No. 23-5332

IN THE SUPREME COURT OF THE UNITED STATES

TAMARA JEUNE, AKA TAMARA VOLTAIRE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined that the district court did not abuse its discretion by admitting evidence pursuant to Federal Rule of Evidence 404(b) of petitioner's prior conviction for a tax crime to show motive, opportunity, intent, plan, or state of mind in petitioner's trial for similarly designed tax offenses.

2. Whether the sentencing court, in calculating petitioner's advisory sentencing range under the Sentencing Guidelines, correctly applied enhancements based on the intended loss of petitioner's tax-fraud conspiracy, Sentencing Guidelines § 2B1.1(b)(1) (2018); the number of victims of the offense, id. § 2B1.1(b)(2); and the production of unauthorized access devices, id. § 2B1.1(b)(11).

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. A2, A4) are not published in the Federal Reporter but are available at 2021 WL 3716406 and 2022 WL 4241968.

JURISDICTION

The judgment of the court of appeals was entered on September 15, 2022. A petition for rehearing was denied on May 10, 2023 (Pet. App. A1). The petition for a writ of certiorari was filed on August 8, 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 Southern District of Florida, petitioner was convicted on one count of conspiring to defraud the government, in violation of 18 U.S.C. 286; one count of filing false, fictious, or fraudulent claims, in violation of 18 U.S.C. 287; and three counts of assisting in the preparation of false tax returns, in violation of 26 U.S.C. 7206(2). Am. Judgment 1. She was sentenced to 180 months of imprisonment, to be followed by three years of supervised release. Id. at 3-4. The court of appeals affirmed petitioner's convictions, but remanded for resentencing. Pet. App. A4. Petitioner was resentenced to 132 months of imprisonment, to be followed by three years of supervised release. Second Am. Judgment 3-4. The court of appeals affirmed. Pet. App. A2.

1. In the early 2000s, petitioner operated Accounting Advisors Group, a tax-preparation business in South Florida. Pet. App. A4, at 1. While at Accounting Advisors Group, petitioner and her sister, Dorothy Jeune, prepared false individual income tax returns for clients, fraudulently inflating their clients' claimed tax withholdings and deductible expenses to generate larger tax refunds. Ibid. Petitioner was eventually indicted on 30 counts of willfully assisting in the preparation of false income tax returns, in violation of 26 U.S.C. 7206(2). Pet. App. A4, at 1. In 2009, petitioner pleaded guilty to one of the charged counts, and the district court sentenced her to 18 months of imprisonment,

to be followed by one year of supervised release. Id. at 1-2. Petitioner served a reduced prison sentence of nine months and began her supervised release in February 2010. Id. at 2.

As a special condition of her supervised release, petitioner was prohibited from providing tax-preparation services. Pet. App. A4, at 2. But before her supervised release period had ended, petitioner began preparing tax returns for clients at another of her companies, Investment Equity Development, Inc. Id. at 2-3; Gov't C.A. Br. 5.[1] Because petitioner was a recently convicted felon, she was not able to obtain an Electronic Filing Identification Number (EFIN) from the Internal Revenue Service (IRS) to facilitate these filings. Pet. App. A4, at 2. Petitioner therefore submitted the returns using EFINs obtained in the names of others, including her boyfriend, Seymour Gordon, her ex-husband, Louis Voltaire, and her son. Id. at 2, 4.

In 2011, the IRS began a civil audit of Investment Equity for its delinquent business and corporate tax filings. Pet. App. A4, at 2. Petitioner told the IRS auditor that she was responsible for managing and running Investment Equity's business. Id. at 3. But petitioner and Voltaire gave the IRS inconsistent and contradictory accounts regarding who prepared tax returns at the company. Ibid. Voltaire initially told the auditor that he did

[1] Unless specifically noted, all references to briefs in the court of appeals are to the briefs in petitioner's first appeal, United States v. Jeune, No. 19-13018 (11th Cir. opinion entered Aug. 23, 2021).

not prepare tax returns at all, but in a subsequent interview at which petitioner was also present, he instead -- with prompting from petitioner -- claimed primary responsibility for preparing tax returns at Investment Equity. Ibid. After the auditor asked Voltaire probing questions about tax preparation and reminded both he and petitioner about the consequences of perjury, petitioner finally admitted that she and her sister had prepared tax returns at Investment Equity. Ibid.

The IRS auditor also observed additional conduct that the auditor found suspicious. Pet. App. A4, at 3-4. For example, during a visit to Investment Equity's office, the auditor saw Gordon applying for an EFIN on a computer. Id. at 4. During a follow-up office visit, the auditor saw a 2012 tax-product training certificate listing petitioner's name and Gordon's EFIN. Ibid. The auditor also observed in plain view fraudulent tax forms that were used to claim false tax withholdings on the returns prepared at Investment Equity. Ibid. The auditor referred Investment Equity for criminal investigation. Ibid.

2. A grand jury in the Southern District of Florida charged petitioner with one count of conspiring to defraud the government, 18 U.S.C. 286; four counts of filing false, fictious, or fraudulent claims, 18 U.S.C. 287; and five counts of assisting in the preparation of false tax returns, 26 U.S.C. 7206(2). Pet. App. A4, at 4. Petitioner pleaded not guilty. Ibid. Her defense theory at trial was that the tax fraud at Investment Equity was

perpetrated by others -- including petitioner's sister, ex-husband, and boyfriend -- without petitioner's knowledge. Pet. C.A. Br. 21; Gov't C.A. Br. 13.

Before trial, the government filed a motion in limine to admit evidence establishing petitioner's 2009 tax-fraud conviction, the facts underlying that conviction, and the fact that petitioner continued to operate a tax-preparation business while on supervised release. Pet. App. A4, at 5; see Gov't C.A. Br. 9-10. The district court granted the motion, finding that the evidence was admissible under Federal Rule of Evidence 404(b) (2018) to prove intent or motive. Pet. App. A4, at 5.

During trial, the government introduced redacted transcripts of petitioner's 2009 guilty plea and sentencing hearing to establish the factual similarities between petitioner's 2009 offense and the charged offenses. Pet. App. A4, at 6; Gov't C.A. Br. 12. That evidence demonstrated that, like the fraud underlying the 2009 offense, the charged conduct involved inflated tax returns for medical and business expenses and falsified Forms W-2 listing businesses with unique names like Nickourts International Inc., and Steven and Steven Electric Inc. Pet. App. A4, at 6. One unredacted portion of the 2009 sentencing transcript contained petitioner's statement, made to the 2009 sentencing judge, seeking the sentencing court's "'mercy'" on the ground that she would "'learn'" from her "'mistake,'" which the government argued showed

petitioner's "absence of mistake" in the commission of the charged offenses in this case. Id. at 6-7.

The government also used evidence of petitioner's prior criminal proceedings to establish her intent, motive, and plan to use other persons' names to obtain EFINs and prepare tax returns at Investment Equity. Pet. App. A4, at 6. The government argued that, because petitioner knew that she was prohibited from preparing tax returns during her period of supervised release, she had to use the names of her close associates. Ibid.; Gov't C.A. Br. 12, 32. In addition, the government introduced evidence showing that, just days before petitioner's 2009 sentencing hearing, she had personally reactivated Investment Equity by filing the requisite paperwork with the State of Florida -- a fact that the government used to rebut petitioner's claim that the fraud at Investment Equity was committed by others. Pet. App. A4, at 2, 6. In its opening and closing statements, the government, without objection from petitioner, also made four references to petitioner's having gone "back" to committing tax fraud after her prior conviction. Id. at 8. For example, in the opening statement, the government said that "[w]hen [petitioner] came out of prison, she went back to what she knew best, committing more tax fraud but this time it was different." Ibid. (emphasis omitted).

The district court provided limiting instructions before the testimony of the two witnesses that presented the government's

Rule 404(b) evidence, before the parties' closing statements, and before the jury deliberations, instructing the jurors to consider the evidence related to petitioner's prior conviction only for the "limited purpose" of assessing petitioner's motive, opportunity, plan, or state of mind. Pet. App. A4, at 8.

At the conclusion of the evidence, the district court granted petitioner's motion for a judgment of acquittal with respect to five of the ten charges in the indictment. Pet. App. A4, at 5. The jury found petitioner guilty on the remaining five charges. Ibid. The court sentenced petitioner to 180 months of imprisonment and ordered her to pay $398,021 in restitution to the IRS. Ibid.

3. In an unpublished, per curiam opinion, the court of appeals affirmed petitioner's convictions, but vacated petitioner's sentence and remanded for resentencing. Pet. App. A4. The court of appeals rejected petitioner's assertion that the district court had abused its discretion in admitting the evidence underlying her 2009 conviction under Rule 404(b), id. at 5-8, and found that petitioner had not established plain error with respect to her unpreserved challenge to the government's references to her prior conviction in its opening and closing statements, id. at 8-9.

The court of appeals explained that, for evidence to be admissible under Rule 404(b), it "(1) must be relevant to an issue other than defendant's character, (2) must be sufficiently proven to permit a jury determination that the defendant committed the

act, (3) must have probative value that is not substantially outweighed by undue prejudice, and (4) must otherwise satisfy Federal Rule of Evidence 403." Pet. App. A4, at 5-6 (quoting United States v. Nerey, 877 F.3d 956, 974 (11th Cir. 2017)). Applying that standard, the court found no abuse of discretion in admitting the evidence underlying petitioner's prior conviction because that evidence -- which established "striking similarities" between the 2009 offense and the charged scheme, id. at 6 -- was relevant to show petitioner's intent, identity, knowledge, and absence of mistake, id. at 6-7. The court further determined that, consistent with Federal Rule of Evidence 403, the probative value of the prior-conviction evidence was not substantially outweighed by any undue prejudice. Pet. App. A4, at 6-7.

The court of appeals rejected petitioner's argument that the government "should not have been permitted to get into the details of her prior conviction" and should have instead "simply relied on the 2009 criminal judgment." Pet. App. A4, at 7. The court explained that many of the details were necessary to establish the similarities between the prior offense and the charged conduct to "prove identity, intent, lack of mistake, knowledge, and modus operandi." Ibid. And, while the court stated that the government should not have relied on the facts that petitioner was initially charged with 30 counts and that her initial sentence was 18 months, it found that evidence insufficiently prejudicial to tilt the balance under Rule 403 because the permissible evidence of the

general scope of her prior offense "would have nonetheless covered at least those thirty counts," and because the length of her prior sentence "was not significantly more prejudicial" than the nine months she actually spent in prison -- a fact that she herself had emphasized as a partial alibi. Id. at 7-8. The court also emphasized that "the district court's instructions to the jury appropriately mitigated any possible unfair prejudice." Id. at 8. The court of appeals observed that "before" the relevant testimony, "closing arguments, and jury deliberations, the district court instructed the jury to consider [petitioner's] 2009 conviction for only the 'limited purpose'" of determining "motive, opportunity, or plan or the state of mind necessary to commit the charged offenses." Ibid.

The court of appeals reviewed "for plain error" petitioner's challenge to the government's references to her prior conviction in its opening and closing statements, observing that petitioner "never objected" to those references in the district court. Pet. App. A4, at 8. The court of appeals acknowledged that the government should not have been permitted to refer to petitioner "having gone 'back' to committing tax fraud" after serving her prior prison sentence, because the court viewed that statement as a "clear propensity argument." Ibid. But the court found "no basis to conclude plain error occurred here." Ibid. It explained that opening and closing statements are not evidence; that the district court had repeatedly given limiting instructions about

the proper use of the prior conviction; and that "[t]he brief impermissible statement here was repeated on four occasions over the course of a five-day trial involving hundreds of trial exhibits and the testimony of sixteen witnesses," such that this was not a case in which the statements "provide an appropriate basis for vacating a conviction." Id. at 9.

The court of appeals also considered petitioner's challenges to certain enhancements that she received in the calculation of her advisory Guidelines range under the Sentencing Guidelines. Pet. App. A4, at 13-16. The court rejected petitioner's argument that she improperly received a 14-point enhancement for loss amount under Sentencing Guidelines § 2B1.1(b)(1) (2018), explaining (inter alia) that "[a]ny error here was invited" because, in the district court, the parties agreed to the loss amount range. Pet. App. A4, at 14; ibid. (stating that "we see no error, in any case"). The court also rejected petitioner's challenge to a two-point enhancement for the production of unauthorized-access devices under Sentencing Guidelines § 2B1.1(b)(11)(B)(i) (2018). The court observed that the definition of "'access device'" includes "personal identification numbers," Pet. App. A4, at 14 (quoting 18 U.S.C. 1029(e)(1)), and explained that petitioner's "practice of duplicating taxpayers' Social Security numbers without their knowledge on falsified tax documents to access fraudulent refunds in their names" satisfied the Guidelines' requirements, ibid. The court determined, however, that the two-

level enhancement petitioner received for obstruction of justice, see Sentencing Guidelines § 3C1.1 (2018), was not supported by the evidence, and the court therefore vacated petitioner's sentence and remanded for resentencing. Pet. App. A4, at 15-16.

Judge Martin dissented from the majority's decision to uphold petitioner's convictions over her Rule 404(b) challenge. Pet. App. A4, at 16-20. Judge Martin "ha[d] no quarrel with the idea that some of the uses the government made of [petitioner's] 2009 conviction came within the bounds of the rules," id. at 18, but in her view, the majority erred in finding that the instances in which it found that the government misused the prior conviction constituted "harmless error," id. at 19.

4. In November 2021, petitioner filed a petition for a writ of certiorari. See 21-6396 Pet. The next month, the district court resentenced petitioner to 132 months of imprisonment, to be followed by three years of supervised release. Second Am. Judgment 3-4. Following entry of the court's amended judgment, petitioner filed a second appeal. The parties subsequently filed a stipulation to dismiss the petition for certiorari pursuant to this Court's Rule 46. See 142 S. Ct. 1355.

In her second appeal to the Eleventh Circuit, petitioner did "not raise any issue arising out of her resentencing." Pet. App. A2, at 1. Instead, petitioner "again" sought to "reverse her convictions, reviving her arguments against the admission of the prior-conviction evidence and the government's use of that

evidence in opening and closing statements." Ibid.; see 21-14420 Pet. C.A. Br. 34-35. As part of that claim, petitioner argued, as she had for the first time in her petition for a writ of certiorari, that the court of appeals' standard for the admission of evidence under Rule 404(b) conflicted with the standard employed by the Third Circuit in United States v. Caldwell, 760 F.3d 267 (2014). 21-14420 Pet. C.A. Br. 37, 54-62; see 21-6396 Pet. i-ii. The court of appeals affirmed in an unpublished per curiam decision, finding petitioner's second appeal barred by the law of the case, because the court had already rejected petitioner's Rule 404(b) argument in the first appeal. Pet. App. A2.

Petitioner subsequently filed a petition for rehearing en banc raising only the Rule 404(b) argument. See 21-14420 Pet. C.A. Pet. for Reh'g 1. Several months later, petitioner filed a supplemental petition for rehearing, in which she argued, for the first time, that the Sentencing Guidelines enhancements based on the offenses' intended loss, the number of victims, and the production of unauthorized access devices, see Sentencing Guidelines § 2B1.1(b)(1), (2), and (11), were invalid under Kisor v. Wilkie, 139 S. Ct. 2400 (2019). See United States v. Dupree, 57 F.4th 1269, 1275 (11th Cir. 2023) (en banc) (applying Kisor's standards for agency deference to Sentencing Guidelines commentary); 21-14420 Pet. C.A. Supp. Pet. for Reh'g i, 9-17. The court of appeals denied rehearing. Pet. App. A1.

ARGUMENT

Petitioner contends (Pet. 14-34) that the court of appeals erred in finding that the district court did not abuse its discretion in admitting evidence about her prior conviction under Rule 404(b), and that the district court erred in its application of certain Sentencing Guidelines enhancements. Neither contention warrants this Court's review.

As to the first question presented, the lower courts' application of Rule 404(b) in this case was correct; contrary to petitioner's assertion, no meaningful difference exists between the court of appeals' approach to Rule 404(b) and that of the Third Circuit; and the courts of appeals have uniformly affirmed the admission of similar Rule 404(b) evidence in other tax-fraud cases. This case would be a poor vehicle for considering the first question presented because petitioner did not press her challenge to the court of appeals' approach to Rule 404(b) evidence in her first appeal, and adopting petitioner's favored articulation of the Rule 404(b) inquiry would not affect the outcome of this case.

As to the second question presented, this Court has repeatedly denied petitions for writs of certiorari seeking review of questions concerning the application of Kisor v. Wilkie, 139 S. Ct. 2400 (2019), to the Sentencing Guidelines;[2] petitioner did

[2] See, e.g., Moses v. United States, 143 S. Ct. 640 (2023) (No. 22-163); Carviel v. United States, 142 S. Ct. 2788 (2022) (No. 21-7609); Duke v. United States, 142 S. Ct. 1242 (2022) (No. 21-7070); Guillory v. United States, 142 S. Ct. 1135 (2022) (No. 21-6403); Wynn v. United States, 142 S. Ct. 865 (2022) (No. 21-

not even raise a Kisor-based claim until her supplemental petition for rehearing; and the court below (like the government) already agrees with her that Kisor should apply. In any event, the district court correctly applied the challenged sentencing enhancements petitioner challenges.

1. The court of appeals correctly determined that the district court did not abuse its discretion in admitting evidence about petitioner's prior conviction under Rule 404(b). Further review of that determination is unwarranted.

a. Rule 404(b) provides that although "[e]vidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with [that] character," it is admissible "for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b)(1) and (2); see Huddleston v. United States, 485 U.S. 681, 685 (1988) ("Extrinsic acts evidence may be critical to the establishment of the truth as to

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5714); Lario-Rios v. United States, 142 S. Ct. 798 (2022) (No. 21-6121); Smith v. United States, 142 S. Ct. 488 (2021) (No. 21-496); Melkonyan v. United States, 142 S. Ct. 275 (2021) (No. 21-5186); Wiggins v. United States, 142 S. Ct. 139 (2021) (No. 20-8020); Kendrick v. United States, 141 S. Ct. 2866 (2021) (No. 20-7667); Lewis v. United States, 141 S. Ct. 2826 (2021) (No. 20-7387); O'Neil v. United States, 141 S. Ct. 2825 (2021) (No. 20-7277); Sorenson v. United States, 141 S. Ct. 2822 (2021) (No. 20-7099); Lovato v. United States, 141 S. Ct. 2814 (2021) (No. 20-6436); Tabb v. United States, 141 S. Ct. 2793 (2021) (No. 20-579); Broadway v. United States, 141 S. Ct. 2792 (2021) (No. 20-836).

a disputed issue, especially when that issue involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct."). 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, 485 U.S. at 686. In addition, there must be sufficient evidence for a reasonable jury to conclude that the defendant committed the act in question. Id. at 689. And the trial court should consider whether evidence of the act, though otherwise admissible under Rule 404(b), should nevertheless be excluded under Federal Rule of Evidence 403 because its "probative value is substantially outweighed by," inter alia, "the danger of unfair prejudice," Old Chief v. United States, 519 U.S. 172, 180 (1997) (quoting Fed. R. Evid. 403 (1988)).

The court of appeals correctly incorporated those principles in addressing petitioner's Rule 404(b) claim here, expressly recognizing that prior-acts evidence is admissible under Rule 404(b) only if it is "relevant to an issue other than defendant's character," "sufficiently proven to permit a jury determination that the defendant committed the act," free of substantial "undue prejudice," and otherwise compatible with Rule 403. Pet. App. A4, at 5-6 (quoting United States v. Nerey, 877 F.3d 956, 974 (11th Cir. 2017)). That approach is fully consistent with this Court's precedent. Indeed, the court of appeals' test stems from the Fifth Circuit's en banc decision in United States v. Beechum, 582 F.2d

898 (1978), cert. denied, 440 U.S. 920 (1979), which this Court cited approvingly in Huddleston v. United States. See Huddleston, 485 U.S. at 689 (citing Beechum, 582 F.2d at 912-913); United States v. Miller, 959 F.2d 1535, 1538 (11th Cir. 1992) (en banc) ("The leading case in this circuit on Rule 404(b) evidence is [Beechum]," whose "analysis has now been confirmed by the Supreme Court in Huddleston."), cert. denied, 506 U.S. 942 (1992); see also Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc) (decisions of the Fifth Circuit handed down before 1981 are binding in the Eleventh Circuit).

The court of appeals also correctly applied the Rule 404(b) analysis to the facts of this case. The court carefully reviewed the particular items of evidence related to petitioner's prior conviction that were admitted at trial, including redacted hearing transcripts and witness testimonies. Pet. App. A4, at 6-7. It then found that this evidence was relevant under Rule 404(b) to show intent, identity, knowledge, and absence of mistake, and that its probative value was not substantially outweighed by undue prejudice. Ibid. And, while the court acknowledged that the government had introduced a few details of the prior conviction that should not have been admitted, the court determined that those details were unlikely to have prejudiced petitioner and that "the district court's instructions to the jury appropriately mitigated any possible unfair prejudice." Id. at 8; see id. at 7-8.

Similarly, although the court of appeals found that four of the government's references to petitioner's prior conviction in the opening and closing statements constituted error, it observed that petitioner had not challenged those statements in the district court, Pet. App. A4, at 8, and that the "brief impermissible" references did not rise to the level of "plain error," particularly in the context of a "five-day trial involving hundreds of trial exhibits and the testimony of sixteen witnesses," id. at 9. Petitioner has not offered any meaningful reason for this Court to review these fact-bound determinations. While petitioner suggests in passing (Pet. 26) that "the plain error standard should not have been applied" to review the government's references to the prior conviction during opening and closing statements, petitioner does not seek further review of the court of appeals' application of the plain-error standard. See Pet. i-iii (questions presented). In any event, the decision below is consistent with this Court's requirements for obtaining relief from forfeited errors. E.g., United States v. Olano, 507 U.S. 725, 736-737 (1993).

b. Petitioner contends (Pet. 25) that review is warranted on the theory that the court of appeals' approach to Rule 404(b) is "fundamentally different" from the Third Circuit's approach in United States v. Caldwell, 760 F.3d 267 (2014). That contention lacks merit, and the courts of appeals have uniformly affirmed the admission of similar prior-acts evidence in tax cases.

In Caldwell, the Third Circuit stated that prior-acts evidence is inadmissible unless it is "offered for a proper non-propensity purpose"; "relevant to that identified purpose"; "sufficiently probative under Rule 403"; and "accompanied by a limiting instruction, if requested." 760 F.3d at 277-278. In this case, the court of appeals explained that prior-acts evidence is admissible only if it is "relevant to an issue other than defendant's character," "sufficiently proven to permit a jury determination that the defendant committed the act," free of substantial "undue prejudice," and otherwise compatible with Rule 403. Pet. App. A4, at 5 (citation omitted). The court of appeals also viewed the repeated limiting instructions by the district court as supporting the propriety of the admission of the evidence in this case. Id. at 8. No meaningful distinction can be drawn between the Third Circuit's approach in Caldwell and the approach in the decision below.

Petitioner nevertheless asserts (Pet. 20) that the court of appeals' first decision in her case conflicts with Third Circuit precedent because the court purportedly relied on "theoretical" non-propensity purposes for Rule 404(b) evidence, whereas the Third Circuit requires an analysis of the "real" purpose for which the evidence was used. See Pet. 25. But petitioner cites no language from any Eleventh Circuit decision in support of her characterization of that court's Rule 404(b) standard as a "theoretical" one. And to the extent that she views the

unpublished decision in her case as adopting such a standard, the court of appeals' detailed analysis of the precise facts of this case belies any assertion that the Eleventh Circuit requires only "theoretical" compliance with Rule 404(b). See Pet. App. A4, at 6-8.

The court of appeals did not consider whether the Rule 404(b) evidence in this case could, theoretically, have been admitted for proper purposes. Instead, it analyzed how the government had used the evidence at trial and determined that for the most part the government had used the evidence for non-character purposes such as proving intent, identity, knowledge, and absence of mistake. Pet. App. A4, at 6-8. The court also identified some statements in the government's opening and closing statements that it viewed as improper, and the court made clear that those were instances of error, but found that they did not warrant reversal. Id. at 8-9.

Petitioner further contends (Pet. 18) that the decision in her case conflicts with Caldwell's rejection of the proposition that "merely by denying guilt of an offense with a knowledge-based mens rea, a defendant opens the door to admissibility of prior convictions of the same crime." 760 F.3d at 281; see Pet. 25. But in Caldwell, the defendant's "knowledge" that he possessed a firearm in violation of 18 U.S.C. 922(g)(1) was "not at issue." 760 F.3d at 279. Here, in contrast, petitioner's knowledge and intent were plainly "at issue." Ibid. At trial, petitioner claimed that she was ignorant of the tax fraud that occurred at

her business, and that the fraud was perpetrated by others behind her back. Gov't C.A. Br. 12-13; see Pet. App. A4, at 6. Thus, as the court of appeals correctly recognized, petitioner's intent was a material issue that the government had the "substantial burden" to prove. Pet. App. A4, at 6 (citation omitted). And, as the court further recognized, the evidence of petitioner's prior conviction was particularly probative of her intent, given the "striking similarities" between the prior and the charged offenses, including that in both cases, petitioner operated a tax preparation business that employed her friends and family and prepared false tax returns that incorporated fabricated Form W-2 wage and withholding information in order to generate larger tax refunds. See Gov't C.A. Br. 3-5.

Petitioner similarly errs in contending (Pet. 25) that the Third Circuit views Rule 404(b) as a "general rule of exclusion," while the Eleventh Circuit views it as a "general rule of inclusion." As discussed, the courts apply materially similar substantive standards to test the admissibility of Rule 404(b) evidence. And as the Third Circuit has observed, Rule 404(b) can be described as both "exclusive" and "inclusive." United States v. Repak, 852 F.3d 230, 241 (3d Cir. 2017) ("Rule 404(b) is a rule of exclusion, meaning that it excludes evidence unless the proponent can demonstrate its admissibility, but it is also 'inclusive' in that it does not limit the non-propensity purposes for which evidence can be admitted."); cf. Caldwell, 760 F.3d at

275 (noting that both the "'exclusionary'" and "'inclusionary'" descriptors "can be misleading") (citation omitted).

The courts of appeals have uniformly recognized that evidence of prior tax violations may be admitted under Rule 404(b) in circumstances similar to petitioner's.[3] Indeed, the Third Circuit itself has recognized that, in a criminal tax case, the government may properly introduce Rule 404(b) evidence of a defendant's "prior tax non-compliance" to make its "essential" showing of "intent or willfulness." United States v. Daraio, 445 F.3d 253, 264 (2006), cert. denied, 549 U.S. 1111 (2007).

Petitioner further errs in suggesting (Pet. 23-24) that the dissenting opinion in this case supports her assertion of circuit disagreement as to the proper approach to Rule 404(b) evidence. The majority and the dissent here did not disagree on the legal

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[3] See, e.g., United States v. Johnson, 893 F.2d 451, 453 (1st Cir. 1990) (upholding admission of uncharged acts of tax fraud to show that the defendant willfully violated tax laws); United States v. Bok, 156 F.3d 157, 165-166 (2d Cir. 1998)("a defendant's past taxpaying record is admissible to prove willfulness circumstantially" because such evidence is "indicative of an intent to evade the tax system"); United States v. Zizzo, 120 F.3d 1338, 1355 (7th Cir.) (upholding admission of failure to file tax returns in prior years as "relevant to [the defendant's] specific intent"), cert. denied, 522 U.S. 998 (1997); United States v. Upton, 799 F.2d 432, 433 (8th Cir. 1986) (per curiam) ("Evidence of [defendant's] questionable compliance with tax laws, both in the years prior to and subsequent to [the charged conduct], is probative of willfulness in the present context."); United States v. Marashi, 913 F.2d 724, 735 (9th Cir. 1990) (upholding admission of prior, similar tax violations to show modus operandi and intent); United States v. Horner, 853 F.3d 1201, 1215 (11th Cir. 2017) (upholding admission of prior-year tax returns to show willful intent to falsify charged returns), cert. denied, 583 U.S. 1069 (2018).

standards that govern petitioner's evidentiary challenge; instead, the dissent disagreed with the majority's determination that the errors it had identified were harmless. Pet. App. A4, at 19. That disagreement over the fact-bound application of harmless-error analysis does not warrant further review.

c. In any event, this case would be a poor vehicle to consider the question presented. In petitioner's first appeal from her conviction, petitioner did not contend that the Eleventh Circuit's approach to Rule 404(b) was overly "theoretical" or otherwise flawed, and she did not cite the Third Circuit's decision in Caldwell. See Pet. C.A. Br. 36-42. Petitioner merely argued that, under the precedent of this Court and the Eleventh Circuit, the admission of the prior-conviction evidence was improper. See ibid. And while petitioner eventually cited Caldwell during her second appeal to the Eleventh Circuit, as part of her attempt to relitigate her Rule 404(b) claim, 21-14420 Pet. C.A. Br. 54-62, that citation came too late; as the court of appeals correctly held, petitioner's Rule 404(b) arguments in the second appeal were barred by the law of the case because the court had rejected petitioner's Rule 404(b) claim in the first appeal. Pet. App. A2, at 2. As a result, the court had no occasion to address petitioner's argument based on Caldwell. Because this is "a court of review, not of first view," Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005), this Court should not review that argument, either.

2. Petitioner separately contends (Pet. 27-34) that the district court's application of three sentencing enhancements under Sentencing Guidelines § 2B1.1 (2018) -- relating to the amount of loss, the number of victims, and the production of an unauthorized access device -- is inconsistent with this Court's decision in Kisor v. Wilkie. That argument lacks merit, and no further review is warranted. The district court correctly applied the challenged sentencing enhancements; this Court generally does not grant certiorari to review questions regarding the application of the Sentencing Guidelines; and petitioner forfeited her reliance on Kisor by failing to raise the issue in the lower courts until a supplemental petition for rehearing.

a. In Kisor, this Court considered whether to overrule Auer v. Robbins, 519 U.S. 452 (1997), and Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945), and thus "discard[] the deference" afforded under those decisions to "agencies' reasonable readings of genuinely ambiguous regulations." 139 S. Ct. at 2408; see Auer, 519 U.S. at 461 (stating that an agency's interpretation of its own regulation is "controlling unless 'plainly erroneous or inconsistent with the regulation'") (citation omitted). The Court took Kisor as an opportunity to "restate, and somewhat expand on," the limiting principles for deferring to an agency's interpretation of its own regulations. 139 S. Ct. at 2414. Among other things, the Court emphasized that "a court should not afford Auer deference" to an agency's interpretation of a regulation

"unless the regulation is genuinely ambiguous" after exhausting all "'traditional tools'" of construction. Id. at 2415 (citation omitted).

Notwithstanding those clarifications, the Court declined to overrule Auer or Seminole Rock -- let alone the "legion" of other precedents applying those decisions. Kisor, 139 S. Ct. at 2411 n.3 (opinion of Kagan, J.); see id. at 2422 (majority opinion); cf. id. at 2424-2425 (Roberts, C.J., concurring in part). The Court explained that it had "applied Auer or Seminole Rock in dozens of cases, and lower courts have done so thousands of times," and that "[d]eference to reasonable agency interpretations of ambiguous rules pervades the whole corpus of administrative law." Id. at 2422 (majority opinion). And the Court adhered to Auer on stare decisis grounds in part to avoid "allow[ing] relitigation of any decision based on Auer," with the attendant "instability" that would result from overturning precedent in "so many areas of law, all in one blow." Ibid.

This Court's decision in Kisor now provides the governing standard for determining whether a federal court must defer to an executive agency's interpretation of the agency's own regulation. 139 S. Ct. at 2414-2418. And the Court's earlier decision in Stinson v. United States, 508 U.S. 36, 44 (1993), reasoned that -- by "analogy," albeit "not [a] precise" one -- the Commission's commentary interpreting the Guidelines should be treated the same way as an executive agency's interpretation of its own regulation.

See id. at 44-45. The government has accordingly taken the position that Kisor sets forth the authoritative standards for determining whether particular Guidelines commentary is entitled to deference. E.g., Gov't Br. at 14-15, Moses v. United States, No. 22-163 (Nov. 21, 2022); Gov't Br. at 15, Tabb v. United States, No. 20-579 (Feb. 16, 2021).

b. Petitioner contends (Pet. 27-34) that the district court's imposition of certain sentencing enhancements contravenes Kisor. But petitioner did not raise her Kisor-based claim until her supplemental petition for rehearing. In her first appeal and her resentencing, both of which postdated Kisor, petitioner did not raise any issue relating to Kisor. In her second appeal, petitioner did not "raise any issue arising out of her resentencing" at all. Pet. App. A2, at 1; see 21-14420 Pet. C.A. Br. 38-61. Instead, petitioner "reviv[ed] her arguments against the admission of the prior-conviction evidence." Pet. App. A2, at 1. Likewise, in her petition for rehearing, petitioner raised only the Rule 404 issue. Pet. C.A. Pet. for Reh'g 1.

It was not until several months later that petitioner argued, for the first time, that the Guidelines sentencing enhancements she received were invalid under Kisor. She did so in a supplemental petition for rehearing, in which she relied on the court of appeals' en banc decision in United States v. Dupree, 57 F.4th 1269 (11th Cir. 2023), which agrees with her (and the government's) position that Kisor's standards for agency deference

apply to Sentencing Guidelines commentary. 21-14420 Pet. C.A. Supp. Pet. for Reh'g i, 9-17; see Dupree, 57 F.4th at 1275.

The court of appeals denied rehearing in petitioner's case, without any judge requesting a vote. Pet. App. A1. It most likely found petitioner's belated Kisor claim to be forfeited, but even if some judges considered that claim, they did so by applying Kisor. Either way, this case would thus be an unsuitable vehicle for considering the application of Kisor to the Sentencing Guidelines.

c. In any event, petitioner identifies no reason for further review of any of the Sentencing Guidelines enhancements that the district court applied.

First, petitioner challenges (Pet. 28-29) the imposition of a 14-level enhancement under Sentencing Guidelines § 2B1.1(b)(1)(H) (2018), based on the intended loss of her tax-fraud conspiracy. Section 2B1.1 provides for increasing offense levels depending on the "loss" amount from a defendant's crime, see id. § 2B1.1(b)(1). Without objection from petitioner, see p. 10, supra, the district court adopted the Probation Office's determination that the loss here was between $550,000 and $1.5 million, relying on the "greater of actual loss or intended loss," Sentencing Guidelines § 2B1.1, comment. (n.3(A)) (2018), in applying a 14-level enhancement. See Pet. App. A4, at 14. As the court of appeals recognized, any error on the loss amount was therefore "invited." Ibid.

Petitioner now contends (Pet. 29) that "[t]he text of § 2B1.1(b)(1) * * * unambiguously" refers to "actual," rather than "intended," loss. But the Guidelines' text does not define "loss," much less limit that term to realized, actual loss. And the plain meaning of "loss" can refer (as the Commentary provides) to anticipated, unrealized losses. See, e.g., Black's Law Dictionary 1132-1133 (11th ed. 2019) (defining "loss" to include not only "actual loss," but also concepts such as "expectation loss," "indirect loss," "intangible loss," and "unrealized loss") (emphasis omitted). And interpreting Section 2B1.1(b)'s reference to "loss" to include intended loss is consistent with the Guidelines' more general consideration of "all harm that was the object of" a defendant's "acts and omissions," Sentencing Guidelines § 1B1.3(a)(2) (2018), and goal of minimizing sentencing disparities for similar conduct, see, e.g., id. Ch. 1, Pt. A.1.3. The relative success of petitioner's scheme does not define her culpability under the Guidelines.

Second, petitioner challenges (Pet. 30-32) her two-level enhancement for an offense involving ten or more victims, Sentencing Guidelines § 2B1.1(b)(2)(A) (2018). Section 2B1.1 provides for a two-level enhancement if the offense "involved 10 or more victims," id. § 2B1.1(b)(2)(A)(i), but does not further define or limit the term "victim[]." And contrary to petitioner's assertion (Pet. 30), the ordinary meaning of "victim" is not limited to one who suffers "actual loss for purposes of

restitution." Instead, the term may include anyone "who is tricked, swindled, or taken advantage of," The American Heritage Dictionary of the English Language 1930 (5th ed. 2016) (emphasis omitted), or any "person harmed by a crime, tort, or other wrong," Black's Law Dictionary 1878. In recognizing that definition to apply here, the commentary to Section 2B.1.1, see Sentencing Guidelines § 2B1.1, comment. (n.4(E)) (2018), is consistent with both the Guidelines' text and structure.

Third, petitioner challenges (Pet. 32-34) her two-level enhancement under Sentencing Guidelines § 2B1.1(b)(11). That enhancement applies if the offense involved the "production or trafficking" of any "unauthorized access device." Id. § 2B1.1(b)(11)(B)(i). Here, the enhancement was based on petitioner's duplication of taxpayer Social Security numbers to create falsified tax documents. See Pet. App. A4, at 14. Petitioner does not dispute that the Social Security numbers she unlawfully used qualified as "unauthorized access devices" for purposes of Section 2B1.1(b)(11). Instead, petitioner contends (Pet. 33) that reading Section 2B1.1(b)(11)'s reference to "production" to include the "'duplication'" of unauthorized access devices is inconsistent with the Guidelines' text. But the ordinary meaning of "production" includes "[t]he act or process of producing," "[t]he total output, as of a commodity," or "[s]omething produced; a product." The American Heritage Dictionary 1406 (emphasis omitted). Indeed, the federal statutory

prohibition on fraudulent production of counterfeit access devices, 18 U.S.C. 1029 -- one of the offenses that can trigger Sentencing Guideline § 2B1.1 (2018) -- accordingly defines the term "'produce'" to include "design, alter, authenticate, duplicate, or assemble." 18 U.S.C. 1029(e)(4) (emphasis added).

Even if the text, context, structure, and purpose of the Guidelines provisions that petitioner cites did not unambiguously support the district court's interpretation, there would at most remain a "genuine ambiguity" in the Guidelines' meaning, as to which the commentary would be entitled to deference under Kisor. See 139 S. Ct. at 2415. The Guidelines commentary represents the "authoritative" and "official position" of the Sentencing Commission on the application of the Guidelines. Id. at 2416 (citation omitted). The Guidelines commentary also implicates the Commission's "substantive expertise." Id. at 2417. As this Court has recognized, the Commission's commentary "assist[s] in the interpretation and application of [the Guidelines], which are within the Commission's particular area of concern and expertise and which the Commission itself has the first responsibility to formulate and announce." Stinson, 508 U.S. at 45.

d. Petitioner does not seek this Court's review of any disagreement among the courts of appeals with respect to Kisor's general applicability to the Sentencing Guidelines. Instead, petitioner cites (Pet. 29) a Third Circuit decision that reached a different result with respect to the loss Guideline. United

States v. Banks, 55 F.4th 246, 257-258 (2022). As the Sixth Circuit has explained, however, that Third Circuit decision is "not persuasive." United States v. You, 74 F.4th 378, 397 (2023) (citing Kisor, 139 S. Ct. at 2415). And any circuit disagreement on that issue, even if implicated by petitioner's forfeited claim, does not warrant further review.

This Court typically leaves the resolution of Guidelines issues to the Sentencing Commission. The Commission has a "statutory duty 'periodically to review and revise' the Guidelines." Braxton v. United States, 500 U.S. 344, 348 (1991) (quoting 28 U.S.C. 994(o)) (brackets omitted). Congress thus "necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." Ibid. Given the Commission's ongoing duty to amend the Guidelines to eliminate conflicts or correct errors, this Court ordinarily does not review decisions interpreting the Guidelines. See United States v. Booker, 543 U.S. 220, 263 (2005). There is no reason to depart from that practice here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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