No. 20-5908

IN THE SUPREME COURT OF THE UNITED STATES

MIKEL CLOTAIRE, 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 the district court abused its discretion under Federal Rules of Evidence 404(b) and 403 by admitting an image from petitioner's post-arrest booking photograph -- which was not identified to the jury as such and omitted any jailhouse administrative markings -- as evidence of petitioner's appearance closer in time to photographs of criminal activity that he claimed showed someone else.

ADDITIONAL RELATED PROCEEDINGS

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

United States v. Clotaire, No. 16-cr-80135 (Nov. 2, 2017)

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

United States v. Clotaire, No. 17-15287 (June 30, 2020)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 3-27) is reported at 963 F.3d 1288.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 2020. The petition for a writ of certiorari was filed on September 29, 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 Southern District of Florida, petitioner was convicted on

one count of conspiring to commit access-device fraud, in violation of 18 U.S.C. 1029(b)(2); one count of fraudulently using an unauthorized access device, in violation of 18 U.S.C. 1029(a)(2); and five counts of aggravated identity theft, in violation of 18 U.S.C. 1028A. Judgment 1. The district court sentenced petitioner to 54 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 3-27.

1. In late 2013 and early 2014, petitioner and his brother Yvenel Clotaire engaged in a fraudulent scheme to submit false claims for state unemployment benefits. Pet. App. 4-5; Presentence Investigation Report (PSR) ¶ 6. Yvenel was at that time a United States Postal Service mail carrier. Ibid. Petitioner and Yvenel applied for Florida unemployment benefits using stolen identities, requesting that preloaded debit cards be delivered to addresses on Yvenel's mail route. PSR ¶ 6. After the debit cards were delivered, petitioner and his accomplices withdrew the available funds. Ibid.

In May 2014, the United States Department of Labor's Miami Field Division received a complaint from the Jupiter Police Department concerning the theft of a police officer's personally identifiable information, which had been used to apply for unemployment benefits from the Florida Reemployment Assistance Program. Pet App. 4; PSR ¶¶ 5, 28. The Department of Labor opened a criminal investigation, led by Special Agent Matthew Broadhurst,

which expanded to involve eight suspected fraudulent unemployment claims. Pet. App. 4; 7/25/17 Tr. 175, 178, 181-182. In each instance, the claimant requested that benefits be paid through a pre-loaded Visa debit card and be delivered by mail to an address in West Palm Beach, Florida. Pet. App. 5; PSR ¶ 6; 7/24/17 Tr. 138-140, 158, 177.

Law enforcement obtained the balance and withdrawal history of the debit cards and surveillance camera footage connected to the ATM withdrawals made on each card. Pet. App. 5; 7/25/17 Tr. 182. From the surveillance footage, law enforcement identified a man who made several withdrawals while driving a white Chevrolet Impala. 7/25/17 Tr. 183-184; see also 7/24/17 Tr. 284-285. Using the license plate number captured from the Impala, officers determined that the vehicle had been rented by Yvenel. Pet. App. 5; 7/25/17 Tr. 184. The officers also learned that Yvenel was employed as a letter carrier and that the fraudulently obtained debit cards had been mailed to addresses on Yvenel's mail route. Pet. App. 5; PSR ¶¶ 6, 10.

Initially, after comparing Yvenel's driver's license photograph to the ATM surveillance photographs, officers believed that Yvenel was the man seen in the ATM surveillance video footage. Pet. App. 5; PSR ¶ 8; 7/25/17 Tr. 185-186. Agent Broadhurst testified before a grand jury about that identification, and Yvenel was indicted in July 2015 on charges of fraudulent use of access devices and aggravated identify theft. Pet. App. 5; PSR ¶ 8;

7/25/17 Tr. 185-186. After his arrest, however, Yvenel identified his brother, petitioner, as the man in the surveillance photos. Pet. App. 5; PSR ¶ 9. Yvenel told law enforcement that he had rented the Chevrolet Impala but had permitted petitioner to drive the vehicle. PSR ¶ 9.

When he saw a photograph of petitioner, Agent Broadhurst determined that he had misidentified the individual in the ATM surveillance photos. 7/25/17 Tr. 186. The government consequently sought to dismiss the initial indictment of Yvenel and obtain a new indictment charging both brothers with their participation in the fraudulent scheme. Ibid.; Pet. App. 5.

2. In February 2017, a federal grand jury in the Southern District of Florida charged petitioner and his brother each with one count of conspiring to commit access-device fraud, in violation of 18 U.S.C. 1029(b)(2); one count of fraudulently using an unauthorized access device, in violation of 18 U.S.C. 1029(a)(2); and five counts of aggravated identity theft, in violation of 18 U.S.C. 1028A. Superseding Indictment 1-6. The defendants were tried separately. Pet. App. 5.

During petitioner's trial, Agent Broadhurst testified about law enforcement's investigation and his initial erroneous identification of Yvenel as the man in the ATM surveillance photographs. 7/25/17 Tr. 175-211. Petitioner's counsel cross-examined Agent Broadhurst about his erroneous identification of Yvenel. Id. at 213-215. Petitioner's counsel elicited that,

despite experience identifying individuals in surveillance videos thousands of times, Agent Broadhurst conducted his investigation for 14 months before identifying petitioner as the man in the photographs; that his initial written reports had identified Yvenel as the person in the ATM surveillance photographs, based on Yvenel's driver's license photograph; and that he had been confident enough to present that conclusion to the United States Attorney's Office for prosecution. Id. at 213-214; 7/26/17 Tr. 14-15, 21-26.

During a sidebar before Agent Broadhurst's testimony, the government informed the district court that it intended to introduce a portion of a booking photograph from the United States Marshals Service, depicting petitioner when he was arrested in connection with the offenses being prosecuted. 7/25/17 Tr. 97-98. The government argued that the photograph was relevant "because it shows [petitioner's] hair" and "his face" as they appeared around the time of the offense conduct and would assist "the jury to help make identification of the pictures" obtained from the ATM surveillance. Id. at 97-98. The government further argued that, combined with petitioner's earlier driver's license photograph, the post-arrest booking photograph established that petitioner had dreadlocks during the relevant period -- "shorter ones in 2011, all the way through 2016" -- which contrasted with petitioner's appearance in the courtroom, without dreadlocks. Id. at 99.

Although the original booking photograph included both "a profile picture" and "a front-on picture," the government explained that, in light of petitioner's objection, it would "only show the picture of the bust." 7/25/17 Tr. 97-98. The government acknowledged that, in the photograph, petitioner was "wearing what [the prosecutor] kn[ew] to be a blue kind of jumpsuit, * * * or the shirt that you typically see Defendants who are in custody wearing." Id. at 98. But the prosecutor explained that, when offering the photograph, he would not ask the Marshal anything "other than to authenticate the picture," and would not "get into [petitioner] being in the jail or any of the procedures behind it." Ibid.

The district court overruled petitioner's objection to the photograph's admission, observing that the photo was "from a time closer to the time of the conspiracy." 7/25/17 Tr. 99. The court also observed that petitioner's clothing was "not that much different than" the shirt petitioner was wearing in his driver's license photograph, but stated that the parties "might be able, by agreement, to take out some of the automated booking system" demarcations. Ibid. The district court also suggested that the parties "might be able to avoid" having the Marshal testify about the date of the photograph through a stipulation. Id. at 100.

The photograph was subsequently admitted into evidence by stipulation, and the jury was informed that the photograph was taken on October 11, 2016. 7/25/17 Tr. 139. Only the forward-

facing portion of the booking photograph was admitted. See Pet. App. 28 (reproducing the photograph as introduced). The photograph depicted petitioner in a blue shirt and two unlabeled solid lines (part of the height gauges) were visible in the background. Ibid. No markings or additional information was visible in the photograph. Ibid.

During his testimony, Agent Broadhurst compared petitioner's facial features from around the time of the crime, as depicted in his booking photograph, with the ATM surveillance photographs. He pointed out petitioner's "dreadlocks," his "complexion," his "beard," his "facial structure," his "nose," and the fact that on "the upper left-hand side of the brow" his "eyebrow tends to peak." 7/25/17 Tr. 192-193.

The government also introduced records from the Florida Driver and Vehicle Information Database containing petitioner's driver's license photos. 7/24/17 Tr. 193-194, 203-204; see Pet. App. 29-32. The most recent photograph in those records was dated May 26, 2011. 7/24/17 Tr. 208. And the government introduced petitioner's passport application, dated June 2012, which also contained a photograph of petitioner. 7/25/17 Tr. 138-139; see Pet. App. 33-38.

Following trial, the jury found petitioner guilty on all counts. Verdict 1-2. The district court sentenced petitioner to 54 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3.

3. The court of appeals affirmed. Pet. App. 3-27. As relevant here, the court rejected petitioner's argument that admitting a portion of his booking photograph "was an abuse of discretion under [Federal Rule of Evidence] 403." Id. at 20; see id. at 20-26.

At the outset, the court of appeals deemed a "longstanding judicial skepticism about the use of mug shots in criminal trials," as potentially inconsistent with Federal Rule of Evidence 404(b)'s prohibition on introducing evidence of prior crimes as evidence of a defendant's bad character, to be "appropriate." Pet. App. 20. The court explained, however, that "mug shots are not categorically barred" as evidence and that "the danger of unfair prejudice will not always substantially outweigh the probative value of the photos in establishing the defendant's identity." Id. at 21.

The court of appeals observed that, under its precedent, the government was required to satisfy three prerequisites for the admission of such photographs -- namely, that the government has "a demonstrable need to introduce the photographs"; that the "photographs themselves, if shown to the jury, must not imply that the defendant has a prior criminal record"; and that the "manner of introduction at trial must be such that it does not draw particular attention to the source or implications of the photographs." Pet. App. 21 (quoting United States v. Hines, 955 F.2d 1449, 1455-1456 (11th Cir. 1992)). And the court determined that the district court had not abused its discretion

in finding those prerequisites satisfied in this case. Id. at 20-26.

First, the court of appeals found that a showing of demonstrable need was "easily met" because "[t]he government's case hinged on whether [petitioner] was the man pictured in the ATM surveillance images." Pet. App. 23. The image from the booking photograph provided the jury with "a depiction of [petitioner] that was roughly contemporaneous with the ATM photos" showing petitioner "with dreadlocks, which he lacked at trial." Ibid. Although petitioner had argued that the June 2012 passport photo would have been equally as probative and was "slightly closer in time" to the 2014 ATM photographs than petitioner's October 2016 booking photograph, the court of appeals explained that "as a court of review, it [wa]s not [its] role to determine whether [petitioner's] passport photograph or mug shot bears a better resemblance to the ATM photos." Ibid.

Second, the court of appeals found that the photograph did not imply that petitioner had a prior criminal record. Pet. App. 23-26. The court observed that the stipulation that the photograph was taken on October 11, 2016 -- the date of petitioner's arrest for the charges being prosecuted -- "effectively removed the implication of a prior arrest." Id. at 23. The court made clear, however, that in its view, such a "stipulation is not a free pass" because "showing the jury an obvious mug shot could still weaken the defendant's presumption of innocence." Id. at 24. But the

court examined the circumstances of the case and found "that is not what happened here." Id. at 25. The court noted that the government had "introduced only the direct shot of [petitioner], removing the profile picture so emblematic of a mug shot," and had also removed "jailhouse administrative markings." Ibid. And although the photograph did show petitioner "wearing standard-issue jailhouse garb, which may or may not have been apparent to jurors," and featured "visible height gauges," the court found that notwithstanding those features, "the jury had no reason to suspect that the photo was taken from an earlier brush with the law." Ibid.

Finally, the court of appeals determined that the "manner of introducing the photograph into evidence" was not prejudicial, because the discussion about the photograph's admission took place away from the jury and the prosecutor "did not draw attention to how or under what circumstances the photographs were taken." Pet. App. 25-26.

ARGUMENT

Petitioner contends (Pet. 9-17) that the district court violated his constitutional rights to a fair trial and fundamental fairness in admitting into evidence a portion of his post-arrest booking photograph, on the theory that the photograph suggested to the jury that petitioner had a criminal history. Neither of those constitutional arguments, however, was pressed or passed upon below. Moreover, the court of appeals correctly rejected the

evidentiary challenge petitioner did press below. Its factbound decision does not conflict with any decision of this Court or of another court of appeals. Further review is unwarranted.

1. The petition for a writ of certiorari should be denied because the question presented was neither presented nor decided below. Petitioner asks this Court to decide whether the introduction of his post-arrest booking photograph violated his "rights to a fair trial and fundamental fairness guaranteed by the Fifth and Fourteenth Amendment[s]." Pet. i; see also Pet. 2-3, 8-9. But petitioner did not raise any constitutional argument before the district court or the court of appeals, and neither court addressed any constitutional questions. In the district court, petitioner objected to the photograph on the grounds that it was "a little too far away from the time charged in the conspiracy to be relevant" and that it was "after being arrested and [in] jail garb." 7/25/17 Tr. 98. In the court of appeals, petitioner argued that the district court's admission of his booking photograph over his objection was an evidentiary error under Federal Rule of Evidence 403. See Pet. C.A. Br. 30, 55-57. And the court of appeals, in turn, addressed and resolved only the admissibility of the booking photograph under Rules 404(b) and 403; it did not address the constitutional issues petitioner presses here. See Pet. App. 20 (recognizing and rejecting only petitioner's argument that the introduction of his booking photograph "was an abuse of discretion under Rule 403").

That alone is a sufficient reason for this Court to deny review. See United States v. Williams, 504 U.S. 36, 41 (1992) (noting this Court's "traditional rule" precluding a grant of certiorari "when 'the question presented was not pressed or passed upon below'") (citation omitted); see also Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

2. In any event, the court of appeals correctly found no error in the admission of the booking photograph. Federal Rule of Evidence 404(b) provides that while "[e]vidence of any other crime, wrong, or 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," such evidence may be admissible "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)(1)-(2). And this Court has recognized that such evidence in fact "may be critical to the establishment of the truth as to a disputed issue." Huddleston v. United States, 485 U.S. 681, 685 (1988). Accordingly, such evidence 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 it only for the non-propensity purposes for which it was admitted, see Huddleston, 485

U.S. at 691-692. The district court's admission of petitioner's post-arrest booking photograph was consistent with those principles.

First, the photograph was introduced for the valid non-propensity purpose of establishing petitioner's identity as the man captured on ATM surveillance footage. As the court of appeals explained, "[t]he government's case hinged on whether [petitioner] was the man pictured in the ATM surveillance images." Pet. App. 23. The "roughly contemporaneous" photograph of petitioner served to demonstrate that fact to the jury. Ibid.

Second, the court of appeals correctly found no abuse of discretion in the district court's determination that the probative value of the photograph for that purpose was not "substantially outweighed" by the potential for undue prejudice. Fed. R. Evid. 403. Proof of petitioner's identity was central to the case; as petitioner himself emphasizes (Pet. 6), "his trial defense was largely based upon mistaken identity" and identification of the man captured in the ATM surveillance photos "was the ultimate issue to be decided." And the booking photograph excerpt -- which "showed [petitioner] with dreadlocks, which he lacked at trial," Pet. App. 23 -- was highly probative of petitioner's identity, particularly in light of Agent Broadhurst's initial erroneous identification of Yvenel and petitioner's attacks at trial on Agent Broadhurst's identification.

Although petitioner contends (Pet. 8, 13) that other evidence, like petitioner's driver's license and passport photos, were "reasonable alternatives" that could have established petitioner's identity, the 2016 booking photograph was the only photograph that post-dated the 2014 ATM surveillance photos and, therefore, the only evidence showing that petitioner's hairstyle was consistent throughout the relevant period. See Pet. App. 30 (2011 driver's license photograph); id. at 36 (2012 passport photograph); see also 7/25/17 Tr. 99 (explaining that the booking photograph, along with earlier photographs, show that petitioner had dreadlocks from 2011 "all the way through 2016," as compared to his appearance at trial). Without that photo, the jury might have harbored doubt about whether petitioner changed his appearance before or after the ATM photos were taken.[1]

On the other side of the ledger, the photograph posed little, if any, unfair prejudice to petitioner. Petitioner argues (Pet. 7) that the photograph was "a clear indication of [his] criminal

[1] Petitioner also mentions (Pet. 13), without citation, "two up-close natural photos of [him] in a social setting[]." He appears to be referring to two pictures found in the execution of a search warrant of a private residence during Agent Broadhurst's investigation. See 7/25/17 Tr. 206-207. The photographs each include full-body depictions of 9 or more individuals; they are not reasonably described as "up-close" photographs of petitioner. See D. Ct. Doc. 157-1 (Aug. 11, 2017); D. Ct. Doc. 185-20 (July 19, 2018). They were not offered for the purpose of identifying petitioner as the man in the ATM surveillance footage. Petitioner did not argue below that they could have served that purpose. And, in any event, neither post-dated 2014. See D. Ct. Doc. 157-1 (dated July 7, 2012); D. Ct. Doc. 185-20 (undated).

activity and bad character." But even if some jurors might have been able to identify petitioner's blue shirt as "jailhouse garb," that was by no means "obvious" from the photograph. Pet. 7-8; see Pet. App. 25 (noting that it "may not have been apparent to jurors" that petitioner was wearing jailhouse-issued garments). As the district court noted, as the reproductions in the petition appendix directly illustrate, and as this Court can itself observe, the clothing was "not that much different than" the shirt petitioner was wearing in his driver's license photograph. 7/25/17 Tr. 99; compare Pet. App. 28 (booking photograph), with id. at 29 (driver's license photograph). And while petitioner points out (Pet. 7) that the prosecutor acknowledged his own awareness that the clothing petitioner wore was typical of defendants in custody, his familiarity with jailhouse garb presumably exceeds most jurors', and that remark was made at a sidebar outside the jury's presence. 7/25/17 Tr. 98.

The photograph was also entered into evidence on stipulation without any discussion before the jury of the photograph's source other than the date it was taken. Pet. App. 25-26. It additionally did not contain the profile view that characterizes "mug shot" photographs in the public consciousness. Id. at 25, 28. And while the two lines visible behind petitioner were part of height gauges, all other "jailhouse administrative markings were removed," id. at 25, such that it would have been far from apparent that those lines were height gauges.

Moreover, even if the photograph were identifiable as a booking photograph, any concern about suggesting prior criminal behavior would have been significantly mitigated by the fact that it was taken upon petitioner's arrest for the very offenses for which he was being prosecuted. Pet. App. 23-24. Although the stipulation concerning the date of the photograph did not indicate that it was the date of petitioner's arrest, given the proximity of the date of the photograph and the date of the superseding indictment, the jury could readily infer the connection. See Superseding Indictment 1 (dated February 2017); see also 7/26/17 Tr. 170 (providing the jury with the Superseding Indictment). Certainly, the jury had "no reason to suspect that the photo was taken from an earlier brush with the law." Pet. App. 25.

Third, although petitioner notes (Pet. 7) that the district court did not give a limiting instruction at trial, petitioner did not request such an instruction. 7/25/17 Tr. 97-100; see Huddleston, 485 U.S. at 691-692 (noting that instruction may be provided upon request). The district court's omission of a Rule 404(b) limiting instruction therefore would be reviewed, at most, for plain error. See Fed. R. Crim. P. 52(b); see also Henderson v. Kibbe, 431 U.S. 145, 154 (1977) ("It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court."). And particularly because such an instruction might well have itself

drawn attention to the photograph's origins, and thus done more harm than good, the omission of one was not plain error.

3. Petitioner also fails to identify any conflict among the courts of appeals' approaches to the admission of booking photographs that would warrant this Court's review.

a. Petitioner principally contends (Pet. 10-11) that the decision below conflicts with the Sixth Circuit's "well-established" precedent "strongly disfavor[ing]" introducing booking photographs in criminal trials. As petitioner observes, the Sixth Circuit has expressed skepticism about the use of "mug shot[s]" as identification evidence. Pet. 10 (citation omitted). But none of the cases cited by petitioner imposes a categorical bar on the introduction of booking photographs in appropriate circumstances, and they do not indicate that the Sixth Circuit would have found an abuse of discretion in the admission of the post-arrest booking photograph here.

In Eberhardt v. Bordenkircher, 605 F.2d 275 (1979), in the course of determining whether a violation of the Fifth Amendment's protection against compelled self-incrimination was harmless, the Sixth Circuit described "[t]he use of mug shots" as having been "strongly condemned in federal trials" and expressed concern that the practice could "effectively eliminat[e] the presumption of innocence and replac[e] it with an unmistakable badge of criminality." Id. at 280. But the court did not pass on the permissibility of using such photos in even the state case before

it, because the Kentucky Supreme Court "ha[d] already held that the introduction of the mug shots" in that case had violated state law. Id. at 279-280.

In Murray v. Superintendent, 651 F.2d 451 (1981), the Sixth Circuit noted that the use of "mug shot" evidence "will often lead to reversal" where it "informs the jury that a defendant has a criminal record." Id. at 454. But the court found no error in that case and reversed the district court's grant of a habeas petition because the "mug shots" introduced into evidence "revealed nothing that the jury did not already know" about the defendant's criminal record. Ibid.

In United States v. McCoy, 848 F.2d 743 (1988), the Sixth Circuit concluded that the district court had erred in permitting the introduction of photographs that had been used for an out-of-court identification, depicting the defendant and other individuals in "prison garb" in front of a sign that read "Cincinnati Police Department." Id. at 745-746. But the court also made clear that, had the defendant challenged the fairness of the identification procedures -- thereby rendering the photographs "necessary to bolster a crucial element of the prosecution's case" -- "the balance would have tipped in favor of admitting the photographs." Id. at 746.[2]

[2] The Sixth Circuit's unpublished decision in United States v. Irorere, 69 Fed. Appx. 231 (2003), cert. denied, 540 U.S. 1204 (2004), did not consider the admission of a booking photograph into evidence at all. Rather, the court there considered, and rejected, a defendant's contention that the use of

None of those decisions suggests that the Sixth Circuit would have reached a different result from the court of appeals below on this record. Indeed, the decision below cited the Sixth Circuit as part of a "longstanding judicial skepticism about the use of mug shots in criminal trials," noting the risk that "showing the jury an obvious mug shot c[an] * * * weaken the defendant's presumption of innocence by stigmatizing him with 'an unmistakable badge of criminality.'" Pet. App. 20, 24 (quoting Eberhardt, 605 F.2d at 280). The decision simply determined that those concerns were substantially mitigated here, where the booking photograph was not an "obvious mug shot" and "the jury had no reason to suspect that the photo was taken from an earlier brush with the law." Id. at 24-25. And it recognized that, as the Sixth Circuit suggested in McCoy, such a photograph was admissible where it bolstered the government's showing on an issue that was "crucially important in the case." Id. at 23.

b. Petitioner likewise fails to identify (Pet. 11-16) a conflict between the decision below and that of any other circuit. Citing a handful of cases, nearly all of which were decided more than 40 years ago, petitioner suggests (Pet. 13) that some courts of appeals are particularly likely to find booking photographs prejudicial where "other credible evidence is available to identify the defendant as the perpetrator of the crime." But he

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a booking photograph in an photographic lineup for purposes of an out-of-court identification was "unduly suggestive." Id. at 236.

overstates any divergence in the courts of appeals' approaches. And he fails to identify any decision indicating that this case would have been resolved differently in any other circuit.

In United States v. Fosher, 568 F.2d 207 (1978), for example, the First Circuit recognized that the government "often finds it necessary to introduce [booking] photographs as part of its effort to identify the defendant and thereby prove its case." Id. at 213. The court declined to adopt any "mechanical" rule to resolve the admissibility of such photographs and emphasized that balancing of probative value against risk of prejudice "is largely committed to the sound discretion of the district court." Id. at 212-213. And the court found that the government had shown a "demonstrable need" to admit the photographs in that case, despite the fact that two trial witnesses had identified the defendant as the culprit. Id. at 215. The court explained that "[t]he matter of identification was crucial to the government's case" and one of the witnesses' testimony had been undermined on cross-examination. Ibid.; see id. at 215 n.24. The same is true here.

Similarly, in United States v. Harrington, 490 F.2d 487 (1973), the Second Circuit recognized that the admission of booking photographs was "not susceptible of a simple solution." Id. at 490. The Second Circuit, like the Eleventh Circuit here, considered the government's need for the evidence as relevant to admissibility, but contrary to petitioner's suggestion (Pet. 14), the Second Circuit did not require a "total lack of alternatives"

for proving identity before a booking photograph could be admitted. Instead, the court found sufficient need in that case despite "testimony from two other witnesses directly connecting [the defendant]" to the crime. Harrington, 490 F.2d at 495 (emphasis added); see also United States v. Mohammed, 27 F.3d 815, 822 (2d Cir. 1994) (declining to require exclusion of booking photographs "taken at the time of [the defendant's] arrest for the crimes charged in [that] case"), cert. denied, 513 U.S. 975 (1994).

In United States v. Reed, 376 F.2d 226 (1967), the Seventh Circuit considered the admissibility of testimony about booking photographs and the defendant's criminal record, not "the admissibility of the photographs themselves." Id. at 228-229 & n.2. The court went on to state in dicta that introducing booking photographs alone presents a "grave risk" when other evidence is available "to show the accused is the person who committed the crime charged," because the character of the pictures themselves "may carry prejudicial implications, through police notations or the appearance or pose of the accused." Id. at 228 n.2. But the court further explained that the photographic evidence in that case might still be admissible during a new trial "depend[ing] on the circumstances in which it is brought forth." Id. at 229; see, e.g., United States v. Castaldi, 547 F.3d 699, 704-705 (7th Cir. 2008) (declining to find an abuse of discretion in the district court's decision to permit a booking photograph to be shown to the jury on a demonstrative, even though "the government could simply

have used the defendants' names on the chart," because the photograph was "presented in such a way that the jury would not have been aware of its origins").

In Barnes v. United States, 365 F.2d 509 (1966) (per curiam), the D.C. Circuit found only that the highly prejudicial booking photographs introduced there, which it deemed to have little or no probative value other than establishing the defendant's prior criminal record, were inadmissible. The court reasoned that the "double-shot picture, with front and profile shots alongside each other," was "so familiar" a format "from 'wanted' posters in the post office, motion pictures and television" that the inference of a criminal record would have been "natural, perhaps automatic." Id. at 510-511. At the same time, the out-of-court identification that the photograph was offered to support had itself been based, in part, on a "full-length snapshot of an ordinary nature" with no mentioned differences in the defendant's appearance. Id. at 510. In those circumstances, the D.C. Circuit determined that the prosecution had attempted to do nothing more than introduce the defendant's criminal record through "indirection or subterfuge." Id. at 511. But it did not hold that booking photographs could never serve a valid evidentiary purpose. See id. at 512 ("We have no need to consider here whether, if the prosecutor has a need and legitimate reason for presentation of [booking photographs], he may do so by making suitable arrangements, by separation and copying, avoiding the incriminatory prejudice."); see, e.g.,

United States v. Starks, 72 F.3d 920, 1996 WL 5568, at *2 (D.C. Cir.) (Tbl.) (per curiam) (finding no plain error in the introduction of a booking photograph in a criminal trial), cert. denied, 517 U.S. 1113 (1996).

Finally, other decisions petitioner cites do not involve booking photographs at all, but instead refer generally to considerations to be weighed when admitting other acts evidence. See United States v. Brunson, 549 F.2d 348, 359-360 (5th Cir.) (flagging "substantial need" as a factor in determining admissibility of other-acts testimony), cert. denied, 434 U.S. 842 (1977); United States v. DiZenzo, 500 F.2d 263, 266 (4th Cir. 1974) (finding defendant's prior conversations about sales of counterfeit bills "reasonably necessary to the government's case" even though the jury could draw a similar inference from other evidence, because the "conversations furnished more dependable proof of [the defendant's] knowledge and intent").

c. Any difference among the courts of appeals' decisions is a matter of degree, not kind, and does not warrant further review here. 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."); accord Fosher, 568 F.2d at 213 (acknowledging "numerous occasions" for "appellate consideration of the admissibility of mug-shot photographs" but explaining that "each decision necessarily has turned on the particular factual setting presented"). In the absence of a strong indication that different courts are consistently reaching different results on similar facts, intervention by this Court is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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