No. 20-8322

IN THE SUPREME COURT OF THE UNITED STATES

FABIAN PERPALL, 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 by admitting evidence pursuant to Federal Rule of Evidence 404(b) of petitioner's prior firearm convictions 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 (S.D. Fla.):

United States v. Perpall, No. 18-cr-20664 (Nov. 12, 2019)

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

United States v. Perpall, No. 19-14554 (May 18, 2021)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is not published in the Federal Reporter but is reprinted at 856 Fed. Appx. 796.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 2021. The petition for a writ of certiorari was filed on June 15, 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 Southern District of Florida, petitioner was convicted of two counts of possessing a firearm and ammunition as a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. A2, A5. Petitioner was sentenced to 240 months of imprisonment, to be followed by three years of supervised release. Pet. App. A5-A7. The court of appeals affirmed. Pet. App. A1-A4.

1. In the summer of 2011, petitioner robbed Tavoris Odom, who reported the robbery to the police. Pet. App. A1. Two days later, petitioner pulled up alongside Odom while Odom was standing on a street corner waiting to buy a gun from a friend. Ibid. Petitioner called out "[a]re you trying to get a gun? Damn, Voris, are you trying to get a gun to kill me, to do something to me?" Ibid. (ellipsis omitted; brackets in original). Petitioner then began to shoot at Odom. Ibid. When Odom tried to run, petitioner hit him with the car, shot him in the leg, and then fired two to three more rounds at Odom while he was lying on the pavement. Ibid. Nearby residents called 911; Odom was taken to a hospital; and, when Odom woke up in the intensive care unit days later, he identified petitioner as the shooter. Ibid.

The next day, police officers in a marked car saw petitioner drive by and attempted to initiate a traffic stop. Pet. App. A1. The officers turned on their lights and sirens, but -- after initially slowing down -- petitioner sped away and led officers on

a high-speed chase that ultimately involved multiple police cars and helicopter support. Ibid. Petitioner eventually got a flat tire and crashed into a fence, after which he briefly tried to flee on foot before he was caught. Ibid.

During the foot chase, one officer stayed behind with petitioner's crashed car. Pet. App. A1. The officer determined that no one else was inside and that petitioner did not own the car, which had been reported stolen three days before. Ibid. The officer also observed a black gun in the center console of the vehicle between the gear shift and the radio. Ibid. DNA testing of the gun was inconclusive, and police found no fingerprints on the gun or ammunition. 7/31/19 Tr. 154-159, 166-168.

2. A federal grand jury in the Southern District of Florida returned an indictment charging petitioner with two counts of possessing a firearm and ammunition as a felon, in violation of 18 U.S.C. 922(g)(1). Second Superseding Indictment 1-2. The first count charged petitioner with possessing a gun in connection with Odom's shooting, and the second count charged petitioner with possessing the gun found in the stolen car petitioner was driving during the police chase. Ibid.

Before trial, the government provided notice, pursuant to Federal Rule of Evidence 404(b), that it would seek to introduce evidence of petitioner's prior firearms convictions to show that petitioner knowingly possessed the gun and ammunition that was found in the stolen car he used during the police chase. C.A.

E.R. 24-33. The government observed that, because the gun "was found in a vehicle that did not belong to" petitioner, he might well "claim that he did not know the gun [and ammunition] w[ere] in the car, and that it was a mere accident that he had them in his constructive possession." Id. at 30. The government explained that it intended to use the prior convictions to "prove that [petitioner's] possession of the firearm in the vehicle was done knowingly, and was not the result of a mistake or accident." Ibid.

Petitioner opposed admission of the evidence, arguing that the government had not shown a "need for the introduction of these prior convictions to show intent or knowledge" and that their prejudicial effect would outweigh their probative value. C.A. E.R. 41. The district court addressed the issue during a pre-trial hearing. 7/29/19 Tr. 37-38; see Pet. App. A2. At the hearing, the government clarified that it was seeking to introduce stripped down records establishing that defendant had prior convictions for discharging a firearm from a vehicle and possessing a firearm as a felon. 7/29/19 Tr. 26-27. The court asked the government to confirm that it was not seeking to introduce petitioner's prior conviction for "attempted premeditated murder with a firearm," observing that it would "never have allowed that in" because "it's way, way too prejudicial." 7/29/19 Tr. 30-31. The government confirmed that it was not asking to introduce the attempted murder conviction. Ibid.

After hearing arguments from the government and the defense, the district court determined that it would allow the government to introduce the "somewhat sanitized" records of the two prior firearms convictions. 7/29/19 Tr. 37-38. The court explained that "because there are issues in this case regarding knowledge, mistake, accident, and the firearm in the automobile," the two prior firearms convictions that the government sought to introduce "have a probative value." 7/29/19 Tr. 37. The court also determined that "what little prejudicial" effect might arise was "outweighed due to the circumstances of this case, because it is very case specific on these things." 7/29/19 Tr. 38. And the court observed that any prejudice could be mitigated through limiting instructions. Ibid.

When the government introduced the prior convictions during its case-in-chief at trial, the district court instructed the jurors that they were not to rely on the convictions "as an indicator that what is alleged here had to have happened," but instead were to consider them for "absence of mistake or knowledge." 7/30/19 Tr. 183. The court also asked the jurors if they understood the instruction before permitting the introduction of the convictions. Id. at 183-184. "[T]he jury audibly answered 'yes.'" Pet. App. A2. The court gave similar instructions at the end of the testimony in which the convictions were introduced. 7/30/19 Tr. 200-201.

At the close of the government's case, petitioner moved for a mistrial based in part on the admission into evidence of his prior convictions. 8/1/19 Tr. 52-54. The district court denied petitioner's motion. 8/1/19 Tr. 56. It explained that because of the "unique circumstances in this case regarding the position of the firearm in the console and possession concerns," the prior convictions were "very probative." Ibid. And it reiterated that their probative value "outweigh[ed] any prejudice" that might result from their admission, ibid., particularly because the government had presented redacted versions of the state court judgments to avoid exposing the jury to overly prejudicial facts and the court had given limiting instructions, 8/1/19 Tr. 56-57.

During the defense case, petitioner took the stand. 8/1/19 Tr. 159. He denied that he was the driver of the stolen car that was involved in the police chase, id. at 190, and he contended that police had arrested him by mistake because he happened to be in a backyard very close to where the car chase concluded, id. at 189. He also testified that he had not possessed or had any guns or ammunition "within [his] eyesight" during the relevant times. Id. at 207.

Just before closing arguments, the court gave limiting instructions for a third time, cautioning the jury that petitioner's prior convictions could not be considered "to decide whether the defendant engaged" in the charged conduct. 8/1/19 Tr. 224-225. And the government also explained in its closing argument

that the jury could not permissibly make a propensity inference, but could "consider [the prior convictions] in deciding whether it was all a big mistake that [petitioner] happened to be present." Id. at 240-241.

c. The jury found petitioner guilty on both counts. Pet. App. A2. Petitioner moved for a new trial, again contending that the district court erred in admitting evidence of his prior convictions. C.A. E.R. 54. Petitioner argued that the government should not have been permitted to introduce his prior convictions in its case-in-chief to demonstrate that he had knowledge of the gun in the stolen car, asserting that the convictions were not relevant to the alibi defense he had subsequently presented. Ibid. The district court denied the motion, again explaining that the prior convictions were admissible to prove petitioner's "intent, knowledge, and lack of mistake" and that "[a]ny prejudicial effect created by the admission of such evidence was mitigated by the [c]ourt's use of limiting instructions to the jury." Id. at 64; see id. at 62-65.

The district court sentenced petitioner to consecutive 120-month terms, for a total of 240 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3.

3. The court of appeals affirmed in an unpublished opinion. Pet. App. A1-A5. The court observed that "Rule 404(b) prohibits evidence of prior bad acts if the evidence is offered to show only propensity," but "allows that evidence for other reasons, such as

to prove 'intent,' 'absence of mistake, or lack of accident.'" Id. at A2 (quoting Fed. R. Evid. 404(b)(2)). It further explained that, "to be admissible under Rule 404(b), the evidence must be relevant to more than propensity, must be reliable, and cannot be more prejudicial than probative." Ibid. And noting the parties' agreement that the evidence in this case was reliable, ibid., the court determined that it met the other two requirements as well, id. at A2-A4.

The court of appeals stated that, under its precedents, "[b]y pleading not guilty, [petitioner] put his knowledge of the presence of the gun at issue, making [his] prior convictions relevant to show intent, state of mind, and absence of mistake or accident" in constructively possessing the gun. Pet. App. A2 (citation omitted). It emphasized, in a footnote, that "[b]ecause this is a constructive possession case," the court was not "reach[ing] the question of whether similar evidence would be relevant to knowledge or intent in an 'actual possession' case." Id. at A2 & n.1. And it observed that "the caselaw in this and other circuits establishes clearly the logical connection between a convicted felon's knowing possession of a firearm at one time and his knowledge that a firearm is present at a subsequent time." Id. at A2.

The court of appeals rejected petitioner's argument that the government did not need to introduce evidence of petitioner's knowledge in this case because petitioner "intended to present an

alibi defense and not to argue mistake or accident." Pet. App. A3. The court observed that it did "not matter what defense [petitioner] said he intended to raise," because the government had to present its case first and had to present sufficient evidence to meet its "burden of proving" that petitioner "'was aware or knew of the firearm's presence'" in the stolen car. Ibid. (citation omitted).

Finally, the court of appeals determined that "[b]ased on [its] precedent and a 'common sense assessment of all the circumstances,'" Pet. App. A4, the district court had not "abused its discretion in concluding that the probative value of the prior convictions was not outweighed by their prejudicial effect," id. at A3. The court observed that the "prosecution had a real need to introduce the evidence to establish knowing possession," and it found that the evidence was not unduly prejudicial given that the district court "gave three separate limiting instructions, refused to admit more prejudicial and less similar prior convictions, and 'somewhat sanitized' the records of the prior convictions that were admitted." Id. at A3-A4.

ARGUMENT

Petitioner renews his contention (Pet. 18-23) that the district court erred in admitting evidence of his prior firearms convictions. Petitioner further contends (Pet. 14-18) that the circuits disagree as to whether the government may introduce Rule 404(b) evidence to establish a fact that the defendant does not

actively contest. This case does not implicate any disagreement in the circuits, and it would moreover be an unsuitable vehicle for further review. 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). It should follow the same course here.[1]

1. Under Rule 404(b), although "[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 [that] character," 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); 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

[1] A similar question is presented in United States v. Smith, petition for cert. pending, No. 20-8143 (filed May 20, 2021).

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) (explaining that "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 that because of the "unique circumstances in this case regarding the position of the firearm in the console and possession concerns," the prior convictions were "very probative." 8/1/19 Tr. 56. And the court of appeals determined that the district court "did not abuse its discretion in admitting the prior convictions," where "the government had to prove that [petitioner] was aware or knew of the firearm's presence" in the stolen car, and the district court "took steps to prevent any unfair prejudice" -- including issuing "three separate limiting instructions, refus[ing] to admit more prejudicial and less similar prior convictions," and ensuring that "records of the prior convictions that were admitted" were admitted only in a limited form. Pet. App. A3-A4 (citation and internal quotation marks omitted).

2. Petitioner asserts that this case implicates disagreement in the courts of appeals regarding whether Rule 404(b) evidence may be admitted to prove an element "regardless of whether the defendant actively contests that element at trial." Pet. 15 (citation omitted). But his contention that the "Third, Fourth, and Seventh Circuits" would have reached a different conclusion because those "circuits, in effect, require that, to justify admission of prior bad acts evidence under Rule 404(b) * * * the issue of fact for which the evidence is professed to be 'probative' and 'relevant' must be actually and actively contested," Pet. 21, is mistaken.

a. Like the court below, the Third, Fourth, and Seventh Circuits recognize that "[t]he parameters of Rule 404(b) are not set by the defense's theory of the case; they are set by the material issues and facts the government must prove to obtain a conviction." United States v. Lee, 573 F.3d 155, 166 (3d Cir. 2009) (citation omitted); see United States v. Sterling, 860 F.3d 233, 247 (4th Cir. 2017) ("[A] not-guilty plea puts one's intent at issue and thereby makes relevant evidence of similar prior crimes when that evidence proves criminal intent.") (citation omitted); United States v. Gomez, 763 F.3d 845, 858 (7th Cir. 2014) (en banc) (refusing to adopt a "generally applicable rule that other-act evidence may not be admitted unless the defendant 'meaningfully dispute[s]' the non-propensity issue for which the evidence is offered.")(citation omitted; brackets in original);

see also, e.g., United States v. Olguin, 643 F.3d 384, 390 (5th Cir.) ("A defendant's not-guilty plea intuitively puts his intent and knowledge into issue."), cert. denied, 565 U.S. 956, 565 U.S. 958 (2011).

As the en banc Seventh Circuit has explained, the advisory committee notes to the Federal Rules of Evidence counsel directly against the adoption of a categorical rule preventing the admission of Rule 404(b) evidence merely because the defendant is not actively disputing the issue to which the evidence is relevant. Gomez, 763 F.3d at 859 (citing, e.g., Fed. R. Evid. 401 advisory committee's notes (1972) ("[t]he fact to which the evidence is directed need not be in dispute" for the evidence to be relevant)). And, as the Seventh Circuit has also observed, a rule requiring an active dispute would be contrary to this Court's precedents, which endorse "the accepted rule that the prosecution is entitled to prove its case free from any defendant's option to stipulate the evidence away." Ibid. (quoting Old Chief, 519 U.S. at 189). Moreover, in cases like this where the defense does not offer to expressly stipulate to the element, a categorical rule would require certainty about the theory of defense that the defendant will ultimately adopt. But even pretrial notice of a possible alibi defense does not commit a defendant to presenting it, cf. Fed. R. Crim. P. 12.1(f) (contemplating "withdraw[al]"), or preclude the defendant from contesting knowledge in the alternative.

b. The decisions that petitioner cites are not to the contrary. Indeed, the Seventh Circuit's en banc decision in Gomez expressly rejected a categorical disputed-issue rule See 763 F.3d at 856-857. And although the Seventh Circuit suggested that the degree to which a fact is contested may be relevant in assessing whether the probative value of the evidence is substantially outweighed by its prejudicial effects under Rule 403, id. at 857, and identified "a few discrete circumstances" where the absence of a dispute might be dispositive to that assessment, ibid., this case does not implicate either of the circumstances it identified. The government was not seeking to introduce petitioner's prior convictions to show felon status notwithstanding his express stipulation of that status, ibid. (citing Old Chief, 519 U.S. at 191-192), nor was it seeking merely to show "general intent," id. at 858. Instead, the government introduced the prior convictions to "prove that [petitioner] knew there was a firearm in the car" he used during the police chase; "[t]here just didn't happen to be a gun in the car that he was found in." 7/29/19 Tr. 36-37. A jury that disbelieved an alibi defense (if one were ultimately offered) might nonetheless harbor doubts about petitioner's knowledge that the gun was in the console of the stolen car.

Petitioner's reliance (Pet. 16) on the Fourth Circuit's decision in United States v. Hall, 858 F.3d 254, 275-277 (2017) is similarly unsound. Hall expressly recognized that "a defendant's plea of not guilty places at issue all elements of the charged

crimes"; the Fourth Circuit merely cautioned that a not-guilty plea does not "throw open the door to any sort of other crimes evidence," because the district court must ensure that the evidence otherwise meets the requirements of Rule 404(b) and Rule 403. Id. at 277. And Hall rejected the admissibility of the Rule 404(b) evidence offered in that particular case because it was either "not relevant," not sufficiently "factual[ly] similar[]," or "substantially" more prejudicial than probative. Id. at 260. The lower courts applied a similar analysis in this case and made a different determination, finding that the prior convictions were "relevant," Pet. App. A2; they involved "very similar crimes," id. at A3; and the district court took appropriate "steps to prevent any unfair prejudice," ibid.; see 7/29 19 Tr. 37-38.

Petitioner's reliance on the Third Circuit's decision in United States v. Caldwell, 760 F.3d 267, 281 (2014), is likewise misplaced. That case involved a felon-in-possession trial in which the government proceeded "purely" on a theory of actual rather than constructive possession. Id. at 278-279. Here, in contrast, the court of appeals specifically observed that "[b]ecause this is a constructive possession case, we need not, and do not, reach the question of whether similar evidence would be relevant to knowledge or intent in an 'actual possession' case." Pet. App. A2 n.1.[2] And

[2] Petitioner contests (Pet. 20) the court of appeal's characterization of the case, arguing that the first of the two felon-in-possession charges was predicated on a theory of actual possession because it was based on his possession of the gun during the attack in which he repeatedly shot Odom. But the government,

Caldwell itself recognized that "'knowledge and intent are frequently at issue'" in "constructive possession cases" like this one. 760 F.3d at 280 (citation omitted).

Finally, petitioner relies on a law review article to substantiate his assertion that the circuits disagree as to whether a defendant must "actively contest[] [an] element at trial" in order to justify the admission of relevant Rule 404(b) evidence. Pet. 15 (quoting Daniel J. Capra & Liesa L. Richter, Character Assassination: Amending Federal Rule of Evidence 404(b) to Protect Criminal Defendants, 118 Colum. L. Rev. 769, 797 (2018) (Capra & Richter)). But, in describing the alleged circuit conflict, the article relies on the same inapposite cases petitioner cites. See Capra & Richter 797. And, as petitioner ultimately admits (Pet. 22), the article expresses extreme skepticism about the wisdom of adopting a categorical rule requiring an "active contest" as a prerequisite to the admission of Rule 404(b) evidence, observing that such a rule appears to be contrary to this Court's decision in Old Chief v. United States, see Capra & Richter 813-814, and that "a hard and fast requirement may be impracticable and costly

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7/29/19 Tr. 36-37, the district court, 8/1/19 Tr. 56, and the court of appeals, Pet. App. A3, all made clear that the prior convictions were relevant to the second felon-in-possession charge, which was predicated on petitioner's possession of the gun found in the stolen car. Because that gun was not found in petitioner's actual possession, the government was required to proceed under a theory of constructive possession. See Caldwell, 760 F.3d at 278 (describing "constructive possession" cases as those where the government must prove that the defendant "exercised dominion or control over the area in which the weapon was found").

to police and may unfairly disadvantage the government in its efforts to prove charges beyond a reasonable doubt," id. at 815.

3. In any event, even if a Rule 404(b) claim like petitioner's warranted review in an appropriate case, this case is a poor vehicle. Petitioner himself acknowledges two considerations counseling against review.

First, petitioner recognizes (Pet. 13) that Rule 404(b) was recently revised to require the government to "articulate * * * the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose," Fed. R. Evid. 404(b)(2), and he acknowledges (Pet. 14) that the amendments might "encourage district courts to take a closer look at the government's professed 404(b) purpose," thereby ameliorating the policy concerns that he asserts. While petitioner suggests this vehicle problem is not substantial because the amendments do not directly resolve the circuit conflict he alleges, this Court should not grant review to consider a question regarding the proper application of Rule 404(b) until the courts have had a chance to apply the recently-updated version of the rule.

Second, petitioner also acknowledges (Pet. 23) that "[o]ne could argue that, because [he] took the stand in his defense," the admissibility of his prior conviction under Rule 404(b) was "ultimately immaterial, because this evidence could have been admitted to impeach [him] under Federal Rule of Evidence 609." Petitioner suggests (ibid.) that the Court should overlook this

significant aspect of his case because he might not have testified if the district court had refused the government's request to admit the Rule 404(b) evidence and because the district court might have limited the government's use of the prior convictions for impeachment. But, at a minimum, this complexity weighs strongly against further review in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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