d 373 (D.C. 2013), the court recognized that "it is well established in our jurisdiction that in the case of sex crimes as well as other crimes, `evidence of one crime is inadmissible to prove disposition to commit crime, from which the jury may infer that the defendant committed the crime charged.'" *Id*. at 379 (quoting *Drew*, 331 F.2d at 89). *Howard*, upon which the panel in the present case relied, is a dangerous anomaly that sanctions what every other case in the DCCA, federal courts and this Court has in the past and continues to recognize as impermissible. The implications of Petitioner's claim do indeed "present an important question of federal law," contrary to Respondent's assertion at page 6.

2. The DCCA panel's decision conflicts with this Court and federal courts.

Respondent incorrectly asserts that the DCCA panel's decision "does not conflict with any decision of this Court or any federal court of appeals" and is "consistent with the approach of federal courts of appeals to the admission of other-sexual-assault evidence in sex-crime prosecutions." Opposition at 6, 9-10. As shown above, the approach of this Court, federal courts and the DCCA has never been to admit evidence solely to show criminal propensity.

Respondent disingenuously asserts that "[t]he only decision on which petitioner bases the claimed conflict is *Drew*. . ." Opposition at 9. Respondent knows full well that every federal circuit has espoused the basic tenet that evidence of other crimes solely to prove criminal propensity is inadmissible. Petitioner could use the allotted word count limits times ten simply citing and quoting each circuit's decisions. For brevity purposes,

Petitioner provides herein a small sample of numerous cases that adhere to the propensity tenet. *See, e.g., United States v. Bayard*, 642 F.3d 59 (1st Cir. 2011); *United States v. Callum*, 584 F.3d 471 (2d Cir. 2009); *United States v. Williams*, 458 F.3d 312 (3d Cir. 2006); *Wynne v. Renico*, 606 F.3d 867 (6th Cir. 2010); *United States v. Norweathers*, 895 F.3d 485 (7th Cir. 2018); *United States v. Plume*, 847 F.3d 624 (8th Cir. 2017); *United States v. Espinoza*, 880 F.3d 506 (9th Cir. 2018); *United States v. Temple*, 862 F.2d 821 (10th Cir. 1988); and *United States v. Sterling*, 738 F.3d 228 (11th Cir. 2013).

Respondent mistakenly cites *United States v. Keys*, 918 F.3d 982 (8th Cir. 2019), and *United States v. Schaffer*, 851 F.3d 166 (2d Cir. 2017). In *Keys*, however, the court held that only a "relevant" prior sexual assault is admissible and that it is relevant "to a charged offense if it is `committed in a manner similar to the charged offense.'" *Id*. at 986 (quoting *United States v. Crow Eagle*, 705 F.3d 325, 327 (8th Cir. 2013) (quotation omitted)). But even if relevant, the evidence is inadmissible if "its probative value is substantially outweighed by one or more of the factors enumerated in Rule 403, including the danger of unfair prejudice." *Keys*, 918 F.3d at 986 (quoting *United States v. Gabe*, 237 F.3d 954, 959 (8th Cir. 2001) (quotation omitted)). Similarly, in *Schaffer*, the court found the defendant's "prior acts demonstrating his sexual interest in minor females are extremely relevant to the question of his intent here" "to engage in sexual acts with [the complainant] at the time he asked her to travel to New Jersey." *Id*. at 182. Therefore, *Schaffer* shows that even though Federal Rules of Evidence 413 and 414 allow other crimes evidence on "any matter to which it is relevant," the evidence still must actually be relevant to a contested issue—which, in

Schaffer, was "intent." Neither case, nor others cited in the appellate court below, stand for the premise that Respondent promotes here—that evidence of prior sexual conduct is admissible solely to prove criminal propensity.

Third, Respondent suggests that even if the decisions prior to *Howard* directly contradict and do not permit *Howard*'s allowance of admission of prior sexual conduct solely to prove propensity, *Howard* announced an "exception" to *Drew* and, therefore, the DCCA panel in the present case was bound to follow *Howard*. Opposition at 8. But, as Petitioner noted below, the DCCA has held that "[w]here a division of this court fails to adhere to earlier controlling authority, [the court] is required to follow the earlier decision rather than the later one." *Thomas v. United States*, 731 A.2d 415, 420 n. 6 (D.C. 1999). *Howard*'s "exception" directly conflicts with long-standing precedent in the DCCA, federal and Supreme Court. In the present case, therefore, the appellate panel was required to follow legal precedent against admission of other crimes evidence solely to prove criminal propensity. It erred in failing to do so and the DCCA erred in failing to grant Petitioner's petition for rehearing.

Moreover, Respondent's assertion that Petitioner's claim presents merely an "intra-court conflict" is illogical. Opposition at 8. It is like saying that if a DCCA panel rules that a prosecutor may strike jurors based solely on their skin color, though all other decisions in the DCCA, this Court and federal circuits and around the country have held that a such conduct by a prosecutor violates due process and must result in a new trial, the errant DCCA panel's decision is merely an "intra-court conflict." It is not. That situation, as well

as the one presented in this Petition, require the attention of this Court because they conflict with long-established Supreme Court, DCCA and federal circuit precedent and present due process implications in admission of evidence that may "overpersuade" a jury to prejudge a defendant. *Michelson, supra*.

3. The DCCA's prejudice ruling is not fact-bound.

Lastly, Respondent asserts that the DCCA panel's ruling that the probative value of Petitioner's prior sexual conduct was not substantially outweighed by unfair prejudice was a "fact-bound and case-specific application[] of its own precedent." Opposition at 10-11. Respondent misunderstands the claim.

First, although the DCCA panel determined that the government *needed* the evidence, the government did not argue in the trial court that it needed the evidence and the trial court made no such finding. The government sought to introduce the evidence to show that Petitioner "had the desire or compulsion to engage in the charged acts." DCCA App. R. 17 at 12 (emphasis added). The trial court rejected admission of the evidence to show identity, intent and motive. Moreover, as Respondent acknowledges, the trial court ultimately admitted the evidence based on *Howard*—that evidence of prior sexual conduct was admissible solely to prove criminal propensity. Opposition at 4. Therefore, there was no argument and no trial court finding to support the DCCA's determination that the evidence was "necessary."

Second, because there was no proffer and no finding in the trial court that admission of prior sexual misconduct was necessary, the DCCA's finding of necessity should have been

confined to the prejudice prong of the analysis. Instead, the court conflated the tests for admission of evidence and the resulting prejudice. But where evidence of a prior crime is deemed inadmissible because it is not "directed to any genuine, material or contested issue in the case," and is not "logically relevant to prove this issue for a reason other than its power to demonstrate criminal propensity," *Roper v. United States*, 564 A.2d 726, 731 (D.C. 1989), the inquiry ends and the evidence is inadmissible. The evidence does not magically become admissible merely because the government's case is too weak without it. In other words, whether evidence is unfairly prejudicial is not in question unless the court first finds the evidence probative "for a reason other than its power to demonstrate criminal propensity." *Id*. The DCCA panel, however, justified admission of the evidence based on its finding, unsupported by the record, that admission was necessary. That is why Petitioner has asserted, but Respondent did not address, that the DCCA erroneously conflated the standards for evaluating admissibility and prejudice.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Honorable Court grant his Petition.

Respectfully submitted,

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