No. 19-8588

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT DONELSON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, in a prosecution for possession with the intent to distribute methamphetamine, the district court abused its discretion under Federal Rule of Evidence 404(b) by admitting evidence that petitioner had previously possessed a distribution-level quantity of methamphetamine.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Fla.):

United States v. Donelson, No. 18-cr-35 (Apr. 4, 2019)

United States Court of Appeals (11th Cir.):

United States v. Donelson, No. 19-11564 (Dec. 30, 2019)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-4) is not published in the Federal Reporter but is reprinted at 797 Fed. Appx. 496.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 2019. The petition for a writ of certiorari was filed on May 28, 2020. 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 Northern District of Florida, petitioner was convicted of possessing 50 grams or more of methamphetamine with the intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A)(viii); possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A)(i); and possessing a firearm as a convicted felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). Judgment 1. The district court sentenced petitioner to 180 months of imprisonment, to be followed by five years of supervised release. Judgment 3-5. The court of appeals affirmed. Pet. App. 1-4.

1. In April 2018, a trooper with the Florida Highway Patrol attempted to stop the driver of a black Nissan for speeding. Trial Tr. 90-91. After the car stopped, the trooper saw someone run from the vehicle. Id. at 91-92. The driver was never located, but troopers searched the car and found a loaded firearm in a compartment behind the radio, as well as a safe in the back seat containing, among other things, 51 grams of methamphetamine, 15 grams of cocaine, more than 80 hydrocodone pills, several phones, and three digital scales. Presentence Investigation Report (PSR) ¶ 20a; Trial Tr. 99-102. A subsequent investigation identified petitioner as the driver of the Nissan, and police obtained a warrant for his arrest. Trial Tr. 49, 102-104, 106-109.

In May 2018, a confidential informant told the police that petitioner was staying in Panama City Beach, Florida, and driving a gray Ford Mustang registered to petitioner's girlfriend. Trial Tr. 26-27. That same day, police officers located the Mustang and eventually saw petitioner leave a nearby residence with a backpack. Id. at 27-28. Officers watched petitioner get into the Mustang, drive to another residence, enter that residence with the backpack, and remain for less than ten minutes. Ibid. Petitioner then returned to the car with the backpack and drove back to the first residence, where he remained for about five minutes. Id. at 29. He then left the first residence with the backpack, got back into the Mustang, and drove to a Harley Davidson dealership. Ibid.; PSR ¶ 14. When the officers attempted to stop the Mustang, petitioner got out of the car while it was still running, threw a wad of cash into the air, and ran away as the Mustang rolled into a marked police car. Trial Tr. 31, 51. Petitioner was apprehended a short distance away. Id. at 31-32, 51; PSR ¶ 15.

Officers searched both the Mustang and petitioner's backpack, which petitioner had left inside the car when he fled. Trial Tr. 34. In the backpack, officers discovered a small box containing approximately 53.7 grams (just under two ounces) of pure methamphetamine with an estimated street value of $1600, three sets of digital scales, plastic sandwich bags, a loaded .357 revolver, and a box of ammunition. Id. at 34-36, 39-40. The

officers determined that petitioner had thrown approximately $4000 into the air as he fled. Id. at 34.

After the officers arrested petitioner and provided him with Miranda warnings, petitioner agreed to speak with an officer, who recorded their conversation. Trial Tr. 62-63. Petitioner initially told the officer that the money he threw into the air was from "side jobs." Gov't Exh. 19, at 2. Petitioner eventually admitted, however, that "some drugs" were in the car and that the money he discarded came from drug sales. Id. at 3; see id. at 3-4.

While in a holding cell at the local jail, petitioner called an associate and confided that the police had found a gun and "like two zips" (i.e., two ounces, see Trial Tr. 56) in his "book bag." Gov't Exh. 21, at 1; see Trial Tr. 52.

2. A federal grand jury charged petitioner with possessing 50 grams or more of methamphetamine with the intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A)(viii); possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A)(i); and possessing a firearm as a convicted felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). Superseding Indictment 1-5.

Before trial, the government moved to admit into evidence details of the April 2018 incident under Federal Rule of Evidence 404(b) as extrinsic evidence relevant to proving petitioner's knowledge about the methamphetamine in the backpack that was

recovered in May 2018 and to establishing that petitioner's modus operandi was to carry a firearm in furtherance of drug trafficking. D. Ct. Doc. 42, at 2-4 (Jan. 9, 2019). The district court found the evidence admissible under Rule 404(b) to show knowledge and intent. D. Ct. Doc. 79, at 2-3 (May 21, 2019).

At trial, the government introduced evidence of petitioner's movements on the day of his arrest, his attempted flight from police, the items found during the search of the Mustang and backpack, and petitioner's recorded admissions to an officer that drugs were in the car and that the money he discarded was from the sale of drugs. See Trial Tr. 27-32, 51, 62-63; Gov't Exh. 19. The government also introduced the recorded jail call during which petitioner admitted that he had a gun and two ounces of methamphetamine in his backpack. See Trial Tr. 52, 56; Gov't Exh. 21, at 1.

In accordance with the district court's pretrial ruling, the government also elicited testimony from two Florida State Troopers who described their roles in the April 2018 attempted traffic stop and subsequent search of the black Nissan. Trial Tr. 90-95, 97-109, 113. One trooper described attempting to stop the speeding vehicle and seeing a large figure run from the passenger side. Id. at 91-92. The other described searching the Nissan and finding methamphetamine and cocaine, a substance suspected to be heroin, 80 pills of suspected hydrocodone, 14 pills of suspected hydrochloride, three scales, and a loaded firearm. Id. at 99-102.

Both the government and defense counsel stated during closing arguments that the evidence had been offered only for the purpose of proving petitioner's knowledge and intent to commit the charged crimes. Id. at 139, 145-147. And the district court explicitly instructed the jury that it could consider the April 2018 incident only for the "limited purpose[]" of "evaluating [petitioner's] knowledge and intent on May 12, 2018," and that it "cannot convict [petitioner] of the crimes charged on May 12, 2018, just because" it may find that petitioner committed the acts alleged in the April 2018 incident. Id. at 155-156.

The jury returned a verdict of guilty on all counts. Verdict 1-2. The district court sentenced petitioner to 180 months of imprisonment, to be followed by five years of supervised release. Judgment 1-5.

3. The court of appeals affirmed in an unpublished, per curiam opinion. Pet. App. 1-4.

The court of appeals determined that the district court had not abused its discretion in admitting the April 2018 evidence under Rule 404(b). Pet. App. 3. It explained that evidence of a prior wrong or act may be admissible under Rule 404(b), as informed by Rule 403, if (1) it is "relevant to an issue other than * * * character"; (2) "sufficient proof" exists "to allow a jury to determine that the defendant committed the prior act"; and (3) the "evidence's probative value" is not "substantially outweighed by undue prejudice." Id. at 2 (citing United States v. Chavez, 204

F.3d 1305, 1317 (11th Cir. 2000), and Fed. R. Evid. 403). The court explained that "Rule 404(b) evidence may be admitted to show intent or knowledge," and that, by pleading not guilty, a defendant makes his intent a material issue for the government to prove at trial. Ibid. At the same time, the court stated that "[t]o prove a defendant's intent with evidence of his other crimes, the government must demonstrate that the extrinsic offense has the same intent as that charged in the instant offense." Ibid. And it added that, even then, "if the government can do without such evidence, fairness dictates that it should." Ibid. (citation omitted).

The court of appeals concluded that the district court did not abuse its discretion in admitting the April 2018 evidence under Rule 404(b). Pet. App. 3. The court observed that both the April and May incidents "involved drug distribution" and that "evidence of prior drug dealings is highly probative of intent to distribute a controlled substance." Ibid. It further observed that both the April and May incidents involved petitioner's efforts to flee from the police. Ibid. It explained that the recovery of methamphetamine, scales, and a firearm a month earlier "could make it more likely that he possessed the gun to further his drug crimes and possessed the drugs in May 2018 intending to distribute them." Ibid. And it determined that the government had provided sufficient evidence from which the jury could find that petitioner committed the April incident; that the similarity and recency of

the April incident "was highly probative" of petitioner's intent in May; and that both the district court's limiting instruction and the government's rebuttal argument "made clear to the jury" that the April 2018 incident was to be considered only in relation to petitioner's knowledge and intent in May 2018. Ibid.

ARGUMENT

Petitioner contends that the district court abused its discretion under Federal Rule of Evidence 404(b) in admitting evidence of an earlier incident in which defendant was suspected of possessing methamphetamine, other drug paraphernalia, and a firearm, on the theory that the district court did not identify a "propensity free" basis for admissibility. Pet. 4; see Pet. 5-25. The court of appeals correctly rejected that contention, and its unpublished, per curiam decision does not conflict with any decision of this Court or of another court of appeals. In any event, this case would be a poor candidate for further review because any error in the admission of petitioner's prior conduct was harmless in light of other overwhelming evidence of his guilt, and because the question presented lacks prospective importance in light of a recent amendment to Rule 404(b). This Court has previously denied certiorari in a case presenting a similar issue, see Jackson v. United States, 139 S. Ct. 2744 (2019) (No. 18-1054), and should do the same here.

1. Under Federal Rule of Evidence 404(b), "[e]vidence 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). Such evidence may be admissible, however, "for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b)(2). Indeed, this Court has recognized that evidence of prior bad acts "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). Accordingly, evidence of a defendant's prior crimes may be admitted if it is relevant to a proper, non-propensity purpose, Fed. R. Evid. 401-402; its probative value is not "substantially outweighed" by the potential for undue prejudice, Fed. R. Evid. 403; and, on request, the district court instructs the jury that it may consider the other-crimes evidence only for the non-propensity purposes for which it was admitted. See Huddleston, 485 U.S. at 691-692.

The court of appeals correctly applied those principles to the district court's determination that evidence about petitioner's prior conduct was admissible to prove his knowledge and intent with respect to the crimes charged. The court of appeals recognized that petitioner placed his intent to distribute methamphetamine at issue when he pleaded not guilty to all charges.

Pet. App. 3. It reasoned that evidence of petitioner's drug distribution in April 2018 was relevant to establishing petitioner's intent to distribute the roughly $1600 worth of methamphetamine he carried from residence to residence one month later in May 2018. Ibid. It determined the similarity and recency of petitioner's prior conduct made the evidence highly probative. Ibid. And it recognized that any potential for undue prejudice was addressed by district court's limiting instruction and the government's own statements making it "clear to the jury * * * that it only offered the April 2018 evidence to prove [petitioner's] knowledge/intent in May 2018." Ibid.

2. Petitioner contends (Pet. 5-23) that the Court should grant review to resolve an asserted circuit conflict about whether a defendant's prior drug possession is admissible to show knowledge and intent in a subsequent drug prosecution. In particular, he asserts (Pet. 5-6) that the Eighth and Eleventh Circuits "apply a virtually per se rule of admissibility for any prior drug activity," while the Third, Fourth, Sixth, and Seventh Circuits "hold[] that prior drug possession convictions should ordinarily be excluded." Petitioner significantly overstates the level of disagreement among the courts of appeals about the scope of a district court's discretion under Rule 404(b). And this case does not implicate any disagreement over the admissibility of prior drug possession because the petitioner's prior conduct from April 2018 involved distribution, not simple possession.

a. Petitioner asserts (Pet. 6) that the Eighth Circuit applies a "blanket rule of admissibility for prior drug possession convictions" in drug distribution prosecutions. He notes in particular that decisions of that court have stated "a prior conviction for distributing drugs, and even the possession of user-quantities of a controlled substance, are relevant under Rule 404(b) to show knowledge and intent to commit a current charge of conspiracy to distribute drugs." Ibid. (quoting United States v. Robinson, 639 F.3d 489, 494 (8th Cir. 2011)). As a threshold matter, many of those decisions concerned only the relevance of "prior conviction[s] for distributing drugs," not drug possession. Ibid. (emphasis added; citation omitted); see, e.g., United States v. Patino, 912 F.3d 473, 476 (8th Cir. 2019); United States v. Valerio, 731 Fed. Appx. 551, 553 (8th Cir. 2018) (per curiam), cert. denied, 139 S. Ct. 793 (2019). In any event, the Eighth Circuit does not treat relevance under Rule 404(b) as the sole criterion of admissibility. Instead, it has explained that the government must also establish that the defendant's earlier conduct is "proven by a preponderance of the evidence"; that the extrinsic evidence is "of greater probative value than prejudicial effect" as described in Rule 403; and that the prior acts are "similar in kind and close in time to a charged offense." United States v. Walker, 428 F.3d 1165, 1169 (8th Cir. 2005), cert. denied, 546 U.S. 1194 (2006).

Accordingly, even where the Eighth Circuit notes the relevance of prior drug convictions or conduct, it recognizes that the government must still satisfy those other requirements in order to introduce the prior convictions or conduct into evidence. See, e.g., United States v. Horton, 756 F.3d 569, 579-580 (separately analyzing whether prior offenses were sufficiently similar to the current charges and whether the potential for undue prejudice substantially outweighed the probative value), cert. denied, 135 S. Ct. 122 (2014). And it has repeatedly cautioned that evidence of prior drug offenses may not be "introduced solely to prove the defendant's propensity to commit criminal acts." United States v. Davidson, 195 F.3d 402, 408 (8th Cir. 1999) (quoting United States v. Brown, 148 F.3d 1003, 1009 (8th Cir. 1998), cert. denied, 525 U.S. 1169 (1999)), cert. denied, 528 U.S. 1180 and 529 U.S. 1093 (2000).

Petitioner is therefore incorrect in asserting (Pet. 9) that evidence of prior drug activity is "per se admissible in subsequent drug distribution prosecutions" in the Eighth Circuit. Indeed, petitioner acknowledges (Pet. 8-9) that the Eighth Circuit recently determined that a district court abused its discretion in admitting evidence of a prior drug-possession conviction under Rule 404(b) in a prosecution for conspiracy to possess with intent to distribute cocaine. United States v. Turner, 781 F.3d 374, cert. denied, 136 S. Ct. 280 and 136 S. Ct. 493 (2015). In doing so, the court of appeals acknowledged the precedent to which

petitioner refers, but emphasized that it should not be read to "invite passive treatment of the Federal Rules of Evidence." Id. at 390. Instead, the court explained that the government, "as the proponent of the evidence, must be prepared to show a permissible purpose for admission of [a] prior conviction." Ibid. And it reiterated that, even if "the government offers a relevant, non-propensity purpose for the evidence," the district court still must "determine whether admission of that evidence is nevertheless substantially more prejudicial than probative." Id. at 391.[1]

Petitioner contends (Pet. 9) that the Eleventh Circuit -- the court below here -- "applies the same rule as the Eighth Circuit: prior drug acts are per se admissible in subsequent drug distribution prosecutions." The Eleventh Circuit, however, has expressly refused to "create a per se rule of admissibility of any prior drug conviction" of the sort that petitioner ascribes to it. United States v. Sanders, 668 F.3d 1298, 1315 (2012) (per curiam). Similar to the Eighth Circuit, the Eleventh Circuit has explained that, in addition to relevance to a non-propensity purpose, the government must also demonstrate that the defendant's prior conduct is "established by sufficient proof to permit a jury

[1] The Eighth Circuit's later decision in United States v. Wright, 866 F.3d 899 (2017), cert. denied, 138 S. Ct. 2026 (2018), does not show any per se rule of admissibility for evidence of drug possession. In Wright, the Rule 404(b) evidence concerned a prior conviction for "manufacture or delivery," not possession, of cocaine, and the court was attentive to the specific circumstances of the case, including the particular rationale of admissibility and the limited possibility of undue prejudice. Id. at 902.

finding that the defendant committed the extrinsic act," and that the "probative value of the evidence [is] not * * * substantially outweighed by its undue prejudice." United States v. Matthews, 431 F.3d 1296, 1310-1311 (2005) (per curiam) (citation omitted), cert. denied, 549 U.S. 811 (2006). In recent decisions, it has cited its 1997 decision in United States v. Butler, 102 F.3d 1191 (11th Cir.), cert. denied, 520 U.S. 1219 (1997), on which petitioner heavily relies, only in describing the relevance requirement; not as a basis for eliminating the other conditions on admissibility. See, e.g., United States v. Hunter, 758 Fed. Appx. 817, 822-823 (11th Cir. 2018) (per curiam); United States v. Jarriel, 499 Fed. Appx. 860, 861 (11th Cir. 2012) (per curiam); United States v. Sawyer, 361 Fed. Appx. 96, 99 (11th Cir.) (per curiam), cert. denied, 562 U.S. 873 (2010); United States v. McQueen, 267 Fed. Appx. 880, 882-883 (11th Cir. 2008) (per curiam); Matthews, 431 F.3d at 1311. And it has found that a district court abused its discretion by admitting evidence of prior convictions where dissimilarities between the circumstances of prior drug offenses and the charged offense undermined the probative value of the proffered evidence as compared to the potential for undue prejudice. See Sanders, 668 F.3d at 1315; see also United States v. Young, 574 Fed. Appx. 896, 901-902 (11th Cir. 2014) (per curiam).

b. Petitioner similarly overstates (Pet. 12-23) the extent to which the Third, Fourth, Sixth, and Seventh Circuits will

exclude evidence of prior drug possession offered under Rule 404(b).[2] As petitioner appears to recognize (Pet. 12), none of those courts has articulated a blanket rule of inadmissibility for evidence of previous drug possession in a subsequent drug-distribution prosecution. Rather, they have recognized that in proper circumstances, such evidence may be introduced for non-propensity purposes. See United States v. Davis, 726 F.3d 434, 442-443 (3d Cir. 2013) ("[T]here is no question that, given a proper purpose and reasoning, drug convictions are admissible in a trial where the defendant is charged with a drug offense.") (citation omitted); United States v. Hall, 858 F.3d 254, 268 (4th Cir. 2017) (recognizing that "a prior possession conviction may be relevant to establishing a defendant's knowledge of the same type of drug for purposes of a later offense"); United States v. Lattner, 385 F.3d 947, 957 (6th Cir. 2004) (recognizing that "claims of innocent presence or association, such as that made by Lattner's defense, routinely open the door to 404(b) evidence of other drug acts."), cert. denied, 543 U.S. 1095 (2005); United States v. Lee, 724 F.3d 968, 980 (7th Cir. 2013) (recognizing the existence of at least some "permissible inferences about [a defendant's] knowledge and intent" based on prior drug-related activity).

[2] Petitioner's assertion (Pet. 11) of an intra-circuit division of authority within the Fifth Circuit does not warrant this Court's review. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

Each of the circuits petitioner identifies as having adopted a more restrictive view of Rule 404(b) evidence has within the last several years permitted the introduction of evidence of prior drug activity, including drug possession, in appropriate circumstances. See, e.g., United States v. Jackson, 619 Fed. Appx. 189, 190-193 (3d Cir. 2015) (determining that "evidence of prior drug transactions * * * went to the non-propensity purposes of showing [the defendant]'s knowledge and intent, as well as assisting the jury in understanding the narrative of facts leading up to the offenses for which [the defendant] was indicted"), cert. denied, 136 S. Ct. 992 (2016); United States v. Hamlin, 701 Fed. Appx. 278, 279 (4th Cir. 2017) (per curiam) (determining that evidence of a defendant's prior possession of cocaine was relevant to defendant's knowledge and intent to commit crime of possession with intent to distribute, where evidence showed that "officers previously arrested [defendant] for carrying the same drug, in similar packaging, [and] while carrying a firearm"), cert. denied, 138 S. Ct. 1308 (2018); United States v. Avalos, 458 Fed. Appx. 530, 533 (6th Cir. 2012) (determining that evidence of defendant's past convictions for, inter alia, possession of methamphetamine "was material to show her knowledge that the money she retrieved for [her co-conspirator] was used to facilitate drug transactions and to infer her intent to join the conspiracy"); United States v. Moore, 531 F.3d 496, 499-500 (7th Cir. 2008) (determining that evidence of uncharged conduct where defendant had previously fled

from police and abandoned bag containing drugs that he intended to sell was relevant to show intent and knowledge in subsequent prosecution for possession with intent to distribute).

c. As petitioner notes (Pet. 12-21), some courts of appeals have in some cases expressed skepticism about the inherent relevance of prior drug possession to establishing a defendant's subsequent intent to distribute drugs. See, e.g., Davis, 726 F.3d at 444-445 (noting disagreement with Eleventh Circuit's decision in Butler on whether prior possession is relevant to showing intent to distribute); Hall, 858 F.3d at 267-268 (same); United States v. Haywood, 280 F.3d 715, 721 (6th Cir. 2002) (same); Lee, 724 F.3d at 979 (noting that "it is not obvious" how a prior conviction for simple possession "would shed light on" an intent to distribute); cf. Matthews, 431 F.3d at 1318 (Tjoflat, J., specially concurring) ("The intent necessary to possess an illegal drug is no more relevant to the intent to either conspire to distribute illegal drugs or to distribute them than any other criminal act."); United States v. Ono, 918 F.2d 1462, 1464-1465 (9th Cir. 1990) (questioning, in dicta, the relevance of the prior "personal use of a controlled substance" to "show intent" to distribute a controlled substance in a subsequent prosecution). But any differences among the approaches taken by the circuits about the admissibility of evidence of prior drug possession does not warrant further review here.

As explained above, any difference is a matter of degree, not of kind. 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 to the outcome of appellate decisions than any differences in the way courts of appeals describe their approaches to the application of Rule 404(b). 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."); United States v. Miller, 673 F.3d 688, 697 (7th Cir. 2012) (recognizing that Rule 404(b), in particular, "requires a case-by-case determination, not a categorical one"). And when case-by-case determinations are committed to the experience and insight of the district courts, this Court has recognized that, over a sufficiently long history of "discretionary [decisions] and review by appellate tribunals, 'the channel of discretion [may be] narrowed.'" Halo Elecs., Inc. v. Pulse Elecs., Inc., 136 S. Ct. 1923, 1932 (2016) (quoting Henry J. Friendly, Indiscretion About Discretion, 31 Emory L.J. 747, 772 (1982)). In the absence of a strong indication that different courts are consistently reaching different results on similar facts, intervention in that process by this Court is not warranted.

In any event, although petitioner focuses (e.g., Pet. 6, 12, 14, 18 n.2) on the admissibility of prior instances of "drug possession," the evidence of his own prior conduct did not concern mere possession. As the trial evidence here showed, the amount of drugs discovered in petitioner's possession in April 2018 was not consistent with simple drug possession. See Trial Tr. 99-102 (explaining the discovery of methamphetamine, 15 grams of cocaine, and more than 80 hydrocodone pills, as well as a firearm, several phones, and three digital scales). The court of appeals thus correctly observed that petitioner's prior conduct "involved drug distribution." Pet. App. 3 (emphasis added). And that observation was critical to the court's reasoning that the evidence was relevant to proving petitioner's intent to distribute methamphetamine in May 2018. See id. at 2 ("To prove a defendant's intent with evidence of his other crimes, the government must demonstrate that the extrinsic evidence has the same intent as that charged in the instant offense.").

3. Finally, further review is also unwarranted in this case for two additional reasons.

First, because the government introduced strong evidence of petitioner's guilt, any error in admitting his prior conduct was harmless. See Fed. R. Crim. P. 52(a). The jury heard evidence that petitioner was observed carrying a backpack to two residences before driving to a motorcycle dealership. Trial Tr. 26-29. When confronted by police, petitioner fled after throwing approximately

$4000 cash into the air. Id. at 31, 34, 51. Once in custody, petitioner admitted that he had drugs in the car and that the money he discarded was from the sale of drugs. Gov't Exh. 19, at 3-4. Police found over two ounces of methamphetamine in petitioner's backpack, along with a firearm and additional paraphernalia associated with drug distribution. Trial Tr. 34-36, 39-40. And petitioner admitted to an associate that he had a gun and two ounces of methamphetamine in his backpack. Gov't Exh. 21, at 1. Given all of that evidence, any error in admitting petitioner's prior conduct did not have a substantial influence on the jury's verdict.

Second, the question presented is of diminishing practical importance. Federal Rule of Evidence 404(b) was recently amended to require prosecutors in future prosecutions (beginning December 1, 2020, absent contrary Congressional action) to provide notice of the "permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose." Fed. R. Evid. 404(b) (effective December 1, 2020). The advisory committee notes accompanying the amended notice provision indicate that it would require the prosecutor to "describ[e] the specific act that the evidence would tend to prove" and "explain[] the relevance of the evidence for a non-propensity purpose." Fed. R. Evid. 404(b) advisory committee's notes to 2020 amendment. The amendment accordingly bears on petitioner's proposal (Pet. 4-5) that courts should "conduct a particularized analysis of whether

the specific facts underlying a prior conviction establish a propensity-free basis for admissibility in light of the specific circumstances of a drug distribution prosecution." Any review of the question presented now could thus be largely retrospective in nature and premature.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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