No. 22-7204

IN THE SUPREME COURT OF THE UNITED STATES

ERISTON WILSON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion in admitting evidence, under Federal Rule of Evidence 404(b)(2), of petitioner's arrest for an uncharged armed robbery as proof of petitioner's intent to engage in the charged conspiracy to commit Hobbs Act robbery.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is not published in the Federal Reporter but is available at 2022 WL 4363831.

JURISDICTION

The judgment of the court of appeals was entered on September 21, 2022. A petition for rehearing was denied on November 2, 2022 (Pet. App. 18a). On January 30, 2023, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including March 31, 2023. The petition for a writ of

certiorari was filed on March 30, 2023. 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 Louisiana, petitioner was convicted on one count of conspiring to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951(a), and one count of aiding and abetting the brandishing of a firearm during a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(ii) and 2. Pet. App. 3a-4a; Judgment 1. He was sentenced to 272 months of imprisonment, to be followed by five years of supervised release. Pet. App. 4a; Judgment 2-3. The court of appeals affirmed petitioner's convictions but vacated his sentence and remanded for resentencing. Pet. App. 1a-17a.

1. Between December 2018 and February 2019, petitioner committed a string of armed robberies in New Orleans with an accomplice named John Weldon. Pet. App. 2a. Petitioner and Weldon robbed at gunpoint a Dollar General on December 26, 2018; a Shell gas station on January 8, 2019; a Circle H Meat Market on January 9, 2019; a Tiger Mart on January 9, 2019; a Quick Save Discount Store on January 23, 2019; another Shell station on January 31, 2019; and a Mike's Grocery on February 2, 2019. See Indictment 2-3; Pet. App. 2a.

On February 5, 2019, Weldon and Eugene Lewis robbed a branch of First Bank and Trust. Pet. App. 2a. Police officers arrested Lewis that day. Ibid. Lewis gave the officers Weldon's phone

number, which they used to obtain Weldon's name and photograph. Ibid. One of the officers recognized Weldon as the potential suspect in a December 23 Shell station robbery. Ibid. After comparing Weldon's image with an image of the December 23 robbery suspect, and confirming that the vehicle at Weldon's listed address matched the vehicle linked to the string of armed robberies mentioned above, officers arrested Weldon. Id. at 2a-3a.

Officers then seized Weldon's phone and secured a search warrant for it. Pet. App. 3a. The phone contained pictures of Weldon and petitioner together wearing the same clothing and shoes worn by the suspects in the string of armed robberies. Ibid. Based on those pictures, as well as surveillance footage from the robberies and witness interviews, the police determined that petitioner committed the robberies with Weldon. Ibid.

On May 11, 2019, officers arrested petitioner in connection with a separate armed robbery, not charged in this case, of the Downman Center Gas Station in New Orleans. See Pet. App. 3a; C.A. ROA 1060-1081.

2. A federal grand jury in the Eastern District of Louisiana charged petitioner and Weldon each with one count of conspiring to commit Hobbs Act robbery at seven locations between December 2018 and February 2019, in violation of 18 U.S.C. 1951(a), and one count of aiding and abetting the brandishing of a firearm during a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(ii) and 2. Indictment 1-4. Both proceeded to trial. Pet. App. 4a.

Before trial, the government provided notice under Federal Rule of Evidence 404(b) that it would seek to introduce evidence of petitioner's role in the May 11, 2019, Downman Center Gas Station robbery, as well as in seven other armed robberies between April and May 2019, to show petitioner's identity and intent with respect to the charged offenses. See D. Ct. Doc. 69, at 2-3 (Oct. 9, 2019), 6; D. Ct. Doc. 112, at 4 (Dec. 6, 2019). Rule 404(b) allows the admission of "[e]vidence of any other crime, wrong, or act" to prove "identity" and "intent" (among other things), though not "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) and (2). Petitioner "concede[d]" that the May 11, 2019, robbery "may be" admissible, but argued that the other uncharged robberies "are not sufficiently similar to identify [petitioner] as a perpetrator." D. Ct. Doc. 118, at 2 (Dec. 6, 2019).

The district court deferred ruling on the proposed Rule 404(b) evidence until trial. See C.A. ROA 1063. The government ultimately sought to introduce officer testimony only about petitioner's arrest for the May 11, 2019, robbery, and not any of the other crimes. Id. at 1063-1065. The court denied petitioner's objection to the admission of evidence of that single prior robbery. Id. at 1065-1071. The court found the evidence permissible under Rule 404(b) on two grounds: first, as evidence of petitioner's identity as one of the robbers at issue in the

prosecution, and second, as evidence of petitioner's "intent to join the conspiracy to commit a Hobbs Act Robbery * * * with Weldon." Id. at 1071; see id. at 1069-1071. The court additionally found that the evidence satisfied the separate requirements of Federal Rule of Evidence 403, because its probative value was not substantially outweighed by the risk of unfair prejudice to petitioner. Id. at 1071.

Then, immediately after the officer's testimony about the other robbery, the district court followed up with a limiting instruction to the jury. C.A. ROA 1081-1082. In that instruction, the court directed the jury that it "must not consider" the officer's testimony "in deciding if [petitioner] committed the acts charged in the superseding indictment." Id. at 1081. The court instead made clear that the jury could "consider evidence of the similar acts allegedly committed on" May 11, 2019, "if beyond a reasonable doubt from the other evidence, in this case, [you find] that [petitioner] did commit the acts charged in the superseding indictment." Id. at 1081-1082. The instruction also confined such "consider[ation]" to two "very limited purposes" -- namely, "to determine the identity of [petitioner]" as "one of the individuals who committed the" armed robberies "and/or whether [petitioner] had the state of mind or intent necessary to" conspire to commit Hobbs Act robbery. Ibid.

Before closing arguments, the district court reiterated the limiting instruction that it had given directly after the officer's

testimony. C.A. ROA 1260-1261. The jury ultimately found petitioner guilty on both counts. Judgment 1. The district court sentenced him to 272 months of imprisonment, to be followed by five years of supervised release. Id. at 2-3.

3. In an unpublished opinion, the court of appeals affirmed petitioner's convictions, but vacated petitioner's sentence and remanded for resentencing because the district court had erred in calculating petitioner's criminal history points under the Sentencing Guidelines. Pet. App. 1a-17a.

In affirming petitioner's convictions, the court of appeals found that the district court had not abused its discretion in admitting testimony about the May 11, 2019, robbery. Pet. App. 8a-11a. The court explained that the admissibility of evidence "under Rule 404(b) 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.'" Id. at 8a (citation omitted; brackets in original). And while the court concluded that the "May 2019 robbery is not relevant to [petitioner's] identity in the charged crimes," because that robbery lacked similarities to the charged robberies beyond the "common elements in armed robberies generally," the court found "the May 2019 robbery is," "[b]y contrast," "relevant to [petitioner's] intent." Id. at 9a-10a. The court observed that a defendant with "unlawful intent in the extrinsic offense * * * is less likely" to have "had lawful intent in the present

offense." Id. at 10a (quoting United States v. Beechum, 582 F.2d 898, 911 (5th Cir. 1978) (en banc)).

The court of appeals rejected petitioner's argument "that intent was not in dispute at trial because the evidence presented definitively proved that the two perpetrators committed the seven robberies in concert with each other." Pet. App. 10a. The court explained that "where, as here, a defendant enters a plea of not guilty in a conspiracy case," "the defendant's intent to commit the offense charged" is at issue, and "the relevancy of the extrinsic offense derives from the defendant's indulging himself in the same state of mind." Ibid. (brackets and citations omitted). And it further determined that any risk of undue prejudice caused by admitting evidence of the May 11, 2019, robbery "did not substantially outweigh its probative value." Ibid.

The court of appeals observed that "[t]he Government's need for the May 2019 robbery evidence to establish intent was not insubstantial," because "the Government had no other evidence to show [petitioner's] state of mind, or intent, and had to prove that [petitioner] knew the unlawful purpose of the conspiracy." Pet. App. 11a. And the court found that any potential prejudice was minimized by the district court's provision of a limiting instruction "both contemporaneously and in its final instructions"; the relative lack of trial time devoted to the May 11, 2019, robbery; and the fact that "the jury was told that the robbery was being prosecuted in state court," which reduced the

"risk that the jury would believe [petitioner] 'should be punished for that activity.'" Ibid. (citation omitted). Accordingly, the court held that "the district court did not abuse its discretion in admitting the evidence" of the May 11, 2019, robbery. Ibid.

ARGUMENT

Petitioner contends (Pet. 9-13) that the district court abused its discretion in admitting evidence of the May 11, 2019, robbery. But the court of appeals correctly determined that the admission of that evidence satisfied Federal Rules of Evidence 404(b) and 403, because the government used it to prove petitioner's intent to commit the charged offenses and its probative value was not substantially outweighed by the danger of unfair prejudice. Its decision does not conflict with a decision of this Court or another court of appeals. And this case would moreover be an unsuitable vehicle for addressing the question presented.

1. As a threshold matter, this case is in an interlocutory posture because the court of appeals vacated petitioner's sentence and remanded for resentencing. Pet. App. 17a. The interlocutory posture of a case ordinarily "alone furnishe[s] sufficient ground for the denial" of a petition for a writ of certiorari. Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916); see Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R., 389 U.S. 327, 328 (1967) (per curiam) (observing that a case remanded to the district court "is not yet ripe for review by this

Court"); Abbott v. Veasey, 137 S. Ct. 612, 613 (2017) (statement of Roberts, C.J., respecting the denial of certiorari).

Consistent with that general rule, this Court routinely denies interlocutory petitions in criminal cases. See Stephen M. Shapiro et al., Supreme Court Practice 4-55 n.72 (11th ed. 2019). That practice promotes judicial efficiency because, among other things, it enables issues raised at different stages of lower-court proceedings to be consolidated into a single petition. See Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 508 n.1 (2001) (per curiam) ("[W]e have authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals."). Petitioner offers no reason to deviate from that practice here.

2. Even aside from the interlocutory posture of the case, the court of appeals' unpublished decision does not warrant this Court's review.

a. Federal Rule of Evidence 404(b) bars the admission of "[e]vidence of any other crime, wrong, or act * * * 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). But the Rule also makes clear that "[t]his 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)(2).

Rule 403, in turn, separately provides that a "court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403.

"The threshold inquiry a court must make before admitting similar acts evidence under Rule 404(b) is whether that evidence is probative of a material issue other than character." Huddleston v. United States, 485 U.S. 681, 686 (1988). Then, as required by Rule 403, the court must "determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice." Id. at 691; see id. at 688; Fed. R. Evid. 404, Advisory Committee Note (1974 Enactment).

b. Here, the court of appeals correctly determined that the district court did not abuse its discretion in admitting evidence of the May 11, 2019, robbery under Rule 404(b). That evidence was "probative of a material issue other than character," Huddleston, 485 U.S. at 686 -- namely, petitioner's "intent" to conspire with Weldon to commit Hobbs Act robbery -- which was an element of the conspiracy charge that the government was required to prove beyond a reasonable doubt at the trial. Pet. App. 10a; see Fed. R. Evid. 404(b)(2); see, e.g., United States v. Martinez, 921 F.3d 452, 467 (5th Cir.), cert. denied, 140 S. Ct. 571 (2019). And "because [petitioner] had unlawful intent" when committing the May 11, 2019,

armed robbery, it is more likely that he "knew the unlawful purpose of" and intended to commit "the [charged] conspiracy" involving a string of armed robberies just three months earlier. Pet. App. 10a-11a (citation omitted).

Although the "probative value" of evidence whose purpose satisfies Rule 404(b) can be "substantially outweighed by its potential for unfair prejudice," Huddleston, 485 U.S. at 691, the district court did not abuse its discretion in finding that it was not outweighed here. See Pet. App. 11a; C.A. ROA 1071. The "Government's need for the May 2019 robbery evidence to establish intent was not insubstantial," because "the Government had no other evidence to show [petitioner's] state of mind." Pet. App. 11a. And any potential prejudice was mitigated by the district court's limiting instructions, the lack of trial time devoted to the May 11, 2019, robbery, and the jury's awareness of the separate state-court prosecution of that robbery. See ibid.

Petitioner argues that the Rule 404(b) evidence was inadmissible because "the element of intent was a foregone conclusion," and "[t]he only material issue before the jury was whether [petitioner] was, in fact, one of the masked individuals in any of the robberies." Pet. 6, 12. But for evidence to be admissible, "[t]he fact to which the evidence is directed need not be in dispute." Old Chief v. United States, 519 U.S. 172, 179 (1997) (quoting Fed. R. Evid. 401, Advisory Committee Note (1972 Amendment)). The government's burden to prove every element of the

offense beyond a reasonable doubt is neither eliminated nor lowered when the defendant opts not to rebut the government's evidence on that element at trial. See, e.g., United States v. Gaudin, 515 U.S. 506, 510 (1995). And by its terms, Rule 404(b) expressly allows the admission of other-act evidence for the purpose at issue here -- "proving * * * intent," Fed. R. Evid. 404(b)(2) -- regardless of whether the defendant has explicitly contested the intent element.

Petitioner's reliance (Pet. 12-13) on Huddleston is misplaced. There, the court rejected the argument that Rule 404(b) "mandate[s] a preliminary finding by the trial court that the act in question occurred." 485 U.S. at 688. Instead, the evidence is sufficient to go to the jury so long as the jury can "reasonably conclude that the act occurred and that the defendant was the actor," id. at 689 -- requirements that are indisputably satisfied for the May 11, 2019, robbery here. Petitioner emphasizes (Pet. 13) Huddleston's statement that Rule 404(b) evidence also must "be offered for a proper purpose," 485 U.S. at 691. But that statement is entirely consistent with the decision below, because the government offered the evidence here to prove petitioner's "intent" -- which Rule 404(b) expressly recognizes as a proper purpose. Fed. R. Evid. 404(b)(2).

The approach taken in the district court, and the unpublished court of appeals decision affirming it, in this case also accounts for Huddleston's -- and petitioner's -- "concern that unduly

prejudicial evidence might be introduced under Rule 404(b)." 485 U.S. at 691. Huddleston enumerates "four * * * sources" of "protection against such unfair prejudice" -- not only "the requirement of Rule 404(b) that the evidence be offered for a proper purpose," but also "the relevancy requirement of Rule 402 -- as enforced through Rule 104(b)," "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 "Federal Rule of Evidence 105, which provides that the trial court shall, upon request, instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted." Id. at 691-692. All of those sources of protection were applied here.

The lower courts' approach distills the first three into two basic inquiries: first, whether the evidence "is relevant to an issue other than the defendant's character" (which incorporates the first two protections of Huddleston), and second, whether the evidence "possess[es] probative value that is not substantially outweighed by its undue prejudice" (which corresponds to the third protection in Huddleston). Pet. App. 8a (citation omitted; brackets in original); see United States v. Beechum, 582 F.2d 898, 911 (5th Cir. 1978) (en banc). In cases addressing specific applications of those inquiries, the court of appeals has explained that the first "is satisfied" when "a defendant enters a plea of

not guilty in a conspiracy case" -- thus "'rais[ing] the issue of intent'" -- and "the prior offense involved the same intent required to prove the charged offense." United States v. Cockrell, 587 F.3d 674, 679 (5th Cir. 2009) (citation omitted). But as the decision below illustrates, Pet. App. 11a, satisfaction of the first requirement does not mean that the other-act evidence will necessarily be admissible -- instead, consistent with Huddleston, the court must still find that the probative value is not substantially outweighed by undue prejudice. See ibid.; Huddleston, 485 U.S. at 681.

The court of appeals has thus found other-act evidence in conspiracy cases to be excludable on that ground -- for instance, where "there was other substantial evidence going to the issue of intent," and "[t]he prior conviction could not have added much." United States v. Jackson, 339 F.3d 349, 356 (5th Cir. 2003); see Beechum, 582 F.2d at 914 (explaining that the second prong turns in part on "the extent to which the defendant's unlawful intent is established by other evidence, stipulation, or inference"). Here, however, "the Government had no other evidence to show [petitioner's] state of mind." Pet. App. 11a.

The district court here also implemented the fourth protection in Huddleston by twice providing a limiting instruction. And "our legal system presumes that jurors will 'attend closely the particular language of [limiting] instructions in a criminal case and strive to understand, make sense of, and

follow' them." Samia v. United States, 143 S. Ct. 2004, 2013 (2023) (citation omitted).

2. Petitioner fails to identify a conflict between the decision below and the decision of any other court of appeals. Petitioner's cited decisions from the Third, Fourth, and Seventh Circuits apply legal rules that are not meaningfully distinct from the one applied by the court of appeals below. Those decisions involve "a case-by-case determination" that generally considers "the probative value of the prior act to prove present intent" and "weigh[s] that value against the tendency of the evidence to suggest unfairly a propensity to commit similar bad acts." United States v. Miller, 673 F.3d 688, 697, 699 (7th Cir. 2012); see United States v. Foster, 891 F.3d 93, 107 (3d Cir. 2018) (similar); United States v. Sterling, 860 F.3d 233, 246-248 (4th Cir. 2017) (similar). And multiple decisions that petitioner cites upheld the admission of Rule 404(b) evidence, thereby reaching results consistent with the outcome below. Sterling, 860 F.3d at 246-248; United States v. Bailey, 990 F.2d 119, 122-125 (4th Cir. 1993); Foster, 891 F.3d at 107-110.

Here, the court of appeals, adopting a substantially similar approach, considered whether the other-act evidence was "relevant to [petitioner's] intent" and then weighed the "probative value" of that evidence against "the risk of prejudice." Pet. App. 10a. While petitioner observes that the Fourth Circuit sometimes considers the "necessity" of the evidence at issue, Pet. 15

(emphasis omitted), the Fifth Circuit likewise considers "the government's need for the extrinsic evidence" in its second inquiry, Pet. App. 10a (quoting United States v. Kinchen, 729 F.3d 466, 473 (5th Cir. 2013)). And both the Fourth and Seventh Circuits have -- like the court below -- recognized that 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." Sterling, 860 F.3d at 247 (citation omitted); see United States v. Gomez, 763 F.3d 845, 858-859 (7th Cir. 2014) (en banc) (similar).

The cited decisions deeming Rule 404(b) evidence inadmissible rested on case-specific factors that are absent here. See United States v. Caldwell, 760 F.3d 267, 281 (3d Cir. 2014) (in prosecution for knowing possession of firearm by convicted felon, Rule 404(b) evidence did not even "tend[] to show that [the defendant] knowingly possessed the gun"); Miller, 673 F.3d at 695 (Rule 404(b) evidence consisted of an "eight-year-old conviction" that shed scarce light on the defendant's present intent); United States v. Hernandez, 975 F.2d 1035, 1039 (4th Cir. 1992) (Rule 404(b) evidence consisted of testimony about different types of acts in a different city). None of those decisions involved evidence (as here) of the defendant committing the same type of crime in the same city mere months after the charged crimes, where "the Government had no other evidence to show [petitioner's] state of mind." Pet. App. 11a.

As other circuits have noted, "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." Miller, 673 F.3d at 696; see Foster, 891 F.3d at 108; Sterling, 860 F.3d at 247. But that recognition accords with Fifth Circuit precedent -- which likewise contains no rule of automatic admission in such circumstances. See, e.g., Jackson, 339 F.3d at 356. And the Second Circuit's 35-year-old statement in United States v. Ortiz, 857 F.2d 900 (1988), cert. denied, 489 U.S. 1070 (1989), that "a defendant may completely forestall the admission of other act evidence on the issue of intent by express[ing] a decision not to dispute that issue," id. at 903-904 (citation omitted; brackets in original), is inapposite in this case, because petitioner has never offered the "unequivocal[]" "expression of willingness to concede intent that [Ortiz] contemplates," id. at 904. And Ortiz may no longer be good law in light of this Court's subsequent decision in Old Chief, which made clear that "[t]he fact to which the evidence is directed need not be in dispute," and a defendant cannot render "relevant evidence * * * inadmissible" through an admission or stipulation. 519 U.S. at 179 (citation omitted); see United States v. Crowder, 141 F.3d 1202, 1205-1206 & n.1 (D.C. Cir. 1998), cert. denied, 525 U.S. 1149 (1999), and 528 U.S. 1440 (2002) (abrogating prior circuit precedent in light of Old Chief and recognizing similar abrogation of "the Second Circuit's position").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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