No. 20-8143

IN THE SUPREME COURT OF THE UNITED STATES

MERWIN SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion by admitting evidence pursuant to Federal Rule of Evidence 404(b) of petitioner's prior firearm conviction as evidence that petitioner's possession of a gun was knowing, intentional, and not the product of a mistake or accident.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (E.D. Mo.):

United States v. Smith, No. 16-cr-364 (June 13, 2019)

United States Court of Appeals (8th Cir.):

United States v. Smith, No. 19-2447 (Oct. 26, 2020)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-7)[1] is reported at 978 F.3d 613.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 2020. A petition for rehearing and rehearing en banc was denied on December 21, 2020 (Pet. App. 8). On March 19, 2020, this Court extended the time within which to file any petition for

[1] The appendix to the petition for a writ of certiorari is not consecutively paginated. This brief refers to the appendix as if it were consecutively paginated beginning with the first page of the court of appeals' opinion.

a writ of certiorari due on or after that date to 150 days from the date of the lower-court judgment, order denying discretionary review, or order denying a timely petition for rehearing. The petition for a writ of certiorari was filed on May 20, 2021. 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 Eastern District of Missouri, petitioner was convicted of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. 1. He was sentenced to 36 months of imprisonment, to be followed by two years of supervised release. Pet. C.A. Br. Addendum 2-3. The court of appeals affirmed. Pet. App. 1-7.

1. At around 2 a.m. on July 17, 2016, a Missouri police officer was canvasing a neighborhood for a larceny suspect in an unrelated case when he observed a speeding car run a stop sign. Presentence Investigation Report (PSR) ¶ 5. The officer activated his emergency lights and siren, and the car came to a stop in a driveway. Ibid. Petitioner, who was the driver, began to exit the vehicle. PSR ¶ 6. The officer ordered petitioner to show his hands, and petitioner -- still partially in the car -- made a gesture towards the passenger side of the car and threw an object out the passenger side window. Ibid. The officer found a gun, a

loaded Colt MK IV Series .45 caliber handgun, on the sidewalk between 10 and 15 feet away from petitioner's car and took petitioner into custody. Pet. App. 2.

In an interview with petitioner after his arrest, the officer asked petitioner what he had tossed out the car window, and petitioner stated that it was "the remote control for the stereo unit." D. Ct. Doc. 37, at 41 (Feb. 15, 2019). The officer located the remote control for the car's stereo "in the center console of the vehicle." Id. at 42.

2. A grand jury indicted petitioner for possessing a firearm as a convicted felon, in violation of 18 U.S.C. 922(g)(1). D. Ct. Doc. 2 (Aug. 17, 2016). Petitioner pleaded not guilty and was tried before a jury. D. Ct. Doc. 12 (July 31, 2018); Gov't C.A. Br. 2.

Before trial, the government filed a notice of intent to introduce, pursuant to Federal Rule of Evidence 404(b), petitioner's prior 2005 federal conviction for being a felon in possession of a firearm. D. Ct. Doc. 48, at 1-2 (Mar. 1, 2019). Rule 404(b) provides that "[e]vidence of any other crime * * * is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with [that] character," but it is 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) and (2). Petitioner filed a response to the government's notice, in which he acknowledged that "[i]t is conceivable that [petitioner's] defense * * * could place the prior conviction at issue, making it relevant to one of the exceptions listed in 404(b)." D. Ct. Doc. 52, at 2 (Mar. 1, 2019). But petitioner asked that the court "reserve ruling on whether the prior conviction is admissible until, if at all, [petitioner] makes the evidence relevant under 404(b)." Ibid.

During the pretrial hearing, the district court asked the government to explain its Rule 404(b) request, and the government observed that Rule 404(b) permits the introduction of a prior conviction for possessing a firearm as a felon "not for propensity, but to show lack of mistake, knowledge, intent, and so forth." D. Ct. Doc. 96, at 15 (Sept. 23, 2019); see id. at 15-17. The government further explained the "steps that c[ould] be taken" to ensure that the evidence "is not unduly prejudicial," including a limiting instruction and a stipulation that would allow the jury to be informed of the prior conviction in a cabined way. Id. at 16. The government stated that such a stipulation might be appropriate because the facts of the prior case -- in which petitioner was found in a car with two guns and his one-year-old son -- might "rise to the level of undue prejudice." Ibid.

When the district court asked the government to "specifically state why" it thought the prior conviction "would be relevant," the government responded that it "has to prove knowing possession" and that "this is not a mistake." D. Ct. Doc. 96, at 17. The government explained that it was uncertain whether the defense was "just going to be a general denial" or would include "specific evidence," but that the government believed that the prior conviction would show petitioner had "knowing knowledge of what a firearm is" and that this was "not a mistake." Ibid.

Petitioner objected, asserting that "there is absolutely nothing probative" about the prior conviction, but that -- at a minimum -- the court should grant petitioner's prior request to "reserve judgment until such time as the Government believes we have put" knowledge at issue. D. Ct. Doc. 96, at 18. Petitioner argued that "it just doesn't seem like the case where accident" or knowledge "would be an issue" and the prior conviction "does not shed any light on [petitioner's] state of mind here." Ibid.

The district court rejected petitioner's argument. The court explained that it was familiar with the facts of this case, in which the government was going to attempt to prove that an officer had seen petitioner "throw something out of the car that was later recovered" and "determined to be a gun." D. Ct. Doc. 96, at 18-19. The court found that "[b]ased on those particular facts," and

the government's "affirmative duty to prove knowing possession," the "evidence [wa]s particularly probative." Id. at 19. When petitioner again expressed doubt about how the prior conviction "shows knowledge" on the night of the alleged crime, the government explained that petitioner had previously stated that he had thrown "a remote for his radio out of the car," rather than a gun, "[s]o the knowledge intent is at issue in this case." Id. at 20-21. The court agreed, reiterating that the government "has an affirmative duty to show knowing possession." Id. at 21. The court stated, however, that it would give a limiting instruction to "alleviate" petitioner's "concern * * * about the propensity." Id. at 19.

At voir dire, petitioner's counsel raised the issue of the prior conviction, informing the potential jurors that they would "hear evidence in this case that [petitioner] has" a prior conviction "for being a Felon in Possession." 3/6/21 Trial Tr. 91. Petitioner's counsel then asked the jurors several times, in several different ways, whether hearing about petitioner's prior conviction might make them think that petitioner "is more likely to be guilty in this case." Id. at 92. None of the potential jurors indicated that the knowledge of the prior conviction would "affect" their "ability to feel like they can fairly consider the evidence," nor did any juror agree with the suggestion that the

knowledge of the prior conviction might "make them lower the bar a little bit for the Government" or might make the potential juror think that if petitioner "was convicted of illegally possessing a firearm" before then "he probably possessed it in this case as well." Id. at 91-92; see id. at 103-105.

After voir dire, the district court reiterated its earlier finding that the prior conviction was admissible because "under the specific facts in this case, it goes to knowledge of what was thrown from the car, lack of mistake, that it just goes to this issue did [the gun] just happen to be there, or a lack of accident, that it was just accidentally in the possession of" petitioner." 3/6/19 Trial Tr. 119.

Petitioner's counsel reminded the jury in her opening statement that "as we discussed in voir dire, [petitioner], even with his felony conviction for the exact same crime in 2005, sits before you right now an innocent man[] because without hearing any other evidence, you all can't know whether or not the Government has proved their case beyond a reasonable doubt." 3/6/19 Trial Tr. 140. The district court read an agreed stipulation informing the jury about the prior conviction at the conclusion of the government's case-in-chief, preceded by a limiting instruction directing the jurors that they may "consider this evidence to help * * * decide knowledge, absence of mistake, or lack of accident,"

but that "this is not evidence that [petitioner] committed such an act in this case," and that "[y]ou may not convict a person simply because you believe he may have committed similar acts in the past." 3/6/19 Trial Tr. 230. Government counsel did not expressly urge the jury to focus or rely on the prior conviction. The court repeated the limiting instruction as part of the jury instructions at the conclusion of trial. Jury Instruction No. 21; see 3/7/19 Trial Tr. 56.

In her closing, petitioner's counsel used the prior felon-in-possession conviction to support the defense's theory that the officer who arrested petitioner had made up a "story" about seeing petitioner throw the gun from the car. 3/7/19 Trial Tr. 72. Petitioner's counsel asked the jury to consider "what[] the risk" would be to the officer of telling a lie about the gun, given that petitioner "is a convicted felon. Not just a convicted felon, he has a Federal gun possession prior. Who is going to believe him? The only person that could contradict [the officer's] story is someone [the officer] has every reason to believe would be completely discarded over his version of the events." Id. at 71-72.

The jury found petitioner guilty, Pet. C.A. Br. Addendum 1, and the district court sentenced petitioner to 36 months of imprisonment, id. at 2.

3. The court of appeals affirmed petitioner's conviction. Pet. App. 1-7. The court rejected the contention that, "because [petitioner] denied ever touching or possessing the gun, knowledge is not relevant to a material issue and evidence of a prior conviction provides only propensity evidence." Pet. App. 3. The court stated that its precedent "forecloses this argument," quoting an earlier decision in which it had held that "[t]he defendant places his knowledge and intent at issue by pleading not guilty even when the prosecution proceeds solely on an actual possession theory." Id. at 3-4 (quoting United States v. Williams, 796 F.3d 951, 958 (8th Cir. 2015), cert. denied, 577 U.S. 1219 (2016)). The court further observed that "'knowing possession' is an element of 18 U.S.C. 922(g)(1), and previous possessions are relevant to proving this element." Id. at 4.

The court of appeals also found that the prior conviction was not too remote in time or too dissimilar to be relevant, and it rejected petitioner's assertion that admitting the conviction was at odds with the court of appeals' earlier decision in United States v. Mothershed, 859 F.2d 585 (8th Cir. 1988), because Mothershed excluded evidence that was "relevant only for propensity purposes" -- namely, "that a person who [was] convicted of possessing money that he kn[e]w[] was stolen from a bank [was] more likely to be a bank robber than [were] most other people who

ha[d] no such record." Pet. App. 4 (quoting Mothershed, 859 F.2d at 589). The court stated that "it is settled law that the use of a prior conviction" for knowingly possessing a gun "is relevant to" a defendant's "knowledge and intent" and is admissible for that non-propensity purpose. Ibid.

The court of appeals also rejected petitioner's contention that this was "a particularly close case," in which the risk that the Rule 404(b) evidence tainted the outcome was "particularly acute." Pet. App. 5 (quoting Pet. C.A. Br. 13) (brackets omitted). The court observed that, while petitioner attempted to portray the government's evidence as resting on the "'uncorroborated testimony of a single police officer,'" in fact, "the jury also considered the photographs from the scene, evidence from the agent who examined the gun, the gun itself, and stipulated evidence." Ibid. (citation omitted).

Finally, the court of appeals found that the district court did not abuse its discretion "in balancing the probative value and the prejudicial effects of the prior conviction." Pet. App. 5. The court of appeals observed that the district court "considered the specific purpose for which the 404(b) evidence would be admitted and its prejudicial effect"; the jury heard the evidence by stipulation, "omitting unrelated prejudicial facts"; and the district court "directed the jury to consider the conviction only

as it related to [petitioner's] knowledge, intent, or absence of mistake." Ibid.

ARGUMENT

Petitioner contends (Pet. 13-20) that the court of appeals erred in affirming the district court's admission of evidence of petitioner's prior conviction for unlawfully possessing a firearm as a felon. Petitioner further contends (id. at 16-20) that the circuits disagree as to when the government may introduce evidence of a prior conviction to prove that a defendant knowingly possessed a firearm as a felon. Any narrow disagreement in the circuits on that issue is not implicated here, and this case would moreover be unsuitable for reviewing it. This Court has repeatedly declined review in cases raising similar questions. See Williams v. United States, 577 U.S. 1219 (2016) (No. 15-6874); Adams v. United States, 136 S.Ct. 2546 (2016) (No. 15-7798). The result should be the same here.[2]

1. Under Rule 404(b), although "[e]vidence of any other 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 [that] character," it is admissible "for another purpose, such as proving motive, opportunity, intent,

[2] A similar question is presented in United States v. Perpall (No. 20-8322) (petition for certiorari review filed June 15, 2021).

preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b)(1) and (2); see Huddleston v. United States, 485 U.S. 681, 685 (1988) ("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."). A trial court's decision whether to admit other-acts evidence under Rule 404(b) is necessarily fact-specific. See Huddleston, 485 U.S. at 691 (trial court must consider whether evidence is offered for a proper purpose, whether it is relevant in light of that purpose, and whether its probative value is substantially outweighed by the risk of unfair prejudice); see also Old Chief v. United States, 519 U.S. 172, 184 (1997) (In "dealing with admissibility when a given evidentiary item has the dual nature of legitimate evidence of an element and illegitimate evidence of character * * * '[t]he determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making [a] decision of this kind under [Rule] 403.'") (quoting Fed. R. Evid. 404 advisory committee's note).

Here, the district court found that "under the specific facts in this case," petitioner's prior conviction for possessing a

firearm as a felon was relevant to show that he had "knowledge of what was thrown from the car." 3/6/19 Trial Tr. 119. The court suggested that the prior conviction made it less likely that there was a "mistake" or an "accident," ibid., in circumstances where petitioner had asserted to the arresting officer that he had thrown a different item out the car window. And the court of appeals affirmed that the district court had not "abuse[d] its discretion" in admitting the evidence, "[c]onsidering the steps" the district court had taken, including analyzing "the specific purpose for which the 404(b) evidence would be admitted," "omitting unrelated prejudicial facts," and giving the jury a detailed limiting instruction. Pet. App. 5.

2. Petitioner asserts (Pet. 13) that the court of appeal's decision "squarely conflicts with the view of the Third, Fifth, and D.C. Circuits" because those courts of appeals do not generally permit the introduction of a prior conviction to show knowledge where the government alleges that the accused had "actual" possession of a firearm. Any narrow disagreement about whether a defendant's prior possession of a firearm is admissible under Rule 404(b) when the Section 922(g) prosecution is based exclusively on a theory of actual possession, however, is not squarely implicated in this case. And in any event, any conflict would not warrant this Court's review at this time.

In general, the government may prove possession by showing either that the defendant had "actual possession" of the gun because he exercised "direct physical control over" it or that the defendant had "constructive possession" of the weapon because he exercised "dominion or control over the [gun] or the area in which [the gun] was found." United States v. Jones, 484 F.3d 783, 787 (5th Cir. 2007). The Third, Fifth, and D.C. Circuits have all acknowledged that a prior conviction for possessing a firearm as a felon may be relevant to prove that the defendant knowingly possessed the gun in a case in which the government seeks to prove "constructive possession," but those circuits have indicated that, "absent unusual circumstances," a prior conviction is generally not admissible when the government proceeds under a theory of "actual possession" because knowledge is usually not at issue in those prosecutions. United States v. Caldwell, 760 F.3d 267, 279 (3d Cir. 2014); see United States v. Linares, 367 F.3d 941, 946-947 (D.C. Cir. 2004). In their view , knowledge is less likely to be an issue in an "actual possession" case because "once the government has shown that the defendant had a firearm under his immediate control," rather than in an area under his control, "any contention that he did not know the nature of what he possessed is effectively precluded." Ibid.

In this case, in response to petitioner's assertion that his prior conviction should be excluded "because he denied ever touching or possessing the gun," the Eighth Circuit cited a previous decision for the proposition that a defendant "places his knowledge and intent at issue by pleading not guilty even when the prosecution proceeds solely on an actual possession theory." Pet. App. 3-4 (quoting United States v. Williams, 796 F.3d 951, 958 (8th Cir. 2015), cert. denied, 577 U.S. 1219 (2016)). Petitioner errs, however, in asserting (Pet. 13) that a disagreement in the circuits is "squarely" implicated here. He suggests that the government proceeded exclusively under a theory of actual possession, but in fact the district court refused petitioner's request to limit the government to that theory.

Before closing arguments at trial, petitioner's counsel unsuccessfully objected to a jury instruction explaining that the law recognizes "different kinds of possession, actual or constructive." 3/7/19 Trial Tr. 49. Petitioner's counsel argued that "the evidence that [the government] presented in this case was not anything about constructive possession," characterizing the government's case as solely premised on "an officer s[eeing] with his own eyeballs that this gun was in [petitioner's] hand." Ibid. The court overruled petitioner's objection, observing that "[t]he gun [wa]s found and recovered outside of [petitioner's]

vehicle and not in his actual possession." Id. at 50. Accordingly, the jury was instructed on both actual and constructive possession, ibid; see Jury Instruction No. 16, and this case does not implicate any disagreement as to whether a prior conviction may be admitted to show knowledge where it is "exclusively an actual possession case," Jones, 484 F.3d at 790.

In any event, any disagreement among the circuits does not warrant this Court's review as a more general matter. First, as noted, any disagreement is narrow and limited to cases in which the government relies exclusively on a theory of actual possession. The courts of appeals, including the Third, Fifth, and D.C. Circuits, have uniformly recognized that prior-crimes evidence may be relevant when possession is constructive rather than actual. See, e.g., United States v. Schmitt, 770 F.3d 524, 533-534 (7th Cir. 2014), cert. denied, 575 U.S. 906 (2015); United States v. Brown, 398 Fed. Appx. 915, 917 (4th Cir. 2010) (per curiam), cert. denied, 563 U.S. 924 (2011); United States v. Williams, 620 F.3d 483, 490 (5th Cir. 2010), cert. denied, 562 U.S. 1243 (2011); United States v. Moran, 503 F.3d 1135, 1144-1145 (10th Cir. 2007), cert. denied, 553 U.S. 1035 (2008); United States v. Newsom, 452 F.3d 593, 606-607 (6th Cir. 2006); United States v. Garner, 396 F.3d 438, 442-445 (D.C. Cir. 2005); United States v. Brown, 961 F.2d 1039, 1042 (2d Cir. 1992) (per curiam); see also United States

v. Brown, 765 F.3d 278, 292, 293 (3d Cir. 2014) (acknowledging that "[e]vidence of knowledge . . . is critical in constructive possession cases," but concluding that the "entirely distinct" prior-act evidence was not relevant in the case under review) (citation omitted; brackets in original).

Second, the application of Rule 404(b) is necessarily fact-dependent, such that appellate courts -- including this Court -- generally cannot provide a dispositive general taxonomy of cases in which its application might be appropriate. Whether prior-acts evidence is admissible turns on a host of case-specific facts, including the purpose for which the evidence is admitted, the relevance of the evidence to that purpose (which may depend on such factors as the similarity of the prior act to the charged offense and its proximity in time), the probative value of the evidence (which depends in part on whether the fact for which the prior-act evidence is admitted is disputed), and the danger of unfair prejudice. Thus, the Third Circuit recognized in Caldwell v. United States, supra, that even in cases involving an actual possession scenario, knowledge could be at issue, and "a proper, non-propensity chain might be forged." 760 F.3d at 282. Indeed, Caldwell suggested that knowledge could be at issue in an actual possession case in which the "defendant claims he did not realize the object in his hand was a gun." Id. at 279. The district court

appears to have had a similar circumstance in mind when it found that the evidence of petitioner's prior conviction was relevant to show that the defendant had "knowledge of what was thrown from the car." 3/6/19 Trial Tr. 119.

Third, petitioner exaggerates the extent of any circuit disagreement. Petitioner contends (Pet. 19) that the Tenth and Eleventh Circuits have joined the Eighth Circuit in making no "distinction" between actual and constructive possession. But the only Tenth Circuit case petitioner cites is unpublished and does not even address whether the government proceeded under a theory of actual or constructive possession. See ibid. (citing United States v. Roberts, 417 Fed. Appx. 812 (10th Cir. 2011). The Eleventh Circuit has not expressly addressed the question presented and recently declined to decide "whether [a prior conviction for possessing a firearm as a felon] would be relevant to knowledge or intent in an 'actual possession' case." United States v. Perpall, 856 Fed. Appx. 796, 799 n.1 (2021), petition for cert. pending, (No. 20-8322) (filed June 15, 2021). And even the Eighth Circuit does not appear to have taken the absolute position petitioner ascribes to it.

The Eighth Circuit has recognized that a prior conviction is particularly relevant where the defendant was not in "actual possession of the firearm" and "the government had to prove

constructive possession." United States v. Battle, 774 F.3d 504, 511 (8th Cir. 2014), cert. denied, 575 U.S. 978 (2015). Further, contrary to petitioner's suggestion (Pet. 18-19), the Eighth Circuit's willingness to permit the admission of a prior conviction in cases involving actual possession does not mean that its precedent permits the government to admit prior convictions that establish nothing more than propensity. In this very case, the court of appeals affirmed the admission of petitioner's prior conviction only after confirming that "[t]he district court considered the specific purpose for which the 404(b) evidence would be admitted." Pet. App. 5. That approach also belies petitioner's suggestion (Pet. 20-23) that the Eighth Circuit departs from other circuits by automatically assuming Rule 404(b) evidence is relevant whenever the defendant has requested a trial, rather than requiring the government to articulate a non-propensity purpose for its admission. Indeed, petitioner himself appears to acknowledge (Pet. 20-21) that the Eighth Circuit's precedent in United States v. Mothershed, 859 F.2d 585, 589 (1988), forbids the admission of a prior conviction where no reasonable non-propensity inference can be drawn from it. And any intracircuit tension between Mothershed and the decision below would properly be resolved by the Eighth Circuit itself. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam).

Moreover, to the extent petitioner is suggesting that this Court should grant review to establish that the government must articulate a non-propensity based purpose for which it seeks to admit Rule 404(b) evidence, Fed. R. Evid. 404(b)(3)(A), recent changes to Rule 404(b) render such review unnecessary. Rule 404(b) has long required the government to provide "reasonable notice" of its intent to admit Rule 404(b) evidence, and last year, the notice requirement was amended to make clear that the government must "articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose." Fed. R. Evid. 404(b)(3)(B). Because the amendments to Rule 404(b) only took effect in December 2020, courts have had little opportunity to assess their effect in cases involving the proposed admission of prior convictions. The amendments specifically address petitioner's primary concern -- that courts will improperly admit evidence that establishes nothing more than propensity -- because they make clear that the government must articulate the reason why the evidence it wishes to admit advances some permissible, "non-propensity" purpose. Fed. R. Evid. 404(b), Advisory Committee's Notes (2020 Amendments). Thus, at a minimum, the Court should not grant review to consider the question presented until the courts have a chance to apply the amended rule.

3. Finally, even setting aside the recent amendment of Rule 404(b), this case would not be an appropriate vehicle to resolve any disagreement among the courts of appeals about the rule's application because any error committed by the district court was harmless. Evidence of petitioner's prior conviction was entered through a stipulation that stripped the potentially prejudicial facts, and the reading of the stipulation was preceded by a limiting instruction that was repeated at the conclusion of trial. Pet. App. 5; Jury Instruction No. 21; see United States v. Adams, 783 F.3d 1145, 1150 (8th Cir. 2015) (finding harmlessness when, among other things, "the court twice issued a limiting instruction to the jury * * * to only use the fact of [defendant's] prior conviction for the limited purposes of showing knowledge or intent"), cert. denied 136 S. Ct. 2449 (2016). And while petitioner suggests that the evidence in his case was "less than overwhelming," Pet. 27 (citation omitted), the court of appeals properly rejected petitioner's attempt to characterize this as a "particularly close case," Pet. App. 5 (citation omitted).

At trial, the jury heard testimony from the arresting officer that he had witnessed petitioner throw something out of his car window; that the item landed on the sidewalk with a "loud metallic clunk noise"; and that, after witnessing the throw, the officer discovered a loaded firearm on the sidewalk in the "exact area

where the item was tossed." 3/6/19 Trial Tr. 171, 175; see id. at 154, 169. The officer further testified that nothing else was in the area where the gun was found; that he had an easy line of sight to the gun; and that the gun had texture and rough edges on its right side -- the side that was facing downward against the concrete -- consistent with the gun having made contact with concrete. Id. at 181-182, 227-228. The jury was shown photographs from the scene of the crime, including photographs of the gun taken at the scene, and it heard testimony from an ATF agent that the gun had "scuff marks." Id. at 161-163, 167, 176-181, 149. The jury was also permitted to examine the gun itself during its deliberations. 3/7/19 Trial Tr. 85-86. Under these circumstances, petitioner has not shown "that evidence of [his] prior conviction[] had a substantial and injurious effect or influence in determining the jury's verdict." United States v. Turner, 781 F.3d 374, 391 (8th Cir.) (citation and internal quotation marks omitted), cert. denied, 577 U.S. 889, and 577 U.S. 980 (2015). And because the resolution of the question presented would not affect the outcome of this case, further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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