No. 22-7204

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Eriston Wilson was charged with conspiring to commit Hobbs Act robbery based on a series of two-person robberies that were captured on surveillance footage. The footage alone made clear that the two masked individuals "worked together," and thus conspired, to commit the robberies—conclusively proving the requisite intent. Indeed, the government argued precisely that point to the jury, stating: "Clearly, [these guys] worked together. You saw it from every video, that they were together." Pet. 6. The only material fact in dispute was the *identity* of the robbers: was Mr. Wilson one of the two men behind the masks? Nevertheless, the Fifth Circuit—relying on longstanding precedent—affirmed the admission of evidence that Mr. Wilson committed an unrelated robbery to prove his "intent" to join a robbery conspiracy, simply because he exercised his constitutional right to a trial. *See, e.g.*, *United States v. Broussard*, 80 F.3d 1025, 1040 (5th Cir. 1996) ("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.").

The Fifth Circuit's *per se* admissibility rule violates this Court's precedent and the plain text of Fed. R. Evid. 404(b), and it also conflicts with precedent of other federal Courts of Appeals. *See* Pet. 9-17. This Court's intervention is desperately needed to correct course and bring uniformity to the federal courts. Mr. Wilson's case presents an excellent vehicle for addressing this issue, and the interests of judicial economy and efficiency support granting his petition at this stage. Accordingly, the Court should grant certiorari on the important question presented in this case.

I. Granting certiorari now would promote judicial efficiency.

The government urges this Court to deny certiorari because the Fifth Circuit remanded Mr. Wilson's case for resentencing, asserting that the case is in an "interlocutory posture." *See* Br. in Opp. 8-9. But the government is wrong that denial of certiorari at this stage would promote judicial efficiency. In fact, the opposite is true. If this Court is inclined to grant certiorari on the question presented, delaying review of the issue will only waste time and judicial resources.

The Fifth Circuit affirmed Mr. Wilson's convictions and remanded his case solely for resentencing, affirming the district court's judgment "in all other respects." Pet. App. 17a. On remand, Mr. Wilson filed a motion for new trial based on newly discovered evidence. *United States v. Weldon*, No. 2:19-cr-034, ECF No. 308 (E.D. La. Mar. 15, 2023). The district court denied that motion, *id.* at ECF No. 319 (E.D. La. May 10, 2023), and resentenced Mr. Wilson to 252 months of imprisonment, *id.* at ECF No. 353 (E.D. La. Aug. 23, 2023). Mr. Wilson appealed his new judgment, but the Fifth Circuit has not yet set a briefing schedule for that appeal. *United States v. Wilson*, No. 23-30596 (docketed Aug. 25, 2023).

The Fifth Circuit's law-of-the-case doctrine bars reexamination of Mr. Wilson's 404(b) challenge on his second appeal, so denying certiorari at this stage would only delay this Court reaching the issue. *See Lindquist v. City of Pasadena, Tex.*, 669 F.3d 225, 238 (5th Cir. 2012); *United States v. Hollis*, 506 F.3d 415, 421 (5th Cir. 2007). No lower court can correct the error at this stage, and there are no factual matters that may be decided below that would affect this Court's analysis of the legal question presented in this petition. Moreover, Mr. Wilson cannot raise any new challenges to

his convictions that would moot the 404(b) issue. *See Lindquist*, 669 F.3d at 239 (explaining that the waiver doctrine prevents the Fifth Circuit from considering an issue "that could have been but was not raised on appeal" during a second appeal following remand).

Importantly, the only new challenge available to Mr. Wilson with respect to his convictions is to appeal the district court's denial of his motion for new trial. If he were to raise and succeed on that claim, his new trial would inevitably include the same, highly prejudicial 404(b) evidence that the Fifth Circuit held to be admissible. In that scenario, delaying consideration of the 404(b) issue on procedural grounds would ultimately result in a second, defective trial and further waste of judicial resources. In contrast, if this Court grants certiorari now to resolve the 404(b) question, it would prevent any need to litigate that issue in the future, and—if this Court finds that Mr. Wilson is entitled to a new trial based on the erroneous admission of extrinsic evidence—it would moot all of the potential claims that Mr. Wilson could have raised in his second appeal. In other words, the issue presented in this petition is "fundamental to the further conduct of the case," and denying certiorari for procedural reasons would only cause unnecessary delay and expense. *See Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947).

The record is fully developed for this Court to reach the question presented, and no further proceedings below will affect the Court's analysis. Reaching the issue now will promote judicial efficiency and avoid unnecessary litigation. If the Court intends to reach this issue, it should grant certiorari now.

II. The government disregards obvious circuit conflict regarding the Fifth Circuit's *per se* rule.

The government confusingly claims that Mr. Wilson "fails to identify a conflict between the decision below and the decision of any other court of appeals" but focuses exclusively on factual distinctions among various cases, ignoring the fundamentally different legal frameworks applied by different courts. *Compare* Br. in Opp. 15-17, *with* Pet. 13-17.

Fifth Circuit precedent holds that similar act evidence is automatically "relevant" to the issue of intent when a defendant "enters a plea of not guilty in a conspiracy case," permitting courts to move directly to Fed. R. Evid. 403's balancing test under the Fifth Circuit's two-prong 404(b) framework. Pet. App. 10a (quoting *United States v. Cockrell*, 587 F.3d 674, 679 (5th Cir. 2009)). In contrast, the Seventh Circuit has held: "[I]f 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." *United States v. Miller*, 673 F.3d 688, 697 (7th Cir. 2012). At least three other circuits agree, imposing additional necessity-related requirements for the admission of extrinsic offense evidence. *See, e.g.*, *United States v. Sterling*, 860 F.3d 233, 247 (4th Cir. 2017); *United States v. Foster*, 891 F.3d 93, 108 (3d Cir. 2018); *United States v. Ortiz*, 857 F.2d 900, 904 (2d Cir. 1988).

The Fifth Circuit's approach is not "substantially similar" to the frameworks applied by the Third, Fourth, and Seventh Circuits, as the government claims. Br. in Opp. 15-16. Unlike the Fifth Circuit, each of those courts has instituted a 404(b) test that includes a requirement intended to ensure that extrinsic evidence is actually

"offered for a proper purpose." *See Huddleston v. United States*, 485 U.S. 681, 691 (1988). And, in each of those jurisdictions, the requirement is independent from the relevance and prejudice inquiries, precluding the admission of 404(b) evidence if it is unnecessary to (or not directed toward) proving the non-propensity issue identified by the prosecution.

Specifically, the Third Circuit applies a four-part test that mirrors the protections articulated in *Huddleston*, beginning with whether the extrinsic evidence is actually "proffered for a non-propensity purpose." *Foster*, 891 F.3d at 107-08. To satisfy that threshold requirement, which precedes any relevance or prejudice inquiry, the court must find that the extrinsic act evidence "*materially advance[s]* the prosecution's case." *Id.* at 108 (cleaned up) (emphasis added). The Fourth Circuit similarly requires that extrinsic evidence be "*necessary* to prove an essential claim or element of the charged offense," in addition to being relevant to a non-propensity issue. *Sterling*, 860 F.3d at 246 (emphasis added). Finally, the Seventh Circuit requires, as part of its own four-prong test, that the extrinsic evidence be "*directed toward* establishing a matter in issue other than the defendant's propensity to commit the crime charged[.]" *United States v. Gomez*, 763 F.3d 845, 859 (7th Cir. 2014) (en banc) (citation omitted) (emphasis added).

In support of its argument that there is no circuit conflict, the government cites the Fourth Circuit's statement 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." Br. in Opp. 16 (quoting *Sterling*, 860 F.3d at 247). That quotation is

taken out of context. The Fourth Circuit made clear that intent being "at issue" does not end the relevance inquiry, explaining:

> 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. *Just because the charged crime includes an intent element, however, does not throw open the door to any sort of other crimes evidence.* We instead conduct a case-by-case analysis to determine whether intent is at issue *in a manner that allows Rule 404(b) evidence.*

Sterling, 860 F.3d at 247 (cleaned up) (emphasis added); *see also Gomez*, 763 F.3d at 859 ("[A]lthough intent can be automatically at issue because it is an element of a specific intent crime, other-act evidence offered to prove intent *can still be completely irrelevant to that issue, or relevant only in an impermissible way*." (cleaned up) (emphasis added)). Additionally, the government ignores that there is a separate step in the Fourth Circuit's 404(b) test, prior to the Rule 403 balancing inquiry, that asks "whether the prior bad acts evidence was necessary." *Sterling*, 860 F.3d at 247. The Fourth Circuit's standard for necessity is whether the evidence "is probative of an essential claim or an element *in a manner not offered by other evidence available to the government*." *Id.* (cleaned up) (emphasis added). Clearly, the extrinsic evidence in Mr. Wilson's case does not satisfy that requirement.

The government also suggests that the Second Circuit's holding in *Ortiz* "may no longer be good law" in light of this Court's decision in *Old Chief v. United States*, 519 U.S. 172 (1997). *Old Chief* is inapposite, as that case did not involve the unique concerns related to the admission of extrinsic offense evidence under Rule 404(b) and the specific safeguards articulated by this Court in *Huddleston*—safeguards that go beyond the relevance and balancing inquiries under Fed. R. Evid. 401 and 403.

Moreover, the Second Circuit later reiterated its holding that "the very nature of a defense put forward by the defendant may itself remove an issue from a case" so as to preclude Rule 404(b) evidence directed to that issue. *See United States v. Scott*, 677 F.3d 72, 82-83 (2d Cir. 2012) (holding that extrinsic evidence related to the issue of identity was inadmissible under Rule 404(b) because "identity was not in dispute," so there was "no proper purpose" for the testimony). In *Scott*, the Second Circuit explained:

> [R]elevance is not the end of the inquiry: evidence admitted under 404(b) must be relevant to an issue *in dispute*. … Identity was not only not in dispute during the trial—it was also clear to the government and to the court that it would not be beforehand. We have held that a formal stipulation removing an issue from a case, while preferable, is not necessary[.]

677 F.3d at 81 (emphasis in original). That precedent directly conflicts with Fifth Circuit precedent holding that extrinsic offense evidence in conspiracy cases is admissible to prove intent "unless [the defendant] affirmatively take(s) the issue of intent out of the case." *United States v. Roberts*, 619 F.2d 379, 383 (5th Cir. 1980) (quotation marks and citations omitted).

III. The government's defense of the Fifth Circuit's ruling lacks merit.

Finally, the government claims that the Fifth Circuit's ruling is consistent with this Court's decision in *Huddleston*, but the government misunderstands both this Court's precedent and the trial record in Mr. Wilson's case. Br. in Opp. 10-15.

First, the government repeatedly (and incorrectly) states that prosecutors "offered" and "used" the 404(b) evidence to prove Mr. Wilson's intent and had "no other evidence" to show his state of mind. *See* Br. in Opp. 8, 11, 12, 14, 16. Those

claims are directly contradicted by the trial record. In the pretrial notice of intent to introduce extrinsic evidence, the prosecution asserted *every* potentially permissible purpose identified in Rule 404(b)(2), never urging a specific reason or need for the evidence. *See* Pet. 5. The district court deferred ruling on the motion until prosecutors called their first 404(b) witness at trial, at which time the court asked the prosecution to identify similarities between the charged and extrinsic robberies to explain how the evidence was relevant to proving Mr. Wilson's *identity* as one of the robbers in this case. *See United States v. Weldon*, No. 2:19-cr-034, ECF No. 274, at 68-71 (E.D. La. Dec. 11, 2019). At no point in that discussion did the prosecutors assert that they intended to offer the evidence as proof of Mr. Wilson's state of mind, much less suggest that they needed it for that purpose. In fact, the trial judge was the only person who raised the issue of intent. The judge explained his determination that the evidence was admissible to prove Mr. Wilson's identity as one of the perpetrators of the charged robberies (which the Fifth Circuit rightly determined was error) and then later noted that the evidence was *also* admissible to prove intent. *Id.* at 72-76.

The government does not identify a single instance in which the prosecution actually offered or used the 404(b) evidence to prove intent at trial, because it never did. As the prosecution itself recognized, intent was easily and irrefutably proven by the surveillance footage itself. Thus, the prosecution used this highly prejudicial extrinsic evidence to convince the jury that Mr. Wilson committed the charged offenses because robberies are "what [Mr. Wilson] does" and "how he supports himself." Pet. 6. The prosecution even told the jury that it was "unbelievable" that

Mr. Wilson "wasn't involved in what was happening in this case" because "he was found hiding in a closet after police asked him to get out for two hours after he fled the scene of [another] robbery in New Orleans East[.]" *Weldon*, No. 2:19-cr-034, ECF No. 274, at 245-46. Clearly, the evidence was not actually "offered for a proper purpose," as *Huddleston* requires. 485 U.S. at 691-92. But the Fifth Circuit's *per se* rule for conspiracy cases disposed of that critical threshold requirement, relegating Rule 404(b) to a general Rule 403 inquiry simply because the government charged Mr. Wilson with conspiracy rather than substantive robbery offenses.

The government also argues that the "limiting instruction" protection of *Huddleston* was applied here. *See* Br. in Opp. 5-6, 13, 14-15. Not so. The district court advised the jury that it could "consider evidence of the similar acts allegedly committed on other occasions *to determine the identity of Wilson as the individual or one of the individuals who committed the crimes alleged in Counts 1 and 3 of the superseding indictment* and/or whether Wilson had the state of mind or intent necessary to commit the crime charged in Count 1 of the superseding indictment." *Weldon*, No. 2:19-cr-034, ECF No. 274, at 87 and 266 (emphasis added). As the Fifth Circuit held, the extrinsic offense evidence was not admissible to prove Mr. Wilson's identity due to the lack of distinct similarities between the charged and extrinsic robberies. Pet. App. 9a-10a. Accordingly, the jury was improperly advised that it could consider that evidence in deciding whether Mr. Wilson was one of the masked individuals who committed the charged robberies, denying him yet another critical protection against unfair prejudice. *See Huddleston*, 485 U.S. at 691-92.

CONCLUSION

The *per se* rule adopted by the Fifth Circuit and other courts is "antithetical to the purposes of Rule 404(b)" and has "turned Rule 404(b) on its head, in so far as conspiracy cases are concerned." *United States v. Matthews*, 431 F.3d 1296, 1318-19 (11th Cir. 2005) (Tjoflat, J., concurring). The Courts of Appeals have all adopted their own, conflicting tests for the admission of extrinsic evidence under Rule 404(b), and this Court's intervention is needed to correct course and secure uniformity among federal courts on this important issue. Mr. Wilson's petition for writ of certiorari should be granted.

Respectfully submitted,

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