No. _____

In The

Supreme Court of the United States

DONALD SHEMAN BUSH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Federal Rule of Evidence 404(b) provides that "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). In the case below, the district court admitted a prior state-court conviction into evidence, reasoning that it was part of the charged crime and therefore did not fall within Rule 404(b). The Fourth Circuit, after noting a split among the circuits as to the appropriate standard of review, applied an abuse-of-discretion standard and affirmed. The Fourth Circuit concluded that the district court had not abused its discretion in deeming the prior conviction "intrinsic" to the charged crime.

The questions presented are:

1. Should the issue of whether evidence falls within Rule 404(b) be reviewed for abuse of discretion (as the Fourth Circuit and other circuits have held) or de novo (as the Third and Ninth Circuits have held)?
2. What is the proper test to determine whether conduct is an "other" act such that it falls within the scope of Rule 404(b)?

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The decision of the United States Court of Appeals for the Fourth Circuit is reported in the Federal Reporter at 944 F.3d 189.

STATEMENT OF JURISDICTION

The Fourth Circuit's opinion and judgment affirming the district court's final judgment were entered on November 27, 2019. (Appendix A) This petition for writ of certiorari is being filed within 90 days of that date. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

PROVISION 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) is the most cited evidentiary rule on appeal. *United States v. Davis*, 726 F.3d 434, 441 (3d Cir. 2013); *see also* Fed. R. Evid. 404

advisory committee's note to 1991 amendment ("Rule 404(b) has emerged as one of the most cited Rules in the Rules of Evidence."). But since the enactment of the Rule in 1975, courts have struggled with how to delineate its scope, and in particular how to determine whether conduct is actually an "other act" and thus subject to the Rule in the first place. Further, circuit courts have struggled with the proper standard by which to review lower-court decisions on that issue.

This Court has never directly addressed the scope of Rule 404(b). Instead, in 1988 the Court stated the following:

> Federal Rule of Evidence 404(b)—which applies in both civil and criminal cases—generally prohibits the introduction of evidence of extrinsic acts that might adversely reflect on the actor's character . . . . Extrinsic acts evidence may be critical to the establishment of the truth as to a disputed issue, especially when that issue involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct.

Huddleston v. United States, 485 U.S. 681, 685 (1988). In the absence of further instruction from this Court, lower courts have seized on the term "extrinsic" and developed various tests to determine whether evidence is intrinsic or extrinsic to a charged crime—and thus subject to Rule 404(b). Sometimes even the same court creates different tests in different cases. *See, e.g.*, *United States v. Beechum,* 582 F.2d 898 (5th Cir. 1979) (en banc) (evidence is intrinsic if it is linked together in time and circumstances with the charged crime); *United States v. Wilson,* 578 F.2d 67, 72 (5th Cir. 1978) (evidence is intrinsic if it is necessary "in order to complete the story of the crime on trial"); *United States v. Bloom,* 538 F.2d 704, 707 (5th Cir. 1976) (evidence is intrinsic if it forms an "integral and natural" part of the account of the circumstances of the crime).

In addition to the variety of substantive tests adopted, the circuit courts have split on whether a district court's decision regarding whether evidence falls within or without Rule 404(b) should be reviewed for abuse of discretion or de novo.

This Court should grant review to determine the proper appellate standard of review as well as the proper test to determine when evidence is subject to Rule 404(b).

STATEMENT OF THE CASE

Petitioner Donald Bush was charged with conspiracy to possess and distribute cocaine and related crimes. Pet. App. at 2. During pretrial proceedings, the government expressed its intent to introduce into evidence a prior state-court conviction of Bush's for distribution of cocaine. *Id* at 3-4. The government provided a Rule 404(b) notice but asked the district court not to conduct a Rule 404(b) analysis because the conviction was "intrinsic" to the charged conspiracy. *Id.* In making this argument, the government provided no evidence that the prior conviction was related in any way to the charged conspiracy. Instead, the government assumed that the conviction was "intrinsic" because it occurred during the timeframe of the charged conspiracy and involved the same drug.

The district court deferred ruling on the issue at the pretrial hearing. During trial, the district court held that the evidence was not subject to Rule 404(b) and agreed to admit it without a Rule 404(b) analysis. The court reasoned that because Bush's prior conviction was "within the conspiracy framework" and because there would be "testimony that he was distributing crack" during the timeframe of the prior conviction, the conviction was "intrinsic" evidence under the Fourth Circuit's decision in *United States v. Chin*, 83 F.3d 83 (4th Cir. 1996). *Id.* at 6.

But at trial, the government did not show how the conviction was part of the charged crime in any manner. The government did not introduce the prior conviction through the testimony of a co-conspirator, or even as part of its case in chief. Nor did the government attempt to link the conviction to the charged conspiracy or explain how it "fit within the conspiracy framework" as the district court had anticipated. Rather, after Bush's trial attorney cross-examined a government witness about the fact that the government had never seized any drugs or drug money from Bush, the government introduced the prior conviction as a rebuttal to the cross examination. Supp. J.A. at 00500-503. Specifically, the prosecutor asked if the witness was aware that Bush had pleaded guilty to distributing cocaine. *Id.* at 00512-514. The witness did not have any personal knowledge of the conviction but, based on the paper record presented to him, testified that Bush had pleaded guilty to dealing cocaine within the timeframe of the conspiracy. *Id.* at 00514. The witness never attempted to connect the state-court conviction to the charged conspiracy.

After a three-day trial, the jury convicted Bush of conspiracy to possess and distribute cocaine. Pet. App. at 7. The jury also convicted Bush of two counts of using a communication facility to aid in the commission of drug felonies, in violation of 21 U.S.C. § 843(b). *Id.* The district court entered judgment in accordance with the jury's verdict and sentenced Bush to a mandatory sentence of life in prison. J.A. at 144.

Bush appealed, challenging among other things the district court's ruling that the prior conviction was "intrinsic" evidence. The Fourth Circuit affirmed.[1] The court

[1] The Fourth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291.

first identified a split among the circuit courts regarding the proper standard of review for a trial court's ruling on whether evidence is subject to Rule 404(b). Pet. App. at 8-9. The Fourth Circuit noted that while the Third and Ninth Circuits review the issue de novo, virtually every other circuit reviews for abuse of discretion. *Id.* The Fourth Circuit adopted the abuse-of-discretion standard. *Id.* The court then explained that, under its precedent, acts are "intrinsic" to a charged crime when they meet one of several tests:

- the acts are "inextricably intertwined" with the charged crime;
- the acts are part of a single criminal episode with the charged crime;
- the acts are "necessary preliminaries" to the charged crime; or
- the acts "serve[] to complete the story of the crime on trial."

Id. at 11. The Fourth Circuit held that the district court had not abused its discretion because the state-court conviction "proved the distribution of the same controlled substance (cocaine base), in the same city (Sumter), during the same period of time," and as a result it was necessarily "intrinsic" to the charged conspiracy.[2] *Id.*

Bush now petitions this Court to clarify both the proper appellate standard of review of a district court's decision whether to apply Rule 404(b) and the proper test for determining what evidence falls beyond the protections of Rule 404(b).

[2] Because the Fourth Circuit decided the case using the abuse-of-discretion standard, the court did not review for harmless error or otherwise note how it would have decided had it chosen to use a de novo standard.

REASONS FOR GRANTING THE PETITION

Rule 404(b) prohibits the use of "other acts" evidence, such as prior convictions, for propensity purposes. *See* Fed. R. Evid. 404(b). In other words, a prosecutor cannot introduce evidence of a prior bad act by a defendant (such as a prior conviction) in order to argue that the defendant is more likely to have committed the charged crime because he or she committed a bad act in the past. One of the principal concerns motivating this Rule is that juries will overvalue such "other acts" evidence and be tempted to make decisions based on a defendant's perceived bad character rather than the actual evidence of the charged crime. *See* Paul S. Milich, *The Degrading Character Rule in American Criminal Trials*, 47 Ga. L. Rev. 775, 778 (2013) (collecting scholarly works regarding other acts evidence).

The text of Rule 404(b) provides no guidance on how to determine whether conduct is an "other" act. Despite lower courts' heavy reliance on parsing whether evidence is "intrinsic" or "extrinsic," the Rule does not even use those terms. In the absence of direction from this Court, the circuit courts have relied on their own definitions of "intrinsic" and "extrinsic" and created a variety of tests to determine whether evidence falls within the scope of the Rule. These tests have no basis in the language of Rule 404(b) itself or in any precedent from this Court, and they often contravene the very purpose behind the Rule. The circuit courts have also split on the appellate standard of review for such decisions, leading to vastly different results for defendants in different jurisdictions. This Court should accept the case for review in order to resolve these conflicts and bring clarity to these important and recurring legal questions.

1. There Is a Deep Split Among the Circuit Courts Regarding the Appellate Standard of Review of a Decision Whether to Apply Rule 404(b)

Before it resolved the merits of Bush's appeal, the Fourth Circuit first identified a significant split among the circuit courts regarding the proper standard of review for a trial court's determination of whether evidence falls within Rule 404(b). This case presents the Court with an opportunity to clarify the proper standard and resolve the disagreement.

a. The Court should resolve the circuit split regarding the appellate standard of review

A clear circuit split has developed regarding the appropriate standard of review for a district court's ruling on whether Rule 404(b) applies in a given case. As the standard of review is often outcome-determinative, this distinction creates a split on an extremely important issue.

The Third and Ninth Circuits review the question de novo, without deference to the district court's determination. *See United States v. Loftis*, 843 F.3d 1173, 1176 n.1 (9th Cir. 2016); *United States v. Green*, 617 F.3d 233, 239 (3d Cir. 2010). While acknowledging that the final *admission* of evidence is reviewed for abuse of discretion, both courts have said that de novo review is appropriate for the district court's threshold ruling because it is based on "a legal interpretation of the Federal Rules of Evidence." *Green*, 617 F.3d at 239; *see also Loftis*, 843 F.3d at 1176 n.1 ("We review admission of 'other crimes' evidence for abuse of discretion; however, whether the evidence is indeed other crimes evidence we review de novo.").

On the other hand, the Fourth Circuit reviews the same issue for abuse of discretion. Pet. App. at 8-9. So do the other circuits that have addressed the issue. *Id.* at n.11 (citing *United States v. Souza*, 749 F.3d 74, 84 (1st Cir. 2014); *United States v. Carboni*, 204 F.3d 39, 44 (2d Cir. 2000); *United States v. Coleman*, 78 F.3d 154, 156 (5th Cir. 1996); *United States v. Conner*, 583 F.3d 1011, 1018 (7th Cir. 2009); *United States v. Ruiz-Chavez*, 612 F.3d 983, 986, 988 (8th Cir. 2010); *United States v. Irving*, 665 F.3d 1184, 1210-11 (10th Cir. 2011); *United States v. Ford*, 784 F.3d 1386, 1392, 1394 (11th Cir. 2015); *United States v. Bell*, 795 F.3d 88, 98-99 (D.C. Cir. 2015)).

Under the current circuit split, therefore, a defendant in Pennsylvania receives a fresh look at the issue by the appellate court, but a defendant across the border in Maryland is subject to the deferential abuse-of-discretion standard. This type of discrepancy is appropriate for this Court's review. *See, e.g.*, *Ornelas v. United States*, 517 U.S. 690, 695 (1996) (noting that the Court "granted certiorari to resolve the conflict among the Circuits over the applicable standard of appellate review" for determinations of reasonable suspicion and probable cause); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 108 (1989) (noting that the Court granted certiorari "to resolve the conflicts among the Courts of Appeals as to the appropriate standard of review" for denial of benefits under ERISA); *Fry v. Pliler*, 551 U.S. 112, 120 (2007) (noting that the Court granted certiorari "to decide a question that [had] divided the Courts of Appeals," specifically "the appropriate standard of review when constitutional error in a state-court trial is first recognized by a federal court"). A

proper, uniform standard of review not only "prevent[s] the affirmance of opposite decisions on identical facts" but also "allow[s] appellate courts to clarify the legal principles." *United States v. Arvizu*, 534 U.S. 266, 275 (2002).

This split is all the more important to resolve because the standard of review is likely to be outcome determinative in a case like this. *See, e.g.*, *Kearney v. Standard Ins. Co.*, 175 F.3d 1084, 1095 (9th Cir. 1999) (explaining that a change from de novo to a clearly erroneous standard of review could be outcome determinative); Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. Chi. L. Rev. 1371, 1391 (1995) (explaining that "the standard of review more often than not determines the outcome"). While the abuse-of-discretion standard assumes that the district court both had and applied its discretion, the de novo standard creates no such presumption and requires the appellate court to engage with the issue afresh. *Ornelas*, 517 U.S. at 697-99. As this Court has explained, "the difference between a rule of deference and the duty to exercise independent review is much more than a mere matter of degree. When de novo review is compelled, no form of appellate deference is acceptable." *Salve Regina Coll. v. Russell*, 499 U.S. 225, 238 (1991) (internal quotation and citation omitted).

Under the status quo, differing standards of review subject criminal defendants to different outcomes depending on which circuit they find themselves in. Some receive a great deal of appellate deference; others receive none. This split should be resolved.

b. The Court should clarify that legal questions, even for interpretations of evidentiary rules, are reviewed de novo

The circuit split also presents the Court with an opportunity to clarify what has hitherto only been implied: that all legal determinations, even those regarding the Rules of Evidence, are reviewed de novo.

Traditionally, trial courts are afforded deference in their factfinding and evidentiary decisions because they are better positioned than appellate courts to make those determinations. *Salve Regina Coll.*, 499 U.S. at 233 (1991) (noting the typical "deference to the unchallenged superiority of the district court's factfinding ability"). By contrast, the "primary function" of a federal appellate court is "as an expositor of law." *Miller v. Fenton*, 474 U.S. 104, 114 (1985). Thus, a district court's *legal* rulings are typically reviewed de novo. *See, e.g.*, *Gonzales v. O. Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428 (2006); *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 948 (1995). In *Ornelas*, for example, this Court recognized that an abuse-of-discretion standard for such legal determinations "would be inconsistent with the idea of a unitary system of law." 517 U.S. at 697. The de novo standard of review "tends to unify precedent" and provides the relevant actors "with a defined set of rules." *Id.* (internal quotation omitted). Plenary review allows legal principles to "acquire more meaningful content through case-by-case application at the appellate level." *See Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 436 (2001).

This Court should apply the same logic to the determination of whether a rule of evidence—and particularly Rule 404(b)—applies. The question in this case does not involve a trial court's determination of witness credibility or litigation

supervision, for which deference would be appropriate. *See Salve Regina Coll.*, 499 U.S. at 233. Rather, the question here is a quintessential legal determination that should be reviewed de novo. *See id.* at 231 ("Independent appellate review of legal issues best serves the dual goals of doctrinal coherence and economy of judicial administration.").

Currently, the circuit courts are operating without an explicit statement from this Court that legal interpretations of the Rules of Evidence are reviewed de novo. Without that guidance, many circuits that apply an abuse-of-discretion standard to review the threshold interpretation of Rule 404(b) nevertheless apply a de novo standard to review interpretations of other Rules of Evidence. *See, e.g.*, *United States v. Phoeun Lang*, 672 F.3d 17, 23 (1st Cir. 2012) ("We review the legal interpretation of a rule of evidence de novo . . . ."); *Borawick v. Shay,* 68 F.3d 597, 601 (2d Cir. 1995) ("Our review must be de novo on the question whether, in exercising its discretion to admit evidence, the district court applied the proper legal test."); *Padilla v. Troxell*, 850 F.3d 168, 175 (4th Cir. 2017) ("We review the district court's evidentiary rulings under the Federal Rules of Evidence for abuse of discretion and its interpretations of such rules de novo."); *United States v. Baker*, 458 F.3d 513, 516 (6th Cir. 2006) ("In reviewing a trial court's evidentiary determinations, this court reviews de novo the court's conclusions of law and reviews for clear error the court's factual determinations that underpin its legal conclusions."); *United States v. Bloom*, 846 F.3d 243, 256 (7th Cir. 2017) ("We review de novo a district court's legal interpretation of the Federal Rules of Evidence . . . ."); *United States v. Montgomery,* 635 F.3d 1074, 1089 (8th Cir. 2011) ("We review the district

court's interpretation and application of the Federal Rules of Evidence de novo and its evidentiary rulings for abuse of discretion."); *United States v. Gutierrez de Lopez*, 761 F.3d 1123, 1132 (10th Cir. 2014) ("Although we review legal interpretations of the Federal Rules of Evidence de novo, we review a district court's evidentiary decisions for abuse of discretion"); *United States v. Paul,* 175 F.3d 906, 909 (11th Cir. 1999) ("To the extent that a ruling of the district court turns on an interpretation of a Federal Rule of Evidence, our review is plenary.").

None of the circuit courts has provided a principled reason why the analysis should be different for Rule 404(b). While the ultimate admission of other-acts evidence under Rule 404(b) is an evidentiary question that would be reviewed for abuse of discretion, the legal question about the scope of the Rule itself should be reviewed de novo. This Court should clarify that a district court's legal interpretation of Rule 404(b), like any other question of law, receives plenary review by the appellate courts.

2. The Courts of Appeals Have Misconstrued the Scope of Rule 404(b), Creating a Legal Issue of National Importance That Deserves This Court's Attention

Separate and apart from the appellate standard of review, the scope of Rule 404(b) has created divergent views among the circuit courts. As scholars noted soon after the Rule was enacted, one of the key words in Rule 404(b) is "other"; only crimes, wrongs, or acts "other" than those charged in the case are subject to the Rule. *See* 22 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5239 (1978). The lower courts generally refer to evidence of the same crime as

"intrinsic" and evidence of "other" crimes as "extrinsic," but they have failed to reduce that distinction into a single, meaningful test.

Indeed, courts have struggled with how to analyze the connection between a given crime or act and the charged crime. *See United States v. Bowie*, 232 F.3d 923, 927 (D.C. Cir. 2000). The most common test is the so-called "inextricably intertwined" test, which many circuits apply in some fashion. *See id.* at 928 (collecting cases). Other tests include whether the evidence "is properly admitted to provide the jury with a complete story of the crime on trial" or whether "its absence would create a chronological or conceptual void in the story of the crime." *United States v. Hughes,* 213 F.3d 323, 329 (7th Cir. 2000); *see also United States v. Carboni,* 204 F.3d 39, 44 (2d Cir. 2000) (stating that evidence is intrinsic if it arose "out of the same transaction or series of transactions as the charged offense," if it is "inextricably intertwined with the evidence regarding the charged offense," or if it is "necessary to complete the story of the crime on trial"); *see also supra* at 6 (listing the different tests used by the Fourth Circuit).

The one thing these tests have in common is that they lack support in either the language of Rule 404(b) or in precedent from this Court. Further, the circuit courts' formulations ignore the fact that the Rule itself is capable of dealing with such evidence. If evidence truly is part of a charged crime, it will always pass Rule 404(b)'s test—which only bars "other acts" evidence when it is offered for propensity purposes. Evidence that is offered as direct proof of a crime is not offered for that reason and thus does not violate Rule 404(b). *See Bowie*, 232 F.3d at 927. Rather than proceeding under Rule 404(b) in that scenario, the government would need to demonstrate that the act was direct

evidence of the crime committed such that it was relevant and probative under Rules 401 and 403. In contrast, the current tests utilized by the circuit courts incorrectly ask a question about the evidence itself (*i.e.*, whether it is inextricably intertwined, or a necessary preliminary, etc.), rather than the purpose for which it is being offered—which is the heart of Rule 404(b).

Similarly, evidence that is *not* part of the charged crime, but an "other act" that is a "necessary preliminary" or "inextricably intertwined" with the charged crime, is already admissible under Rule 404(b) when it is not offered for propensity purposes. As some courts have noted, such "other acts" are offered to provide context or background or to give a coherent picture of the facts of the crime charged, not to show a defendant's propensity to commit crimes. *See United States v. Seigel*, 536 F.3d 306, 317 (4th Cir. 2008) ("Rule 404(b) is viewed as an inclusive rule, admitting all evidence of other crimes or acts except that which tends to prove *only* criminal disposition."); *United States v. Heidebur*, 122 F.3d 577, 579 (8th Cir. 1997) (similar).

The intrinsic/extrinsic tests as currently articulated do little more than deprive criminal defendants of the procedural protections built into Rule 404(b) itself, such as notice and the right to a limiting jury instruction. These protections are crucial to maintain the rights of defendants, as this Court has previously acknowledged. *United States v. Felix*, 503 U.S. 378, 382 (1992); *Estelle v. McGuire*, 502 U.S. 62, 75 (1991); *Dowling v. United States*, 493 U.S. 342, 346 (1990); *Huddleston*, 485 U.S. at 691-92. Yet, the tests created by the circuit courts skirt the very safeguards that the Rule was designed to protect.

The current tests are therefore unsatisfactory. This Court should clarify what it meant in *Huddleston* when it referred to "extrinsic acts" and provide a definitive framework for determining when evidence is and is not subject to Rule 404(b).

3. This Case Is an Ideal Vehicle to Resolve These Issues

This case is an ideal vehicle to resolve the circuit split and to articulate the proper scope of Rule 404(b). First, the issues were properly preserved, as Bush objected to the introduction of this evidence both before and during trial and requested a Rule 404(b) jury instruction that was denied. Second, both the trial court and the Fourth Circuit directly addressed these issues. Third, both questions are cleanly presented by this case, and there are no "logically antecedent questions that could prevent [the Court] from reaching the question[s]" presented here. *See Unite Here Local 355 v. Mulhall*, 571 U.S. 83, 85 (2013).

The only other issue raised on appeal below is separable from these issues and is not raised here. Articulating the correct standard of review and the correct scope of Rule 404(b) would require a remand to the Fourth Circuit for reconsideration of Bush's appeal.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

This the 25th day of February, 2020.

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