

IN THE  
SUPREME COURT OF THE UNITED STATES

No. \_\_\_\_\_

OCTOBER TERM, 2022

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KEVIN MILLER,

Petitioner,

- VS -

UNITED STATES OF AMERICA,

Respondent.

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

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## **QUESTION PRESENTED FOR REVIEW**

Whether, in a drug distribution trial, evidence of a defendant's drug use and simple possession is admissible to prove *mens rea* if the use and possession occurred contemporaneously with the acts connected to the charged distribution offense?

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Petitioner respectfully prays that a *writ of certiorari* issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

## **JURISDICTION AND CITATION OF OPINION BELOW**

On February 17, 2023, the Ninth Circuit affirmed Petitioner's conviction in an unpublished Memorandum opinion, attached as Exhibit "A" to this petition. The Ninth Circuit denied Petitioner's petition for rehearing, and suggestion for rehearing en banc, on March 30, 2023. This Court has jurisdiction to review the Ninth Circuit's decision pursuant to 28 U.S.C. § 1254.

## **FEDERAL STATUTORY PROVISION AT ISSUE**

### **(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.

Fed. R. Evid. 404(b).

## **INTRODUCTION**

Petitioner asks this Court to grant review in the instant case to decide two important issues relating to the government's ability to use a defendant's drug use, or simple possession of drugs for his own use, to prove that the defendant participated in a drug distribution offense. A majority of circuit courts, including the Ninth Circuit, have found that a defendant's drug use or simple drug possession are generally inadmissible to prove *mens rea* in a drug distribution trial. Other circuit courts have come out the other way, however, finding that drug use or simple possession are generally admissible to establish *mens rea* in a distribution case. With this petition, Petitioner asks the Court to grant review of this case for two reasons: (1) to address this inter-circuit tension and provide guidance to lower courts regarding whether drug use and simple possession, generally, are probative as to the elements of a drug trafficking prosecution; and (2) to address whether such evidence increases in probative value, sufficient to warrant its admission at trial, if a defendant used or possessed drugs for personal use at the time of the charged trafficking offense.

## **STATEMENT OF FACTS AND CASE**

In June 2016, the DEA learned that persons in the Midwest were distributing methamphetamine which was being obtained from sources in San Diego, CA. Government agents determined that a particular distributor (Holmes) traveled to San Diego to obtain significant quantities of methamphetamine from a person named Harrison. Holmes began cooperating with the government, and as part of his cooperation, he negotiated a purchase of methamphetamine from Harrison in which Harrison mailed a package of methamphetamine from San Diego to an address provided by the government.

After Holmes introduced an undercover agent (“UC”) to Harrison, the UC and Harrison spoke about arranging a purchase of methamphetamine in San Diego. They ultimately agreed to meet in a parking lot to conduct the transaction. On the day of the buy, Harrison told the UC that his source of supply had not arrived at his home yet, but would be there soon. The government had a surveillance team at Harrison’s house, and they subsequently saw a Pontiac arrive at the house. Soon after, Harrison called the UC and told him that his source had arrived at his home, and he was driving to pick up the UC to bring him to his house for the sale. Harrison was arrested at the parking lot, and agents entered his property and found Petitioner, Garcia, and Batty standing near the Pontiac. Officers found a backpack on the rear

passenger floor which contained five Ziploc bags containing a total of 1.59 kilograms of methamphetamine, and a handgun which Garcia had placed in the hatchback of the car. The government charged Garcia, Batty, and Petitioner with conspiracy to possess with the intent to distribute methamphetamine, and possession of methamphetamine with the intent to distribute. [ER 1-3]. Garcia died while the case was ongoing, while Batty pled guilty and cooperated.

While in custody prior to his release on bond, Petitioner placed two phone calls to his sister where he asked her to remove and discard two small baggies which were locked in a safe inside a trailer where Petitioner resided at the trucking business property owned by his family. A subsequent investigation by the government confirmed that Petitioner's brother-in-law opened the safe, removed the two baggies, and flushed the substances inside the baggies down the toilet.

Batty debriefed with the government as part of her cooperation. She told the government that while she, Garcia, and Petitioner were waiting at Harrison's house on the day of their arrest, they each used methamphetamine inside of a small shed on the property. Batty said she supplied the methamphetamine which each person snorted.

The government moved to introduce evidence of the drug use and possession at trial. The government claimed that the drug use was inextricably

intertwined with the instant offense, and also was admissible under Rule 404(b). [CR 199 at 17-28]. The government asserted that the possession and phone calls tended to prove that Petitioner had knowledge of the methamphetamine in his safe, that he directed his brother-in-law to dispose of the substance, and that he had the opportunity and intent to distribute methamphetamine. [CR 199 at 22-26; ER (19-28)]. Petitioner argued that the drug use evidence was separate from the charged offenses and lacked relevance, and that the baggies should be excluded because, among other reasons, it was a personal use amount. [ER 31].

The district court admitted both the drug use and possession evidence on the basis that each was inextricably interwoven with the charges in the case. [ER 30-32]. At trial, the government's theory of the case was that Petitioner conspired with Harrison, Garcia, and Batty to supply methamphetamine to the UC, and that he actually supplied a portion of the methamphetamine seized by the government. Petitioner's defense theory was mere presence – that while he was present at Harrison's house with Garcia and Batty and used drugs with them that day, he did not supply any of the methamphetamine which was seized from the backpack, and he was not part of any agreement to distribute methamphetamine to the UC.

The jury convicted Petitioner on both counts of the indictment. On appeal, Petitioner challenged the introduction of the drug use and

possession/destruction evidence, asserting that it was not intertwined with the instant offense, it was not admissible under Rule 404(b), and Rule 403 required its exclusion. The Ninth Circuit panel rejected the claims. As to the drug use evidence, the panel determined that the evidence of Petitioner's contemporaneous drug use was properly admitted as substantive evidence of guilt because it allowed the government to present a comprehensive story regarding the commission of the crime.<sup>1</sup> [Ex. "A"]. The panel further found that if the drug use evidence did represent other acts evidence, it was admissible under Rule 404(b) to prove knowledge, opportunity, and lack of mistake. Id. . Id. As to the drug possession/destruction evidence, the panel found that the evidence was admissible both as substantive evidence of guilt and as Rule 404(b) other acts evidence. Id.

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<sup>1</sup> Ninth Circuit Judge Hurwitz concurred as to the drug use evidence, finding that assuming this evidence was improperly admitted, it was harmless. [Ex. "A"].

## **ARGUMENT**

### **THIS COURT SHOULD GRANT THIS PETITION TO RESOLVE A CIRCUIT CONFLICT AS TO WHETHER A DEFENDANT'S DRUG USE, OR SIMPLE POSSESSION OF DRUGS, IS ADMISSIBLE TO ESTABLISH MENS REA IN A DRUG DISTRIBUTION TRIAL, AND TO ADDRESS FURTHER WHETHER DRUG USE OR POSSESSION WHICH OCCURS CONTEMPORANEOUSLY WITH THE DISTRIBUTION ACTS ALTERS ITS ADMISSIBILITY**

The majority of circuits, including the Ninth Circuit, are in agreement that evidence of a defendant's drug use or simple drug possession lacks probative value as to establishing *mens rea* in a drug trafficking offense. See, e.g., United States v. Gordon, 987 F.2d 902, 908-09 (2nd Cir. 1993) (finding that prior drug cocaine possession conviction not probative as to intent or knowledge in cocaine trafficking case); United States v. Davis, 726 F.3d 434, 443-44 (3rd Cir. 2013) (possession of cocaine convictions not admissible to prove intent or knowledge in subsequent trial for distribution of cocaine); United States v. Hall, 858 F.3d 254, 267-68 (4th Cir. 2017) (defendant's prior conviction for possession of a drug is not relevant to establishing the defendant's intent to distribute a drug at a later time, absent some additional connection between the prior offense and the charged offense); United States v. Haywood, 280 F.3d 715, 721-22 (6th Cir. 2002) (finding that prior conviction for possession of crack cocaine conviction was not admissible in subsequent trial for distribution of crack cocaine); United States v. Ramirez,

Robles, 386 F.3d 1234, 1244 (9th Cir. 2004) (prior conviction for possessing methamphetamine not admissible to prove intent or knowledge in trial for distribution of methamphetamine and conspiracy to distribute methamphetamine).

Other circuits, however, have come out differently, finding that evidence of drug use, or possession of drugs for personal use, is sufficiently probative of knowledge or intent so as to warrant admission in a drug trafficking case. See, e.g., United States v. Gadison, 8 F.3d 186, 192 (5th Cir. 1993) (finding that defendant put his intent “at issue when he entered his plea of not guilty to the conspiracy charge in the indictment,” and prior conviction for possession of cocaine “was probative of a defendant’s intent in a prosecution for conspiracy to distribute.”); United States v. Armijo, 834 F.2d 132, 135-36 (8th Cir. 1987) (observing that prior drug use helps establish motive, intent, and lack of accident regarding alleged participation in conspiracy, and “the use of drugs relates to the need to obtain them”); United States v. Smith, 741 F.3d 1211, 1225-26 (11th Cir. 2013) (noting that court’s precedent contradicts argument that evidence of defendant’s earlier six-year old cocaine possession convictions ought not to have been admitted as probative of his later intent to distribute cocaine).

The first reason that the Court should review this case is to resolve this circuit conflict regarding whether evidence of a defendant’s drug use and simple

possession generally is admissible in a prosecution for drug distribution. In 2020, 37.3 million Americans were “current illegal drug users,” meaning they had used an illegal drug in the last 30 days. See Drug Abuse Statistics, National Center for Drug Abuse Statistics<sup>2</sup> (2020) at p.2. Considering use within the prior year, than number grew to 59.2 million Americans. Id. at p.3. Given the prevalence of illicit drug use in our society, the question of whether the government can use a defendant’s drug use, or simple possession of drugs, in a prosecution for a drug trafficking offense is an impactful question for which unity in the circuits is necessary.

The circuits which have precluded drug use or simple possession evidence in trafficking prosecutions have done so because such evidence does not tend to “prove a material element of the charged conduct.” Ramirez-Robles, 386 F.3d at 1244. Circuits generally have analyzed the admissibility of this evidence in the context of instances of drug use or possession which occurred prior to the trafficking prosecution. See Haywood, 280 F.3d at 721-22 (prior conviction for possession of drugs); Gordon, 987 F.2d at 908-09 (same); Davis, 726 F.3d at 443-44 (same); Hall, 858 F.3d at 267-68 (“a defendant's prior conviction for possession of a drug is not relevant to establishing the defendant's intent to distribute a drug at a later time”).

In the instant case, Petitioner’s drug use, and possession of drugs for his

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<sup>2</sup> drugabusestatistics.org

own use, occurred contemporaneously with the events connected to the charged offense. He used methamphetamine with a co-defendant who provided the drug just prior to the drug sale, and he possessed a personal use quantity of methamphetamine in his office at that same time. The Ninth Circuit panel relied on the close-in-time nature of this evidence in affirming its introduction, noting that the drug use and possession “occurred either contemporaneously with or shortly after the drug deal . . . .” [Ex. “A” at 2].

Had Petitioner’s drug use or possession occurred apart from the offense conduct, exclusion of the evidence would have been required. See United States v. Mehrmanesh, 689 F.2d 822, 831-32 (9th Cir. 1982) (circuit precedent “precludes a determination that evidence of Mehrmanesh’s prior drug use can logically relate to an issue in this drug importation case other than his general criminal propensity.”); United States v. Flores, 802 F.3d 1028, 1047-48 (9th Cir. 2015) (“drug use and simple possession cannot be introduced to show that a defendant conspired to smuggle drugs.”). But this distinction should be of no moment given the nature of this evidence. Whether Petitioner had a conviction for methamphetamine use or possession from years earlier, or whether he used and possessed the drug on the day of his arrest, does not change the fact that “[p]ossession and distribution are distinct acts—far more people use drugs than sell them—and these acts have different

purposes and risks.” Davis, 726 F.3d at 444. “Acts related to the personal use of a controlled substance are of a wholly different order than acts involving the distribution of a controlled substance.” United States v. Ono, 918 F.2d 1462, 1465 (9th Cir. 1990). “[I]f the act of possessing or using marijuana is to be admissible to prove intent to transport and sell marijuana, . . . then there is no reason why participation in any drug-related crime could not be used to prove intent to engage in any other drug-related crime, or why any robbery could not be used to prove the requisite intent with respect to any other robbery. A rule allowing such evidence would eviscerate almost entirely the character evidence rule.” David P. Leonard, The New Wigmore, A Treatise on Evidence: Evidence of Other Misconduct & Similar Events § 7.5.2.

The Ninth Circuit’s ruling in this case eviscerated the character evidence rule by admitting Petitioner’s drug use and simple possession which only “involv[ed] the personal abuse of [illegal drugs],” whereas the charge against him “involve[d] the implementation of a commercial activity for profit.” Ono, 918 F.2d at 1465. While the panel attempted to link the use and possession to the instant offense by finding that the evidence corroborated another witness’ testimony, explained his familiarity with the Harrison property, and established a relationship between Petitioner, Miller, and Garcia, none of these bases supports the introduction.

There was no dispute that these people knew each other, the drug use was not necessary to show a familiarity with that location, and a district court cannot allow the government to make an end-run around the rules of evidence under the guise of allowing its witness to corroborate her testimony. This is why, in citing case law to support its finding of a material connection between the drug use/ possession and the instant offense, the Ninth Circuit panel cited two cases, United States v. Beckman, 298 F.3d 788, 793-94 (9th Cir. 2002), and United States v. Williams, 989 F.2d 1061 (9th Cir. 1993), which examined prior instances of drug trafficking, not use or possession. [Ex. “A” at 3]. See Beckman, 298 F.3d at 793-94 (contested evidence was that of a prior marijuana smuggling run when the charge at bar was a marijuana smuggling run); Williams, 989 F.2d at 1070 (prior evidence was drug deals between a cooperator, defendant, and his co-conspirator in case where defendant was on charge for the same conduct, but claimed that he was not part of the charged conspiracy or distributions). In each of those cases, the prior distribution acts were relevant due to their nature and similarity to the charges offenses, and in both cases were necessary for the government to provide to the jury a coherent and comprehensive account of the charged offense. That was not the case here.

In sum, the question of whether the government can introduce evidence of a defendant’s drug use or simple possession in a drug trafficking prosecution is a

conflicted issue which requires attention from the Court. There is disagreement among the circuits as to whether this evidence can be introduced to establish *mens rea* generally, and further guidance from the Court is necessary to instruct how the timing of the use or possession affects the admissibility of this evidence. This case presents an excellent opportunity for the Court to address both of these issues.

### **CONCLUSION**

For the above reasons, Petitioner respectfully requests that the Court grant the instant petition to review the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

Dated: April 26, 2023

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