No. _____

IN THE

Supreme Court of the United States

ERISTON WILSON,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Each Court of Appeals has instituted its own multi-pronged test for determining the admissibility of extrinsic evidence under Fed. R. Evid. 404(b), creating deeply entrenched circuit conflict over the proper application of that ubiquitous evidentiary rule. The Fifth Circuit and others hold that extrinsic evidence of acts similar to the charged offense is automatically relevant to "intent" and thus admissible under Rule 404(b) any time a defendant pleads not guilty to a conspiracy charge. Other circuits disagree. The question presented is:

Does the Fifth Circuit's *per se* rule conflict with the text of Rule 404(b), as well as this Court's precedent?

RELATED PROCEEDINGS

The following proceedings are directly related to this case:

- *United States v. Eriston Wilson*, No. 2:19-cr-034, U.S. District Court for the Eastern District of Louisiana. Judgment entered September 15, 2021.
- *United States v. Eriston Wilson*, No. 21-30474, U.S. Court of Appeals for the Fifth Circuit. Judgment entered September 21, 2022 (1a-17a). Petition for Rehearing En Banc denied on November 2, 2022 (18a).

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

PETITION FOR WRIT OF CERTIORARI

Petitioner Eriston Wilson respectfully asks this Court to review the decision of the U.S. Court of Appeals for the Fifth Circuit.

JUDGMENT AT ISSUE

The Fifth Circuit issued its judgment affirming Mr. Wilson's convictions on September 21, 2022. The Fifth Circuit's decision is attached as the Appendix (1a-17a).

JURISDICTION

The Fifth Circuit issued its decision September 21, 2022. App'x at 1a-17a. Mr. Wilson filed a timely petition for rehearing en banc, which was denied November 2, 2022. App'x at 18a. The original deadline for this petition was January 31, 2023, but the Honorable Justice Alito granted a 59-day extension to March 31, 2023. *See* Sup. Ct. No. 22A680. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND FEDERAL RULE INVOLVED

The Fifth Amendment to the U.S. Constitution provides, in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law[.]

The Sixth Amendment to the U.S. Constitution provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury[.]

Federal Rule of Evidence 404(b) provides, in relevant part:

> **(b) Other Crimes, Wrongs, or Acts**.
>
> > **(1)** ***Prohibited Uses***. Evidence 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.
> >
> > **(2)** ***Permitted Uses***. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.
> >
> > **(3)** ***Notice in a Criminal Case***. In a criminal case, the prosecutor must:
> >
> > > (A) provide reasonable notice of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it;
> > >
> > > (B) articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and
> > >
> > > (C) do so in writing before trial — or in any form during trial if the court, for good cause, excuses lack of pretrial notice.

STATEMENT OF THE CASE AND PROCEEDINGS

This appeal arose from a trial in which two individuals—John Weldon and Eriston Wilson—were accused of conspiring to commit Hobbs Act robbery. A series of seven armed robberies of gas stations and convenience stores were alleged as the "overt acts" of that conspiracy. Mr. Wilson was also charged with brandishing a firearm in furtherance of one of those robberies. John Weldon was separately charged with committing a bank robbery and another gas station robbery during the same time frame.

The robberies Mr. Wilson was accused of committing with Mr. Weldon were all observed by eyewitnesses and captured by surveillance cameras. However, none of the witnesses could identify the offenders or describe them in any detail, and the two suspects depicted in the surveillance footage were fully masked. Nonetheless, the evidence against John Weldon was overwhelming. It included testimony from his accomplice in the separate bank robbery (in which Mr. Wilson was not alleged to have been involved), surveillance footage of his distinctive tattoos, a gun found in his girlfriend's car that matched the one used in the robberies, a large amount of cash found in his home that matched the amount stolen in the bank robbery, cell site data placing his phone in the vicinity of several of the robberies, and various clothing items and shoes found in his home and car that were similar to items worn by the two suspects in the gas station and convenience store robberies.

In contrast, the government's evidence against Eriston Wilson was slim. During the three-day, 24-witness trial, only three witnesses provided any information

related to the government's allegation that Mr. Wilson was Mr. Weldon's accomplice in the two-person gas station and convenience store robberies: two law enforcement officers and Eriston's brother (Lee Wilson). As one officer candidly admitted, a search executed at Mr. Wilson's home revealed nothing of evidentiary value, and law enforcement's evidence implicating him in the robberies consisted exclusively of about ten photographs and videos of Mr. Wilson that officers found on Mr. Weldon's phone. Some of the images showed Mr. Wilson wearing shoes that the officer believed matched a suspect in a few of the robberies, while other photos showed Mr. Wilson with a gun in his waistband or holding cash in his hands. Lee Wilson testified that all three men—John Weldon, Eriston, and Lee—routinely swapped clothes.

By far, the most incriminating evidence against Mr. Wilson was testimony by two law enforcement officers about his commission of an entirely unrelated robbery three months after Mr. Weldon went to jail for the charged offenses. That evidence was admitted under Fed. R. Evid. 404(b), over the adamant objection of defense counsel. The two officers testified that multiple individuals robbed a gas station, and law enforcement tracked the getaway vehicle to an apartment complex, where officers observed Mr. Wilson and others exit the car and enter an apartment. Upon searching that apartment, officers found guns, money, and Mr. Wilson hiding in a closet.

In determining whether evidence is admissible under Rule 404(b), courts in the Fifth Circuit apply the two-prong test articulated in *United States v. Beechum*, 582 F.2d 898 (5th Cir. 1978) (en banc). Under that test, admissibility of an extrinsic offense "hinges on whether (1) it is relevant to an issue other than the defendant's

character, and (2) it 'possess[es] probative value that is not substantially outweighed by its undue prejudice' under Federal Rule of Evidence 403." *United States v. Smith*, 804 F.3d 724, 735 (5th Cir. 2015) (quoting *Beechum*, 582 F.2d at 911). Rule 404(b)(2) provides a list of non-propensity purposes for which extrinsic evidence may be admissible, including to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."

Prior to Mr. Wilson's trial, the prosecution filed a "notice of intent" to introduce evidence of his extrinsic robbery offense "to show [his] motive, intent, preparation, plan, knowledge, and absence of mistake or lack of accident." *United States v. Weldon et al.*, No. 2:19-cr-034, ECF No. 69, at 5 (E.D. La. Oct. 9, 2019). In other words, the government simply copied all of the purposes from Rule 404(b)(2) as the basis for introducing the extrinsic offense, without explaining how it served any particular purpose.[1] In a subsequent filing, the government asserted that the extrinsic offense was evidence of Mr. Wilson's "knowledge, plans, and conspiring to commit armed robberies" and "also go[es] to show [his] identity" as one of the robbers in the pending charges. *Weldon*, ECF No. 112, at 3 (E.D. La. Dec. 6, 2019). In that filing, the prosecution relied on Fifth Circuit precedent holding that the first prong of the *Beechum* test is automatically satisfied whenever a defendant enters a plea of not

[1] In other parts of the filing, the prosecution omitted "intent" from the list of purposes to which it believed the extrinsic offense was relevant—for example, stating: "The similar, yet extrinsic, convictions and conduct are significant to the charged offenses because they provide evidence relevant to Weldon's and Wilson's motive, knowledge, opportunity, preparation, plan, or absence of mistake or accident." *See id.* at 3.

guilty in a conspiracy case. *See id.* (citing *United States v. Broussard*, 80 F.3d 1025, 1040 (5th Cir.1996)).

At trial, the district court admitted the extrinsic robbery for two purposes: (1) to prove Mr. Wilson's identity as one of the individuals who committed the robberies alleged as overt acts of the charged conspiracy, and (2) to prove his intent to join the robbery conspiracy. *Weldon*, ECF No. 274, at 72-76 (E.D. La. Oct. 20, 2021). Of course, the government had no need to prove intent—as the prosecution made clear to the jury, the intent of the two suspects who committed the robberies underlying the conspiracy charge was obvious. The prosecution told the jury:

> A conspiracy is pretty simple. … It's exactly what you would think it would be. It's two people working together to commit a crime. That's what they are doing. They agree to work together to try to accomplish the goal of committing a crime.
>
> That's what these guys did in this particular case. *Clearly, they both worked together. You saw it from every video, that they were together*. They had a plan and every one of those were similar. They went in and they decided to rob those convenience stores.

Id. at 207 (E.D. La. Oct. 20, 2021) (emphasis added). In other words, the element of intent was a foregone conclusion upon any determination that Mr. Wilson did, in fact, commit one of the charged robberies. Thus, the government used the Rule 404(b) evidence at trial for the sole purpose of proving Mr. Wilson's identity as one of the individuals who committed the charged robberies—and to make improper, character-based arguments. Most glaringly, the prosecution argued in closing that Mr. Wilson "went and committed another [robbery]" after Mr. Weldon went to jail because: "That's what he does. That's how he supports himself." *Id.* at 227-28.

Mr. Wilson challenged the admission of this highly prejudicial Rule 404(b) evidence on appeal. The Fifth Circuit correctly determined that the district court erred in admitting the extrinsic robbery offense for the purpose of proving Mr. Wilson's identity as one of the perpetrators of the charged robberies. App'x at 9a. As the court noted, the only similarities between the charged and extrinsic robberies were "common elements in armed robberies generally"—*i.e.*, armed men wearing masks and gloves stealing money from a gas station and using a getaway vehicle. App'x at 9a. However, the court affirmed the district court's determination that the evidence was relevant to the issue of intent, relying solely on the Fifth Circuit precedent holding that *Beechum*'s first prong is satisfied whenever "a defendant enters a plea of not guilty in a conspiracy case[.]" App'x at 10a (citing *United States v. Cockrell*, 587 F.3d 674, 679 (5th Cir. 2009). The court found no abuse of discretion in the evidence's admission, despite the fact that intent was never placed at issue at trial. The only question at trial was whether Mr. Wilson was one of the suspects in surveillance footage of the robberies, and the footage clearly demonstrated that the two people committing the robberies—whoever they may be—were acting in concert with one another.

Mr. Wilson filed a timely petition for rehearing en banc, seeking review of the Fifth Circuit panel's rulings on his challenges to the admission of the 404(b) evidence. The Fifth Circuit denied the petition. *See* App'x at 18a.

REASONS FOR GRANTING THE PETITION

In criminal trials, prosecutors long have been prohibited from introducing evidence of a defendant's unrelated crimes "to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Fed. R. Evid. 404(b)(1). That makes sense, as the Fifth and Sixth Amendments of the U.S. Constitution entitle criminal defendants to due process and to be tried on the charged offenses by an impartial jury. Thus, in prosecuting a defendant for an alleged robbery, the government cannot introduce evidence that the defendant committed a *different* robbery on some other occasion to prove that he is someone who commits robberies and thus more likely to have committed the charged offense. Yet, there are other, specific purposes for which this type of extrinsic evidence *may* be admissible at trial—namely, to prove "motive, opportunity, intent, preparation, plan, knowledge, identity absence of mistake, or lack of accident." Fed. R. Evid. 404(b)(2).

In *Huddleston v. United States*, this Court empathized with concerns that prosecutors may attempt to introduce unduly prejudicial evidence under Rule 404(b). 485 U.S. 681, 691 (1988). However, the Court explained "that the protection against such unfair prejudice emanates" from four specific sources. *Id.* Those sources include: (1) "the requirement of Rule 404(b) that the evidence be offered for a proper purpose"; (2) "the relevancy requirement of Rule 402"; (3) "the assessment the trial court must make under Rule 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice"; and (4) the requirement under Rule 105 that the trial court, upon request, issue a limiting

instruction to the jury "that the similar acts evidence is to be considered only for the proper purpose for which it was admitted." *Id.* at 691-92.[2]

Since *Huddleston*, the Courts of Appeals all have adopted and applied their own specific tests for Rule 404(b) admissibility.[3] The Fifth Circuit has continued to enforce decades-old precedent holding that a plea of not guilty to a conspiracy charge *automatically* makes similar, extrinsic offenses relevant to the issue of intent—regardless of whether intent is actually a disputed, material element for which the government needs to present additional evidence at trial. Additionally, circuit splits have emerged related to the "proper purpose" and relevancy protections articulated by this Court in *Huddleston*. For the reasons discussed in detail below, this Court should grant certiorari to address whether the Fifth Circuit's *per se* rule conflicts with this Court's prior decisions and Rule 404(b)'s limitation, resolve circuit conflict, and clarify the requirements of Rule 404(b).

I. Fifth Circuit precedent violates *Huddleston* and Rule 404(b).

In the Fifth Circuit, "admissibility under Rule 404(b) hinges on whether (1) [the extrinsic act] is relevant to an issue other than the defendant's character, and

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[2] *Huddleston* also held that extrinsic evidence can be admitted only "if there is sufficient evidence to support a finding by the jury that the defendant committed the similar act." *Id.* at 685.

[3] *See, e.g.*, *United States v. Martínez-Mercado*, 919 F.3d 91, 101 (1st Cir. 2019); *United States v. Rutkoske*, 506 F.3d 170, 177 (2d Cir. 2007); *United States v. Garner*, 961 F.3d 264, 273 (3d Cir. 2020); *United States v. Bell*, 901 F.3d 455, 465 (4th Cir. 2018); *United States v. Gutierrez-Mendez*, 752 F.3d 418, 423 (5th Cir. 2014); *United States v. Barnes*, 822 F.3d 914, 920 (6th Cir. 2016); *United States v. Torres-Chavez*, 744 F.3d 988, 991 (7th Cir. 2014); *United States v. Contreras*, 816 F.3d 502, 511 (8th Cir. 2016); *United States v. Carpenter*, 923 F.3d 1172, 1182 (9th Cir. 2019); *United States v. Tennison*, 13 F.4th 1049, 1055 (10th Cir. 2021); *United States v. Horner*, 853 F.3d 1201, 1213 (11th Cir. 2017); *United States v. Moore*, 732 F.2d 983, 987 (D.C. Cir. 1984).

(2) it 'possess[es] probative value that is not substantially outweighed by its undue prejudice' under Federal Rule of Evidence 403." *Smith*, 804 F.3d at 735 (quoting *Beechum*, 582 F.2d at 911). That two-part test was developed in 1978—a decade before this Court's decision in *Huddleston*—and the Fifth Circuit continues to apply it today. According to the Fifth Circuit, the first prong "is identical" to the relevance inquiry under Rule 401, and thus extrinsic evidence is deemed relevant "when it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Beechum*, 582 F.2d at 911 (quotation marks omitted).

The Fifth Circuit elaborated on the relevance prong in *Beechum*, explaining that the relevance of an extrinsic offense "is a function of its similarity to the offense charged," which "is determined by the inquiry or issue to which the extrinsic offense is addressed." *Id.* When the extrinsic offense is offered to prove a defendant's "intent" to commit the charged offense, the Court explained that "the relevancy of the extrinsic offense derives from the defendant's indulging himself in the same state of mind in the perpetration of both the extrinsic and charged offenses." *Id.* "The reasoning is that because the defendant had unlawful intent in the extrinsic offense, it is less likely that he had lawful intent in the present offense." *Id.*

In 1980—again, several years before this Court decided *Huddleston*—the Fifth Circuit addressed for the first time the question of "[w]hether a not guilty plea of itself sufficiently raises the issue of intent to make extrinsic offense evidence admissible in the government's case in chief[.]" *United States v. Roberts*, 619 F.2d 379, 382 (5th Cir.

1980). The defendant in that case was charged with participating in a gambling conspiracy, and the prosecution sought to introduce evidence of the defendant's prior conviction for a gambling offense. *Id.*at 381. Despite the fact that "the prosecution had no reason to anticipate a denial of criminal intent, and the defendant never openly made it an issue," the trial court ruled that the defendant's "plea of not guilty itself raised the issue of intent," thereby satisfying the relevance prong. *Id.* at 381-82. The Fifth Circuit affirmed, reasoning that intent is often difficult to prove in conspiracy cases, especially when a defendant "is a passive or minor actor in a criminal drama," and noting that the government "may be forced to present some independent evidence of intent" if "the evidence linking the defendant to a conspiracy is subject to an innocent interpretation." *Id.* at 382-83. The court thus held:

> In every conspiracy case, therefore, a not guilty plea renders the defendant's intent a material issue and imposes a difficult burden on the government. Evidence of such extrinsic offenses as may be probative of a defendant's state of mind is admissible unless he affirmatively takes the issue of intent out of the case.

Id. at 383 (quotation marks, alteration, and citation omitted).

In the decades following *Roberts*, the Fifth Circuit simplified that holding into a *per se* rule that wholly eliminates any relevance or "proper purpose" inquiry from the Rule 404(b) admissibility test in conspiracy cases—rendering the Rule 404(b) analysis merely coextensive with Rule 403. The Fifth Circuit has explicitly and repeatedly held: "The mere entry of a not guilty plea in a conspiracy case raises the issue of intent sufficiently to justify the admissibility of extrinsic offense evidence." *United States v. Broussard*, 80 F.3d 1025, 1040 (5th Cir. 1996); *see also, e.g.*, *United*

States v. Bermea, 30 F.3d 1539, 1562 (5th Cir. 1994); *United States v. Parziale*, 947 F.2d 123, 129 (5th Cir. 1991); *United States. v. Heard*, 709 F.3d 413, 430 (5th Cir. 2013). Put another way: "Where . . . a defendant enters a plea of not guilty in a conspiracy case, the first prong of the *Beechum* test is satisfied." *Cockrell*, 586 F.3d at 679.

In this case, the government alleged that Mr. Wilson and his co-defendant conspired to commit Hobbs Act robbery, identifying seven completed robberies as the "overt acts" of the conspiracy. The central evidence was surveillance footage of each robbery, which depicted two masked individuals entering and robbing stores together in a coordinated fashion. There was no question that the two people depicted in each robbery conspired—*i.e.*, agreed with one another to commit the robbery. Indeed, the prosecution told the jury exactly that—observing that two perpetrators "clearly" worked together, as evidenced by every video. The only material issue before the jury was whether Mr. Wilson was, in fact, one of the masked individuals in any of the robberies, as the government alleged. Nevertheless, the Fifth Circuit affirmed the district court's admission of Mr. Wilson's extrinsic robbery offense to prove his intent to join the charged Hobbs Act conspiracy, relying solely on the Fifth Circuit rule derived from *Roberts*. (10a.) That holding—and the decades of precedent upon which it relied—contradicts the plain language of Rule 404(b) and flies in the face of this Court's holding in *Huddleston*.

Rule 404(b) expressly limits the *purposes* for which extrinsic offenses evidence may be admitted at a criminal trial. The rule is directed to the prosecution's intended

use of the evidence—not the mere existence of some similarity to the case at bar. By its plain language, it only permits the possibility of admitting extrinsic evidence for the "purpose" of "*proving* motive, opportunity, intent," etc. Fed. R. Evid. 404(b)(2). And, in seeking to introduce such extrinsic evidence, the prosecution is required to "articulate . . . the permitted purpose for which [it] intends to offer the evidence and the reasoning that supports the purpose[.]" Fed. R. Evid. 404(b)(3)(B). In *Huddleston*, this Court cited the rule's requirement "that the evidence be *offered* for a proper purpose" as the primary source of protection against unfair prejudice. 485 U.S. at 681-82 (emphasis added).

The Fifth Circuit's *per se* rule, and its application in this case, betray this core requirement and fundamental protection of Rule 404(b). Under the Fifth Circuit's precedent, it does not matter whether the government needs or intends to use a similar, extrinsic offense to prove a defendant's intent to join a charged conspiracy—it can introduce the evidence as long as the court decides that Rule 403 is satisfied. In this case, the government was able to introduce highly prejudicial evidence that Mr. Wilson committed an unrelated robbery to convince the jury that he committed the charged offenses, without it actually being offered for any permissible purpose. This Court's intervention is needed to correct the Fifth Circuit's decades-old precedent, which violates this Court's prior decisions and Rule 404(b).

II. Significant and pervasive circuit conflict has developed around the Fifth Circuit's *per se* rule and the proper application of Rule 404(b).

Each circuit has instituted its own multi-pronged test for determining the admissibility of extrinsic evidence under Rule 404(b). The tests all incorporate the

central requirements that (1) the evidence be *relevant* to a proper, non-character-based purpose (*i.e.*, a purpose identified in Rule 404(b)(2)), and (2) its admission satisfies Rule 403's balancing test. However, significant and deeply entrenched conflict has developed among of the circuits over adoption of the Fifth Circuit's rule derived from *Roberts* and, more broadly, the question of what degree of materiality or necessity is required to render extrinsic offense evidence relevant and admissible under Rule 404(b).

The First, Eighth, and Eleventh Circuits all have adopted the rule that a plea of not guilty to a conspiracy charge automatically renders similar, extrinsic offenses relevant to the issue of intent. *See, e.g.*, *United States v. Zeuli*, 725 F.2d 813, 816 (1st Cir. 1984); *United States v. Cooper*, 990 F.3d 576, 584 (8th Cir. 2021); *United States v. Matthews*, 431 F.3d 1296, 1311 (11th Cir. 2005).[4] Though bound by precedent, at least one judge on the Eleventh Circuit has recognized the problematic nature of this rule, emphasizing that the doctrine that has emerged from *Roberts* "has evolved into one that undermines Rule 404(b) itself[.]" *Matthews*, 431 F.3d at 1313 (Tjoflat, J., concurring). The *per se* admissibility rule is "reflexively invoked" in conspiracy cases, as it was here, and "frequently without reference to context, or any other analysis for that matter[.]" *See id.* at 1315.

[4] *Roberts* was decided when the now-Eleventh Circuit was still part of the Fifth Circuit, making the Eleventh Circuit bound by that precedent.

Other circuits—including the Second, Third, Fourth, and Seventh Circuits—have expressly disagreed with the Fifth Circuit's rule. For example, the Seventh Circuit has explained:

> Rule 404(b) does not provide a rule of automatic admission whenever bad acts evidence can be plausibly linked to 'another purpose,' such as knowledge or intent, listed in the rule. The Rule 402 requirement of relevance and the unfair prejudice balancing inquiries of Rule 403 still apply with full force. This must be so because the list of exceptions in Rule 404(b), if applied mechanically, would overwhelm the central principle.
>
> {…}
>
> When . . . intent is not *meaningfully disputed* by the defense, and the bad acts evidence is relevant to intent only because it implies a pattern or propensity to so intend, the trial court abuses its discretion by admitting it.

United States v. Miller, 673 F.3d 688, 696 (7th Cir. 2012) (quotation marks and citations omitted) (emphasis added). Indeed, "if a mere claim of innocence were enough to automatically put intent at issue, the resulting exception would swallow the general rule against admission of prior bad acts." *Id.* at 697.

The Fourth Circuit has similarly rejected the notion that Rule 404(b) evidence is automatically relevant and admissible simply because intent is "at issue" as an element of the charged offense. *See, e.g.*, *United States v. Hernandez*, 975 F.2d 1035, 1039-40 (4th Cir. 1992); *United States v. Sterling*, 860 F.3d 233, 247 (4th Cir. 2017). And, in contrast with the Fifth Circuit and others, the Fourth Circuit's Rule 404(b) admissibility test actually incorporates an independent requirement of *necessity*. *See Hernandez*, 975 F.3d at 1040. Thus, even if an extrinsic offense bears some relevance to the "intent" element of the charged offense, it still is not admissible unless it is

"probative of an essential claim or an element *in a manner not offered by other evidence available to the government*." *Sterling*, 860 F.3d at 247 (quotation marks and citation omitted) (emphasis added). In other words, the mere fact that the charged crime includes an intent element "does not throw open the door to any sort of other crimes evidence." *United States v. Bailey*, 990 F.2d 119, 123 (4th Cir. 1993).

The Third Circuit has likewise held that "[s]imply invoking a non-propensity purpose does not magically transform inadmissible evidence into admissible evidence." *United States v. Foster*, 891 F.3d 93, 108 (3d Cir. 2018) (quotation marks and citation omitted). "Rather, the testimony concerning other acts must *materially advance* the prosecution's case." *Id.* (quotation marks and citation omitted) (emphasis added). Thus, a court cannot simply look to the elements of the charged offense to determine whether the extrinsic act bears some marginal relevance or similarity to the charge. Instead, courts must "consider the material issues and facts the government must prove to obtain a conviction." *United States v. Caldwell*, 760 F.3d 267, 276 (3d Cir. 2014) (quotation marks and citation omitted).

The Second Circuit has gone even further, establishing a rule that prohibits the admission of Rule 404(b) evidence to prove intent when the defendant denies committing the charged acts. *United States v. Ortiz*, 857 F.2d 900, 904 (2d Cir. 1988) ("Intent is not placed in issue by a defense that the defendant did not do the charged act at all."). Thus, in the Second Circuit's view, "[w]hen a defendant unequivocally relies on such a defense, evidence of other acts is not admissible for the purpose of proving intent." *Id.*

The circuits are inextricably divided in their applications of Rule 404(b), particularly as it relates to conspiracy cases and the permissible purpose of using extrinsic acts to prove "intent." In several circuits, the district court's admission of the highly prejudicial evidence regarding Mr. Wilson's commission of an unrelated robbery undoubtedly would have been held to be an abuse of discretion—particularly considering the government neither used nor needed the evidence to prove intent. The Fifth Circuit only affirmed the district court's intent-based ruling due to its decades-old *per se* rule that similar acts are admissible to prove intent in conspiracy cases. This Court should grant certiorari not only to review the Fifth Circuit's rule but also to resolve the significant, pervasive circuit conflict over the proper application of Rule 404(b).

III. This case presents an ideal vehicle to address the issue presented.

The question presented in this petition invokes longstanding precedent and deep-seeded circuit conflicts that warrant this Court's intervention. Mr. Wilson's case presents an ideal vehicle to address this Rule 404(b) issue. His challenge to the admission of the extrinsic evidence was well-preserved below, and that evidence was highly prejudicial, serving as the most incriminating evidence against him at trial. Indeed, it was by far the strongest evidence implicating Mr. Wilson in the commission of any robbery. Finally, this is a case in which the *Roberts*-derived rule was used to admit extrinsic evidence when the *intrinsic* evidence related to the charged offenses left no doubt whatsoever regarding the intent of the offenders, whoever they may be. For these reasons, Mr. Wilson's case is an excellent vehicle for the Court to address the Fifth Circuit's sweeping rule and the related circuit conflict that has emerged.

CONCLUSION

Petitioner Eriston Wilson respectfully asks this Court to grant certiorari on the question presented.

Respectfully submitted,

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