No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA - RESPONDENT

VS

MARIO REYNOSO, *et al.* - PETITIONER

ON PETITION FOR WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

/s/ Kari S. Schmidt
Kari S. Schmidt, #11524
Counsel of Record for Petitioner
Conlee Schmidt & Emerson LLP
200 W. Douglas, Suite 300
Wichita, Kansas 67202
Phone: (316) 264-3300
Fax: (316) 264-3423
Email: karis@fcse.net

QUESTIONS PRESENTED

Whether Rule 404(b)(2) of the Federal Rules of Evidence permits district courts the use of propensity/character-conforming reasoning to reach an ultimate decision whether to admit the same evidence for a non-propensity/non-character purpose?

PARTIES TO THE PROCEEDINGS

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED PROCEEDINGS

United States District Court for the District of Kansas:

United States v. Mario Reynoso,
No. 2:19-CR-00137-RB-1 (September 1, 2020)

Tenth Circuit Court of Appeals:

United States v. Mario Reynoso,
No. 20-2130 (June 29, 2021)

United States v. Mario Reynoso,
No. 20-2130 (May 16, 2023)

United States v. Mario Reynoso,
No. 20-2130 (July 18, 2023)

United States Supreme Court:

Mario Reynoso v. United States,
No. 21-7644 (June 6, 2022)

Mario Reynoso v. United States,
No. 21-7644 (August 22, 2022)

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

United States Supreme Court Cases

United States Courts of Appeal Cases

Other Courts

Constitutional Provisions

State Statutes

Federal Rules

Treatises and Other Authorities

IN THE

SUPREME COURT FOR THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The re-issued opinion of the United States Court of Appeals for the Tenth Circuit appears at Appendix A to the petition and is reported at 2023 U.S. App. LEXIS 18261, 2023 WL 4586142. The original opinion of the United States Court of Appeals for the Tenth Circuit appears at Appendix B to the petition and is reported at 861 Fed. Appx. 204. The memorandum and order of the United States District Court for the District of New Mexico appears at Appendix C to the petition and is reported at 398 F. Supp. 3d 1115.

JURISDICTION[1]

On June 29, 2021, the United States Court of Appeals for the Tenth Circuit decided the case below.

On July 21, 2021, the United States Court of Appeals for the Tenth Circuit issued its mandate in the case below.

On June 6, 2022, the Supreme Court of the United States denied Petitioner's first petition for a writ of certiorari.

On August 22, 2022, the Supreme Court of the United States denied Petitioner's petition for reconsideration.

On July 17, 2023, the United States Court of Appeals for the Tenth Circuit recalled its mandate of July 21, 2021 and vacated its order and judgment of June 29, 2021.

On July 18, 2023, the United States Court of Appeals for the Tenth Circuit re-issued its order and judgment in the case below.

Petitioner did not file a petition for rehearing with the United States Court of Appeals for the Tenth Circuit.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The Solicitor General of the United States has been served with notice of this petition in accordance with Supreme Court Rule 29.4(a).

---

[1] This petition for a writ of certiorari arises out of a unique procedural posture due to the Tenth Circuit Court of Appeals' grant of Petitioner's *pro se* motion to that court to vacate and re-issue its decision below. As such, all orders of the United States Court of Appeals for the Tenth Circuit articulating the relief ordered are attached for this Court's reference at Attachment E herein.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

Fifth Amendment, U.S. Constitution

(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.

STATEMENT OF THE CASE[2]

A. Underlying Substantive Facts.

1. Note on Geography.

The following events took place in Sunland Park, New Mexico and El Paso, Texas. This Court may take judicial notice of the fact that Sunland Park, New Mexico is reasonably described as a cross-border suburb of El Paso, and is part of the El Paso metropolitan area which includes El Paso, Sunland Park, and Ciudad Juarez, Chihuahua, Mexico (which shares an international border with both Sunland Park and El Paso).[3] Furthermore, this small area along the Texas/New Mexico/international border is one of the most heavily-trafficked areas in the entire country, and especially in connection with trafficking and distribution of methamphetamine.[4]

---

[2] Petitioner cites to the Tenth Circuit Record on Appeal using the following citation format: "R1.230." The "R1" heading refers to the record volume, such that R1 refers to volume 1, and R6 refers to volume 6. Numbers following the period, such as ".230," refer to the record page number, such that R1.230 refers to page 230 of volume 1 of the Tenth Circuit's consolidated record.

[3] Google Maps search, "Sunland Park, New Mexico." Available at: < https://www.google.com/maps/place/Sunland+Park,+NM/@31.8719851,-106.4712825,11.62z/data=!4m6!3m5!1s0x86ddf780a72e7be9:0x446d5d651cc1b69b!8m2!3d31.796496!4d-106.5799891!16s%2Fm%2F02095qj?entry=ttu>.

[4] *See* Daniel Borunda, *Juarez police find huge drug load worth $63 million in abandoned trailer*. El Paso Times Online, Dec. 7, 2020, available at: < https://www.elpasotimes.com/story/news/local/juarez/2020/12/06/juarez-drug-bust-nets-over-60-million-fentanyl-meth-heroin-marijuana/3851077001/> (last accessed: Oct. 13, 2023); Julian Resendiz, *Crystal meth 'epidemic' fueling murders in Juarez*. KTSM Online, May 20, 2023, available at: < https://www.ktsm.com/news/crystal-meth-epidemic-fueling-murders-in-juarez/> (last accessed: Oct. 13, 2023); Elena Reina, *Drug traffickers terrorize Mexico's Ciudad Juarez: Shootings, Molotov cocktails and murder*. El Pais Online, Aug. 12, 2022, available at: <

2. The Offense Charged.

In April 2018, a confidential informant (CI) informed Homeland Security Investigations (HSI) that an individual named "Mario" (last name unknown) was involved in drug trafficking in and around El Paso, Texas and southern New Mexico. [R1.16; R3.115-116]. HSI agent Joey Rodriguez was the case agent assigned to the matter. The CI provided a phone number for "Mario" to Agent Rodriguez. [R3.116] (915-549-2841). This number was determined to be registered to Petitioner between March 1, 2018 and June 30, 2018). [R3.124, 139, 265]. The CI provided a photograph of the license plate on a gray 2011 Ford Fusion known to her to the CI to be "Mario's" car. [R3.116, 117-118]. HSI checked the license plate number against motor vehicle registration records. This, in turn, led HSI to cross-reference vehicle registration records with state licensing records. This ultimately led HSI to determine that the vehicle was registered to Petitioner at all times relevant herein. [R3.116, 118-124]. It also led HSI to obtain a copy of Petitioner's drivers license, including a photograph. [R3.124]. HSI then included the license photograph in a six-photo array (a "six-pack") featuring the license photograph and five other photographs of persons with "similar . . . weight, height, ethnicity, and . . . background." [R3.124-125]. HSI then presented the six-photo array to the CI, and she identified the license photo as depicting "Mario." [R3.124-125]. The CI also identified a Facebook profile known to her to be "Mario's" Facebook profile page.

---

https://english.elpais.com/international/2022-08-12/drug-traffickers-terrorize-mexicos-ciudad-juarez-shootings-molotov-cocktails-and-murder.html> (last accessed: Oct. 13, 2023).

[R3.117]. However, the Facebook profile page was linked to a person named "Mario Hernandez," not Petitioner. [R3.117, 180-181].

In May 2018, based on the foregoing investigation, HSI conducted a buy/walk operation. HSI agent Omar Lujan acted undercover as a buyer of narcotics. On May 1, 2018, Agent Rodriguez provided to Agent Lujan the phone number for "Mario" obtained from the CI: 915-549-2841. [R3.49, 139]. Using his undercover phone number, Agent Lujan communicated with "Mario" at this number, both via text messages and through phone calls, multiple times between May 3 and June 6. [R3.50-51]. On May 3, 2018, Agent Lujan received a text message from "Mario's" phone number. [R3.50]. This led to a variety of exchanges in which Agent Lujan and "Mario" negotiated Agent Lujan's purchase of methamphetamine using his undercover identity. [R3.60]. Ultimately, Agent Lujan and "Mario" agreed to meet to purchase the narcotics on May 8, 2018. [R3.63]. On May 7, 2018, Agent Lujan and "Mario" engaged in another telephonic exchange in which they agreed to meet at the Sunland Park casino the next day, on May 8. [R3.63-64].

On May 8, 2018, prior to the meet, HSI provided to Agent Lujan a picture of "Mario." [R3.67, 83-84]. It is unclear whether this photograph was Petitioner's drivers' license photograph, *supra*. Later that day, HSI agents went to the casino parking lot. Agent Rodriguez and Agent Ortiz positioned themselves in the parking lot in support of Agent Lujan. [R3.102, 125]. Once in the Sunland Park casino parking lot, Agent Lujan engaged in another series of telephonic communications with "Mario." [R3.65-67].

Soon thereafter, a gray four-door Ford Fusion matching the description of "Mario's" vehicle parked 15 feet in front of Agent Lujan's undercover vehicle. [R3.67-68, 104]. Neither Agent Rodriguez nor Agent Ortiz were able to identify the driver of the vehicle from their positions. [R3.126, 191].

Agent Lujan exited his vehicle and made contact with the driver of the Ford Fusion through a rolled-down window. [R3.68, 88]. At time of the contact, Agent Lujan was wearing sunglasses. [R3.88]. Through his sunglasses and rolled-down, tinted car windows, Agent Lujan briefly engaged with the driver for no more than 15 seconds. [R3.88, 90, 110, 112]. During this time, Agent Lujan allegedly identified the driver as the person in the photo of "Mario" provided to him by HSI earlier that day. [R3.68]. He later identified at trial Petitioner as the driver of the car on May 8. [R3.68, 72-73, 98].

The driver instructed Agent Lujan to enter the Ford Fusion. [R3.68]. Agent Lujan entered the backseat directly behind the driver. [R3.68]. The driver then looked several places: "turning around, he's looking at [Agent Lujan], he's looking all around. He's looking to the front, looking to the sides." [R3.68]. Agent Lujan observed tattoos on the driver which he was unable to observe in detail, despite later testifying they were "consistent" with Petitioner's tattoos. [R3.70-71, 90, 97]. The driver pointed to a box in the center console of the Ford Fusion indicating the narcotics were inside. [R3.68]. Agent Lujan opened the box and pulled from it a plastic bag containing what was later determined to be two ounces of methamphetamine. [R3.68]. Agent Lujan then gave the driver $800. [R3.68]. Agent

Lujan then exited the vehicle and left the scene. Agent Lujan faced the driver no more than 30 seconds – off and on – throughout the entire encounter. [R3.90].

Later that evening, Agent Lujan texted with "Mario" again. [R3.74]. Agent Lujan texted to "Mario" that he had provided less than the agreed-upon amount of narcotics. [R3.75]. On May 25, 2018, Agent Lujan texted to "Mario's" number again. [R3.78]. On June 6, 2018, Agent Lujan and "Mario" communicated through text and calls to organize another transaction. [R3.78-79]. However, a subsequent transaction between "Mario" and Agent Lujan never occurred. [R3.80].

The CI never identified the driver of the vehicle on May 8 as Petitioner. [R3.185]. Despite having seized a box in which the narcotics were present, HSI did not conduct fingerprint analysis to compare to Petitioner's prints. [R3.92, 111, 176]. Despite having seized a box and the bag in which narcotics were present, HSI did not conduct DNA collection and analysis to compare to Petitioner's DNA profile. [R3.93, 111, 176]. Despite having control and access to the cash used to pay the driver, HSI did not mark or note the bills used for the transaction to compare to cash seized from Petitioner. [R3.95-96]. And HSI failed to obtain guest information records from the motel to which the driver went after the May 8 transaction. [R3.127-128]. The only evidence tying Petitioner, as opposed to the vehicle, to the May 8 transaction was Agent Lujan's testimony that he identified the driver as the "Mario" on the photo provided to him, and Agent Lujan's in-court identification of Petitioner as the driver of the vehicle.

3. Other "Bad Acts."

a. August 22, 2018 Incident.

On August 22, 2018, Petitioner arrived at a hotel that was a target in an unrelated narcotics investigation. [R3.211-212]. El Paso County Deputy Sheriff Samuel Magallanes was conducting surveillance when he observed Petitioner arrive at the hotel in a 2011 Ford Fusion. [R3.212]. He and other law enforcement officers approached the Petitioner and he consented a search of his vehicle. [R3.212]. Law enforcement also search Petitioner's person. [R3.212-213]. During these searches, law enforcement found almost $5,000 in cash, 2.5 ounces of methamphetamine divided into 19 1-gram "bindles." [R3.213]. Agent Rodriguez testified that none of Petitioner's conduct related to the August 22 incident "prove [Petitioner] was in the car May 8th." [R3.190].

b. January 30, 2019 Incident.

On January 30, 2019, HSI, U.S. Marshals and the El Paso County Sheriff's Office, pursuant to a felony warrant, arrested Petitioner. [R3.128, 217]. Law enforcement located him arriving at a restaurant in El Paso driving the same vehicle he drove during the August 22 incident. [R3.218]. Law enforcement recovered a little over $4,500 in cash. [R3.219]. From his vehicle law enforcement recovered a scale, 176 grams (seven ounces) of methamphetamine, and a cellular phone. [R3.130, 149, 222]. However, the cellular phone seized from Petitioner had a different number than the phone used by "Mario" to organize the May 8 transaction. [R3.116, 130] (915-549-2841 vs. 915-412-1734). Additionally, the phone seized from

Petitioner on January 30 was registered to a person named Eric Delgado – not Petitioner. [R3.139, 266]. However, DEA intelligence analyst William Hague testified that after an analysis of the phone records for both the 2841 number registered to Petitioner and the 1734 number registered to Delgado, the same person was the primary user of both phones. [R3.269].

The Government introduced at trial text messages exchanged between the 1734 number and unknown callers occurring between January 22, 2019 and January 30, 2019. [R3.132-133, 134, 135, 136]. None of these numbers were the phone number Agent Lujan used in May 2018 to communicate with "Mario." Agent Rodriguez testified to his opinion that the language Petitioner was using in text messages was code used by people engaged in narcotics distribution. [R3.132-137]. Agent Rodriguez did not testify that the person using the 1973 number was delivering drugs, but merely that "people that are in sales of narcotics will say they're out making drops or sales." [R3.134].

c. Jail Calls Regarding Events Outside Scope of May 8 Incident.

After his January 30 arrest, Petitioner made several hundred phone calls from the jail during his pre-trial detention. [R3.143]. During his detention, he made calls to four people relevant to this case: Nancy (his wife)(last name unknown), Priscilla (last name unknown), Angie (last name unknown), and "Big Smokes" (real name unknown). [R3.143-152, 164-175].

In connection with a phone call between Petitioner and Nancy, Agent Rodriguez testified that Petitioner made statements such as "Wonders owes me,

like, 900; Susanna owes me 200; Yvette owes me 600." [R3.150]. Agent Rodriguez speculates that "[Petitioner]'s telling Nancy that there's money that's owed out there to him by individuals that he provided narcotics for." [R3.151]. Agent Rodriguez does not testify to declarations on the phone call giving rise to an inference that Petitioner believes these people owed him money from the sales of narcotics, as opposed to any other reason people might owe other people money. Agent Rodriguez then testifies generally that it is "typical in narcotics transactions or with narcotics traffickers that they want the money to go to a trusted person," but does not testify that to any specifics in Petitioner's case. [R3.151]. Similarly, Agent Rodriguez testifies to his belief that when Petitioner refers to an "uncle" that it must be code because "[i]n the narcotics world, it's somebody who is supplying him." [R3.151-152, 166]. He testified to his belief that the phrases "stack" and "one" both refer to $1,000. [R3.169]. He testified to his belief that the phrase "stores" refers to street-level narcotics traffickers. [R3.170]. He testified to his belief that the phrase "check in" refers to reporting earnings from drug sales to superiors in an organizational trafficking hierarchy. [R3.172]. In other words, he testifies to Petitioner's use of words and phrases with common, ordinary meanings that are *also* used by drug traffickers, referring to *different* meanings; in other words, code. However, Agent Rodriguez does not identify alleged code words or phrases used *both* by Petitioner over his jailhouse calls *and* by "Mario" in May-June 2018, or testify that any such words had the same coded meaning. In fact, Agent Rodriguez

agreed that the jailhouse calls about collecting money "doesn't prove [Petitioner] was in the car" on May 8. [R3.189].

B. Procedural Facts.

A grand jury indicted Petitioner on May 7, 2019 on one count of distributing 5 grams or more of methamphetamine on May 8, 2018, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B). [R1.14]. On June 28, 2019, he submitted a motion *in limine* to exclude evidence and testimony from the events of May 22, 2018 and January 30, 2019 from trial pursuant to Rule 404(b) of the Federal Rules of Evidence. [R1.15-25]. On July 3, 2019, the District Court denied Petitioner's motion. [R1.26-43]. On July 7, 2019, Petitioner renewed his objection to admission of such evidence or testimony. [R3.13, 32]. The District Court denied Petitioner's oral motion for reconsideration. [R3.36].

At trial, the Government admitted testimonial evidence from law enforcement witnesses, photographic evidence and other items of evidence recovered from the August 22 and January 31 incidents. Agent Maganalles agreed that none of his testimony nor evidence admitted during his testimony "show[ed] who was driving the car on May 8th." [R3.225]. The Government called Erin Elizabeth Littman, an evidence clerk, to testify only to evidence collected during the August 22, 2018 incident and the January 30, 2019 incident. [R3.227-231].

Ultimately, Petitioner never challenged or disputed whether *somebody* engaged in a violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B) by selling narcotics to an undercover HSI agent on May 8, 2018. [R3.271]. Petitioner never disputed that the

narcotics trafficker at issue used Petitioner's phone as an instrument of the May 8 offense. [R3.271]. And Petitioner never disputed that the narcotics trafficker at issue used Petitioner's gray 2011 Ford Fusion as an instrument of the May 8 offense. [R3.271]. The *only* issue Petitioner challenged was the identity of the narcotics trafficker, *i.e.* the driver of Petitioner's vehicle, in connection with the May 8 offense. [R3.271-272]. Petitioner averred that Agent Lujan merely identified on May 8 the driver of the vehicle as the person depicted in the photograph shown to him earlier that day. [R3.273]. But it was not until trial that Agent Lujan actually identified Petitioner as the driver of the vehicle on May 8. [R3.68].

The jury ultimately convicted Petitioner. [R1.44]. The District Court sentenced him to 280 months imprisonment. [R1.45]. On September 1, 2020, Petitioner timely filed his Notice of Appeal to the Tenth Circuit. [R1.51]. On January 14, 2021, Petitioner filed his opening brief in Tenth Circuit Case No. 20-2130. On June 29, 2021, the Tenth Circuit issued its decision, denying Petitioner's prayer for relief.

On April 13, 2022, Petitioner filed out-of-time a petition for a writ of certiorari with this Court. On June 6, 2022, this Court denied his petition. On August 22, 2022, this Court denied Petitioner's petition for rehearing. On August 25, 2022, Petitioner filed *pro se* with the Tenth Circuit a motion to compel. Petitioner alleged his appellate counsel misrepresented to Petitioner that his representation terminated upon the Tenth Circuit's affirmation of the conviction and sentence, and that appellate counsel erroneously failed to submit a petition for

writ of certiorari to this Court. This caused Petitioner to fail to timely file a petition for writ of certiorari.

On May 16, 2023, Petitioner filed with the Tenth Circuit a *pro se* motion for appointment of counsel pursuant to 28 U.S.C. § 3006A(c) (the Criminal Justice Act) asking the Tenth Circuit to recall the mandate, vacate and reissue its judgment in the appellate case affirming Petitioner's conviction and sentence to allow him reasonable opportunity to timely file a petition for a writ of certiorari in this Court. That same day, the Tenth Circuit issued an order granting such relief.

On July 11, 2023, Petitioner filed a *pro se* motion with the Tenth Circuit for appointment of counsel. On July 17, 2023, the Tenth Circuit granted Petitioner relief and appointed counsel in this case "to represent [Petitioner] in connection with a petition for writ of certiorari in accordance with Section VII of [the Tenth Circuit]'s Criminal Justice Act Plan." In conformance with the Tenth Circuit's July 17 mandate specifically appointing Counsel to prepare a petition for writ of certiorari to this Court, Petitioner's counsel has conducted extensive review of the record on below, independent investigation into the facts of the case, and other due diligence in determining the extent to which there exist any matters within the rubric of reviewable questions this Court will consider for certiorari review. This petition follows and, in Counsel's opinion, constitutes all good faith, non-frivolous matters for review before this Court.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

THIS CASE PRESENTS AN OPPORTUNITY TO ADDRESS THE SCOPE OF RULE 404(b) OF THE FEDERAL RULES OF EVIDENCE WHEN "BAD ACTS" EVIDENCE IS ADMITTED FOR A PROPER PURPOSE BUT REQUIRES PROPENSITY/CHARACTER REASONING TO ADMIT.

A. The use of Rule 404(b) evidence has come under scrutiny and deserves consideration in light of courts' expansive scope in application in recent years.

The Fifth Amendment asserts that "[n]o person shall . . . be deprived of life, liberty, or property without due process of law." U.S. Const., amt. v. This guarantee is asserted as a right to "fundamental fairness;" to be free of judicial or Governmental conduct in the prosecution of criminal matters which is "shocking to the universal sense of justice." *See Gideon v. Wainwright*, 372 U.S. 335, 339 (1963). Coextensively, Rule 404(b) of the Federal Rules of Evidence prohibits the Government from admitting "[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;" a so-called "propensity purpose." Thus, as a general proposition, Rule 404(b) extends from the Constitution's guarantee of due process and fundamental fairness in judicial proceedings: people are to be convicted for their actions – not their character. *See United States v. Gomez*, 763 F.3d 845, 861 (7th Cir. 2014); *United States v. Brown*, 597 F.3d 399, 404 (D.C. Cir. 2010); *People v. Zackowitz*, 254 N.Y. 192, 198 (1930)("The law . . . is not blind to the peril to the innocent if character is accepted as probative of crime"). Evidence of "other bad acts" is generally treated under the rule as irrelevant under Rule 403, and thus inadmissible, to avoid conviction on Offense A merely by demonstrating that a

person was guilty or likely guilty of Offense B. However, evidence of uncharged crimes, wrongs or other acts "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).

Due to the Fifth Amendment concerns implicit in the admission of such evidence, the exceptions under sub-section (b)(2) are supposed to be subject to a heightened Rule 403 relevance analysis. For instance, historically, when the non-propensity purpose alleged by the Government is identity, admission of Rule 404(b) evidence pursuant to sub-section (2) has been strictly limited to instances in which the evidence and testimony to be admitted demonstrates a "pattern and characteristics . . . so unusual and distinctive as to be like a signature." *United States v. Carroll*, 207 F.3d 465, 468 (8th Cir. 2000); *See United States v. Appolon*, 715 F.3d 362, 373 (1st Cir. 2013)("we determine whether the proffered evidence truly possess 'special relevance'"); *United States v. Benedetto*, 571 F.2d 1246, 1249 (2d Cir. 1978)("so nearly identical in method as to earmark them as the handiwork of the accused"). Similarly, when the non-propensity purpose alleged by the Government is knowledge, the knowledge at issue must be a *specialized* knowledge that the average person would not have or would not have easy access to. *See United States v. Garcia*, 880 F.2d 1277, 1278-1279 (11th Cir. 1989)(in prosecution for falsifying statements on loan application, admitted to prove knowledge about how to effectively forge documents); *United States v. Walters*, 351 F.3d 159, 161,

164-167 (5th Cir. 2003)(in prosecution for making a bomb, admitted to prove access to information about how to construct destructive devices).

The earmark for all Rule 404(b)(2) evidence historically has been that the evidence must concern *only* the accused to be admissible in the first place. However, as recent scholars and other courts have noted, the policy behind this rule has been ignored. Instead, courts have expanded their implicit definition of what makes a defendant's other bad acts "unusual and distinctive" as to him, and toward an ever-growing definition of non-propensity purposes that requires only *some* common characteristics between the instant offense conduct and the "other bad acts" conduct, even if those similar characteristics are *also* similar or common in the way that *other people* may commit the same offense.

For instance, under the traditional formulation, a person's use of an unusual caliber gun used to create wounds in the same limb or body part on multiple victims who share similar backgrounds or characteristics beyond time and place would survive Rule 404(b) scrutiny. But more and more, federal courts would say that a person's use of a 9mm caliber round (a common round), a common make (such as Wincester), and in which the victims are shot generally in the back, would be sufficient to create this signature. In the more pedestrian crime of drug trafficking, courts are more and more defining characteristics that would be reasonably expected or common in *most* drug transactions as "signature characteristics" and admitting "other bad acts" evidence that fits under the ever-growing umbrella.

The admissibility of evidence regarding "other bad acts" has been described by some scholars as "the single most important issue in contemporary criminal evidence law." Edward J. Imwinkelried, *The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition*, 51 Ohio St. L.J. 575, 576 (1990). Recently, however, scholars have brought into question courts' misapplication of Rule 404(b) and its state corollaries. Some courts have held that the non-propensity purpose must be reached absent a phantom or implied propensity link in the chain. For instance, the Seventh Circuit recently noted that it is not enough that the non-propensity conclusion is reached. Instead, the non-propensity purpose must be "established by 'some propensity-free chain of reasoning," meaning "'[t]he other-act evidence's relevance to 'another purpose' must be established through a chain of reasoning that does not rely on the forbidden inference that a person has a certain character and acted in accordance with that character.'" *United States v. Ferrell*, 816 F.3d 433, 444 (7th Cir. 2015)(quoting *Gomez*, 763 F.3d at 856, 860).

It is in this "propensity-free chain of reasoning" where scholars have noted the erosion of Rule 404(b)(1) through an expansion of what constitutes admissible "other bad acts" evidence under Rule 404(b). For instance, as recently as February 2023, at least one scholar noted:

> Rule 404(b)(2) clarifies that other-acts evidence (as distinct from other-acts character evidence) may be admissible if it is offered for a non-character purpose that is, for a purpose that does not require propensity reasoning, or inferences based on an individual's character or propensity such as to prove motive, intent, or knowledge. This is important because other-acts evidence may be highly probative for non-character purposes

> without giving rise to the concerns associated with other-acts evidence. However, courts also regularly misapply Rule 404(b)(2) by permitting other-acts evidence that, although relevant to a Rule 404(b)(2) purpose such as intent or motive, indeed requires propensity reasoning. For example, courts regularly admit evidence that a defendant previously engaged in drug trafficking to prove that the defendant has a propensity to commit such acts and is therefore likely to have had the requisite knowledge and intent to distribute drugs in the incident in question. Indeed, some of these misapplications are so deeply ingrained in the common law that courts do not even acknowledge the rule when departing from it.

Hillel J. Bavli, *Character Evidence as a Conduit for Implicit Bias*, 56 U.C. Davis L. Rev. 1019, 1023-1024 (2023).

Legal scholars are not the only ones taking note of this erosion and expansion. Recently, the State of Georgia reconsidered its Rule 404(b) corollary in light of the ever-expanding definition of "signature characteristics": Official Code of Georgia Annotated § 24-4-404(b). Mirroring the federal rule, Georgia's statute prohibits admission of "[e]vidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, including but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Ga. Code Ann. § 24-4-404(b) (2011).

In *Wright v. State*, the Georgia Court of Appeals considered a case in which the defendant was found guilty at trial of two controlled substance offenses and two firearm offenses. 362 Ga. App. 867, 867 (2022). The trial court permitted the prosecution to admit evidence of the facts underlying the defendant's 2011 conviction for possession with intent to distribute marijuana and possession of a

firearm "for the purposes of establishing [defendant]'s knowledge, intent and lack of mistake." *Id.* at 876. The *Wright* Court considered the limits of its Rule 404(b) corollary. As to knowledge, the *Wright* Court held that "'knowledge' refers either to a special skill, such as safe-cracking, bomb-making, or document forgery, or to specific knowledge based on past experience," and not to a generalized knowledge or common sense common to other criminals engaged in the same offense. *Id.* at 879. The core of the question is whether the specialized knowledge or skill "was *required* for any of the offenses" at issue in the case. *Id.* at 880 (emphasis added). Just because a means of committing an offense may be considered prudent (given the criminal objective) does not mean it is either specialized or required. This constitutes a roll-back from the expanding of Rule 404(b)(2) admissions under the guise of expanding the definition of "non-propensity purpose" by ignoring the Seventh Circuit's propensity-free chain of reasoning. This Court should take review of the matter in light of the *Wright* Court's recent rollback and continued critique of lower courts' application of the rule.

B. This case presents ideal facts under which to consider the scope of "specialness" or "uniqueness" of signature in manner, knowledge, or other non-propensity purpose required to consider "other bad acts" probative of an instant offense.

Scholars critiquing the erosion of Rule 404(b)(1) tend to use the drug trafficker as a common example of a crime which may be committed in many ways, all of which will inherently have similarities. For instance, it would be expected that *every* methamphetamine dealer would possess methamphetamine. It would be

expected that *every* methamphetamine dealer would possess methamphetamine in amounts associated with distribution. It would be expected that *every* methamphetamine dealer would possess methamphetamine in amounts associated with distribution, sub-divided into personal use amounts (so as to sell to individual drug users). Similarly, it would be expected that *every* methamphetamine dealer would use a phone to conduct drug transactions. The use of phones and codes is so ubiquitous in the drug trade that they have been the subjects of popular television programs[5] and musical artists going back to the 1960's.[6] Thus, so as to distinguish Trafficker A from Trafficker B, the historical formulation of Rule 404(b) would require the proffered evidence to prove specificity beyond that which would be expected to avoid Government expansions of non-propensity uses to the point where they become proxies for *all* drug dealing instead of *this defendant*'s conduct.

In this case, only one fact question was in issue: who sat in the driver's seat of Petitioner's gray 2011 Ford Fusion at the Sunland Park casino parking lot on May 8, 2018 when Agent Lujan sat in the backseat and purchased less than two ounces of methamphetamine? Obviously, the Government bore the burden of proving Petitioner was the driver. But the District Court permitted the Government to admit evidence from Petitioner's unrelated "bad acts," *i.e.* drug transactions

[5] *See The Wire* [Television Series] (Home Box Office 2002-2008).

[6] *See* The Jimi Hendrix Experience, *Purple Haze* (Reprise Records 1967), Jefferson Airplane, *White Rabbit* (RCA Victor 1967), Sublime, *Burritos* (MCA Records 1996), D'Angelo, *Brown Sugar* (EMI Records 1995), Janis Joplin, *Mary Jane* (Columbia Records 1975), Gucci Mane, *Bricks* (Warner Bros. Records 2009).

entirely divorced from the May 8 incident, under the guise of proving the identity of the driver. However, the evidence from the August 22 incident and the January 30 incident were pretextually admitted solely to paint Petitioner as a drug trafficker, but having no bearing on whether Petitioner was *the* drug trafficker at the Sunland Park casino on May 8.

Of the Government's nine witnesses, only three were actually involved with or present for the May 8 transaction. And only one of them ever testified to being able to see the driver's face that day. The CI was never called by the Government to establish that the person alleged by the Government as the person she knew as "Mario" was even in the six-photo array. And the one witness who was even close enough to reasonably perceive the driver on May 8 – Agent Lujan – testified that he was wearing sunglasses, viewing the driver from the side through a rolled-down, tinted window for only a few seconds before getting into the backseat of the vehicle, behind the driver's head. Agent Lujan did not testify that he identified Petitioner as the driver that day. He merely testified that the driver was the person he saw in a photo provided to him earlier in the day. It was not until trial – more than a year later – that Agent Lujan actually identified Petitioner as the driver that day.

The bulk of the Government's evidence had little to nothing to do with the events of May 8, 2018. The Government called Samuel Magallanes to testify *only* to the events of August 22, 2018 and January 30, 2019. Ironically, the Government objected to the relevance of its own witness' testimony when Petitioner cross-examined Magallanes *because* "[h]e didn't testify about May 8th!" [R3.224]. If ever

there was good evidence of the Government's pretextual use of "other bad acts" evidence, it is the calling of a witness when that evidence is good for the Government's case but then objecting to its own witness when that evidence is bad for the Government's case. But ultimately, the Government's theory – and that accepted by the District Court as the basis for admission of the 404(b) evidence – came down to testimony from witnesses whose apparent favorite testimony was akin to "in my long experience as a narcotics investigator…" and "narcotics traffickers generally…" In other words, the District Court admitted 404(b) evidence under the theory that because the May 8 offense conduct shared characteristics with *all* methamphetamine transactions in a heavily-trafficked area of the country, and the August 22 conduct and January 30 conduct fell under the umbrella of "methamphetamine transactions in a heavily-trafficked area of the country," that evidence pertaining to the August 22 conduct and the January 30 conduct was necessarily relevant to the May 8 conduct.

A brief breakdown of these generalizations shows the unreasonableness of this assumption:

> • Sunland Park, New Mexico is in the El Paso and Ciudad Juarez metropolitan area, both of which are major population centers.
>
> • The El Paso metro area is at the heart of meth trafficking in the United States.

Thus, it is not surprising or shocking (i) that Petitioner knew or reasonably would have known meth traffickers, (ii) that Petitioner would allow other people to borrow his vehicle if they were driving in the same area, and (iii) that some of those people

he might allow to borrow his car also were meth traffickers. Similarly, it is not surprising or shocking that (i) Petitioner had a phone with an El Paso area cell phone as Sunland Park, New Mexico is merely a suburb of El Paso, Texas, (ii) Petitioner borrowed a phone of another person with an El Paso, Texas cell phone, or (iii) that to the extent drug traffickers put phones in other people's names (as Agent Rodrigues testified), that another trafficker put a phone in Petitioner's name and used it in connection with May 8. The record merely shows that on May 8, Petitioner was the registered user of the cell phone number and the registered owner of the vehicle that was used. But neither of those – alone – proves that he was the caller or the driver on May 8. It is only in consideration of the August 22 and January 30 evidence and testimony that a picture appears in which Petitioner *actually* uses the car (though never actually using the same phone).

Otherwise, the Government relies on mere generalizations of conduct reasonably expected in *all* meth transactions in heavily-trafficked areas:

> • Agent Lujan was sold meth on May 8 by a person in possession, Petitioner was arrested on August 22 and January 30 in possession, therefore Petitioner was the person who sold Agent Lujan meth on May 8 as opposed to any other meth dealer in the El Paso area?
>
> • Agent Lujan was sold meth in divided, pre-packaged personal use amounts on May 8, Petitioner was in possession of meth divided into pre-packaged personal use amounts on August 22 and January 30 (though in significantly different amounts than on May 8), therefore Petitioner was the dealer who sold Agent Lujan meth on May 8 as opposed to any other meth dealer in the El Paso area?
>
> • Agent Lujan purchased meth with $800 in cash, and Petitioner was arrested in possession of cash in amounts between $4,500 and $5,000 on August 22 and January 30, therefore Petitioner was the dealer who sold

> Agent Lujan meth on May 8 as opposed to any other meth dealer in the El Paso area?
>
> • Agent Lujan used "drug code" to communicate with "Mario" in connection with the May 8 transaction, and Petitioner's phone and jailhouse calls used "drug code" (though never the *same* code as on May 8), therefore Petitioner was the dealer who sold Agent Lujan meth on May 8 as opposed to any other meth dealer in the El Paso area?

And this is not to forget that Petitioner had already provided notice of an alibi defense and had subpoenaed the appearance of his alibi witness. [R3.257-258]. At the last minute, after the conclusion of the Government's case-in-chief, Petitioner elected not call this witness *due to* the District Court's admission of the 404(b) evidence. [R3.258]. In other words, the admission of this evidence had a direct bearing on Petitioner's presentation of the affirmative alibi defense. This outcome cannot be divorced from what preceded it, and it is a natural outcome of the District Court's admission of this evidence. In this case, the admission of this evidence was integral to the outcome.

The District Court's admission of the August 22 and January 30 evidence was based on the fact that Petitioner's conduct on *those* dates *also* involved (i) transactions in which phones generally were used, (ii) transactions in which codes generally were used, (iii) methamphetamine was a drug found (though not the only drug), (iv) the methamphetamine was found in each instance to total distribution amounts (though the actual amount significantly differed from 2 ounces to 7 ounces), (v) the methamphetamine was found divided and pre-packaged into personal use amounts, (vi) cash (in differing amounts), and (vii) the highly-trafficked El Paso/Juarez area. Frankly, those characteristics are reasonably

expected in likely *every* methamphetamine transaction in the El Paso area. The one distinguishing feature is the use of the same car. However, absent more, one characteristic does not create a probative pattern; nor does the use of a vehicle to deliver narcotics constitute special knowledge about drug dealing the general public could not learn by watching a single episode of *The Wire*.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

/s/ Kari S. Schmidt
Kari S. Schmidt, Kan. Sup. Ct. No. 11524
Counsel of Record for Petitioner
Conlee Schmidt & Emerson LLP
200 W. Douglas, Suite 300
Wichita, Kansas 67202
Phone: (316) 264-3300
Fax: (316) 264-3423
Email: karis@fcse.net

CERTIFICATE OF COMPLIANCE

As required by Rule 33 of the Rules of the Supreme Court of the United States, I certify that this petition is proportionally spaced and contains 7,130 words, which includes footnotes. I relied on my word processor to obtain the count, and it is Microsoft Word 10. My petition was prepared in Century, a proportional typeface, and contains 26 pages of text.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

/s/ Kari S. Schmidt
Kari S. Schmidt
Counsel of Record for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that this document, with any attachments, was electronically filed on the 16th day of October, 2023, with the Clerk of the Court using the Supreme Court of the United States Electronic Filing System in accordance with Rule 29 of the Rules of the Supreme Court of the United States. I additionally certify that paper copies of this original Petition for Writ of Certiorari were forwarded by third-party commercial carrier this 16th day of October, 2023, in accordance with Rule 29 of the Rules of the Supreme Court of the United States. I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope with the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days:

Original with 10 copies to:

Clerk of the Court
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

And 3 copies to:

Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

And 1 copy to:

Mario Reynoso
Reg. No. 33835-180
FCI Forrest City Medium
Federal Correctional Institution
P.O. Box 3000
Forrest City, Arkansas 72336

/s/ Kari S. Schmidt
Kari S. Schmidt
Counsel of Record for Petitioner

United States v. Mario Reynoso

ATTACHMENT A

Re-Issued Decision
of U.S. Court of Appeals for the Tenth Circuit

FILED
United States Court of Appeals
Tenth Circuit

July 18, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MARIO REYNOSO,
a/k/a Mario Hernandez,

Defendant - Appellant.

No. 20-2130
(D.C. No. 2:19-CR-00137-RB-1)
(D. N.M.)

ORDER AND JUDGMENT*

Before **MATHESON**, **BRISCOE**, and **CARSON**, Circuit Judges.

Mario Reynoso appeals his conviction and sentence for distributing five grams or more of methamphetamine in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B). He argues (1) the district court abused its discretion in admitting evidence of other acts under Federal Rule of Evidence 404(b) to prove his identity, knowledge, and intent; (2) the trial evidence was insufficient to support his conviction; and (3) his sentence

* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

is substantively unreasonable. Exercising jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, we affirm.

I. BACKGROUND

A. *Facts Underlying the Charged Offense*

A confidential source informed federal agents that someone named "Mario" was selling methamphetamine in the area around Las Cruces, New Mexico, and El Paso, Texas. The source did not know Mario's last name but provided the agents with Mario's phone number and a photograph of the license plate from Mario's gray 2011 Ford Fusion. Agents determined that the vehicle and the phone number were both registered to defendant, Mario Reynoso, at the same address. From a photo line-up including Mr. Reynoso's driver's license photograph, the confidential source identified Mr. Reynoso as the person he knew as "Mario."

Working undercover, Agent Omar Lujan began calling and texting the phone number registered to Mr. Reynoso, communicating with a person identifying himself as "Mario." Mario agreed to sell Agent Lujan two ounces of methamphetamine for $800, and they arranged to meet at a casino named Sunland Park on May 8, 2018. On that day, Agent Lujan was provided with a picture of Mr. Reynoso. He exchanged additional text messages and phone calls with Mario to coordinate the meeting.

At the agreed location, Agent Lujan saw a gray Ford Fusion with the same license plate registered to Mr. Reynoso. He approached the driver's door and spoke to the driver through the rolled-down window. At that point, Agent Lujan identified

the driver as Mr. Reynoso based on the photograph he had been provided. At the driver's direction, Agent Lujan got into the Ford Fusion and sat in the middle of the back seat. The driver turned to face Agent Lujan, who asked about the meth. The driver pointed to a Band-Aid box on the center console. Agent Lujan pulled from that box a plastic bag containing what appeared to be two ounces of methamphetamine. Agent Lujan gave the driver $800. The driver said he needed to leave and told Agent Lujan to call him later.

That same day, Agent Lujan called the phone number registered to Mr. Reynoso and spoke to Mario. Agent Lujan indicated the bag of methamphetamine was less than two ounces, and Mario agreed he owed Agent Lujan another gram. Agent Lujan contacted Mario again in June 2018 to set up a second drug buy, but no further transaction occurred. Mr. Reynoso was later charged in a superseding indictment with distributing five grams or more of methamphetamine on May 8, 2018.[1]

B. *Rule 404(b) Evidence*

The government notified the district court of its intent to introduce Rule 404(b) evidence relevant to Mr. Reynoso's identity as the person who sold the methamphetamine to Agent Lujan on May 8, as well as to Mr. Reynoso's knowledge and intent. It sought to introduce evidence related to Mr. Reynoso's arrest on August 22, 2018, by sheriff's deputies conducting a narcotics investigation in a hotel parking

[1] Mr. Reynoso does not dispute that the methamphetamine sold to Agent Lujan on May 8 amounted to five grams or more.

lot in El Paso. At that time, Mr. Reynoso was driving his 2011 gray Ford Fusion that had been used in the May 8 drug sale. In the car, the deputies found what appeared to be 2.5 ounces of methamphetamine, as well as other types of illegal drugs, drug paraphernalia, and a digital scale. They also seized over $4,000 from Mr. Reynoso's person.

The government also sought to introduce evidence related to Mr. Reynoso's arrest in El Paso on January 30, 2019, on a warrant following his indictment in this case. At that time, he was driving the same gray Ford Fusion, but with a different license plate. Agents found over $4,000 in cash on his person and seven one-ounce bags of methamphetamine in the vehicle. Agents also seized from Mr. Reynoso a cell phone containing text messages that discussed various drug transactions. The seized cellphone used a different phone number than the number registered to Mr. Reynoso that Agent Lujan had used to communicate with "Mario" regarding the May 8 drug sale. But both phone numbers had been used to contact the same 33 individuals, including Mr. Reynoso's wife.

Finally, the government sought to introduce evidence of jail phone calls recorded while Mr. Reynoso was awaiting trial, in which he discussed various ongoing drug trafficking activities.

Mr. Reynoso moved to exclude the proffered evidence. He first argued it was not relevant to prove his knowledge and intent because the identity of the person who sold methamphetamine to Agent Lujan on May 8 would be the main issue in the case. The district court disagreed, holding that the government could introduce evidence of

his knowledge and intent in the absence of a stipulation that these elements of the charged offense were uncontested. The court further held that evidence of Mr. Reynoso's arrests, his cell phone texts, and his jail phone calls was admissible under Rule 404(b) to prove knowledge and intent because Mr. Reynoso's "subsequent possession of large quantities of methamphetamine in his vehicle" was "quite similar" to the charged offense, "and his alleged use of a cell phone and jail phone calls to coordinate narcotics trafficking are likewise quite similar to his alleged use of the first phone to coordinate the drug buy with [Agent Lujan]." R., Vol. I at 38.

Mr. Reynoso also contended that the evidence was not admissible to prove his identity because his arrests shared no signature quality elements with the May 8 drug sale to Agent Lujan. The district court again disagreed, holding that the 2011 gray Ford Fusion registered to Mr. Reynoso at his address constituted a sufficiently specific and distinctive device to render the evidence of his later drug-related acts involving that same vehicle relevant to prove his identity in the charged offense.

Finally, the district court held under Federal Rule of Evidence 403 that the probative value of the Rule 404(b) evidence was not substantially outweighed by its potential for unfair prejudice, and the court said it would give the jury a limiting instruction on its use of that evidence.

C. *Conviction and Sentence*

The jury convicted Mr. Reynoso on the charged offense. At sentencing, the district court calculated his applicable guidelines range as 360 months to life in

prison. The court then sentenced Mr. Reynoso below the guidelines range to 280 months.

II. DISCUSSION

On appeal, Mr. Reynoso contends that (A) the district court erred in admitting the Rule 404(b) evidence, (B) the trial evidence was insufficient to support his conviction, and (C) his sentence is substantively unreasonable.

A. *Rule 404(b) Evidence*

We review the district court's evidentiary ruling for an abuse of discretion. *See United States v. Merritt*, 961 F.3d 1105, 1111 (10th Cir. 2020). "Under this standard, we will not disturb a trial court's decision unless we have a definite and firm conviction that the trial court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Id.* (brackets and internal quotation marks omitted).

Under Rule 404(b), "[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 the character." Fed. R. Evid. 404(b)(1). But such "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). In determining admissibility under Rule 404(b), courts consider four factors:

> (1) the evidence must be offered for a proper purpose; (2) the evidence must be relevant; (3) the trial court must make a Rule 403 determination of whether the probative value of the similar acts is substantially

> outweighed by its potential for unfair prejudice; and (4) pursuant to [Federal Rule of Evidence] 105, the trial court shall, upon request, instruct the jury that evidence of similar acts is to be considered only for the proper purpose for which it was admitted.

United States v. Smalls, 752 F.3d 1227, 1237 (10th Cir. 2014) (internal quotation marks omitted). Rule 404(b) "is one of inclusion, rather than exclusion, unless the evidence is introduced for the impermissible purpose or is unduly prejudicial." *Id*. (internal quotation marks omitted).

1. Knowledge and Intent

The district court held that all of the proffered Rule 404(b) evidence was admissible to prove Mr. Reynoso's knowledge and intent. He contends his knowledge and intent were irrelevant because the sole issue in the case was whether he was the person who sold methamphetamine to Agent Lujan on May 8. But under our reasoning in *United States v. Shumway*, 112 F.3d 1413, 1421-22 (10th Cir. 1997), the district court did not err in holding that the evidence was admissible because, absent a stipulation by Mr. Reynoso that knowledge and intent were uncontested, the government bore the burden of proving these elements of the charged offense.

Mr. Reynoso nonetheless asserts the evidence was not relevant to his knowledge and intent under the reasoning in *United States v. Commanche*, 577 F.3d 1261 (10th Cir. 2009). The defendant in *Commanche* was charged with assault with a dangerous weapon with intent to do bodily harm. *Id.* at 1264. The government sought to introduce evidence of the facts underlying his two prior aggravated battery convictions—specifically that he had brandished sharp cutting instruments—to prove

his intent regarding the charged offense. *Id.* We held that the district court erred in admitting such evidence, concluding it was immaterial to the defendant's claim of self-defense, which was "the sole disputed issue in the case." *Id.* at 1268. We reasoned that "the details of [the defendant's] prior aggravated battery convictions demonstrate nothing about his intent; they simply show that he is violent." *Id.* at 1269. And we noted that "the present case is not one in which intent is proven circumstantially based on repeated substantially similar acts" because there was "no indication in the record that [the defendant] claimed self defense on the two other occasions." *Id.*

Commanche is readily distinguishable. First, we did not address the precise issue presented here: whether evidence relevant to an element of the charged offense is admissible absent the defendant's stipulation that the element is uncontested. On that issue, Mr. Reynoso neither acknowledges our holding in *Shumway* nor attempts to distinguish it. Second, unlike *Commanche*, this case does involve evidence of repeated substantially similar acts relevant to intent. *See United States v. Conway*, 73 F.3d 975, 981 (10th Cir. 1995) (affirming admission of evidence of prior drug-related arrests as relevant to proving intent). Yet Mr. Reynoso does not argue that the district court erred in holding that the other acts evidence was sufficiently similar to the charged offense to be relevant to prove his knowledge and intent. He therefore fails to show that the district court abused its discretion in admitting the other acts evidence for these proper purposes.

2. Identity

Mr. Reynoso next argues the district court abused its discretion in admitting evidence of his two arrests to prove his identity as the driver of the gray Ford Fusion who sold methamphetamine to Agent Lujan on May 8. According to Mr. Reynoso, the court erred because his later arrests shared no signature quality elements with the charged offense.

"We have held that to prove identity, evidence of prior illegal acts need not be identical to the crime charged, so long as, based on a totality of the comparison, the acts share enough elements to constitute a signature quality. *Shumway*, 112 F.3d at 1420 (internal quotation marks omitted). "Elements relevant to a signature quality determination include . . . geographic location, the skill necessary to commit the acts, or use of a distinctive device." *Id.* (citations and internal quotation marks omitted). "[T]he weight to be given to any one element and the number of elements necessary to constitute a 'signature' are highly dependent on the elements' uniqueness in the context of a particular case." *Id.* Here, the district court concluded that the gray Ford Fusion registered to Mr. Reynoso at his address was a sufficiently distinctive device to render evidence of his later drug-related bad acts involving that same vehicle relevant to proving his identity for the charged offense.

Mr. Reynoso asserts that "[a]nyone could have driven [his] car on May 18, 2018 to deliver the drugs." Aplt. Br. at 14. But he acknowledges that the use of his car was a "common unique fact[]" between the May 8 drug sale and his later arrests. *Id.* And he does not challenge the district court's conclusion regarding the

distinctiveness of the 2011 gray Ford Fusion as the basis for admitting the evidence to prove his identity. He therefore fails to show that the district court abused its discretion.

3. **No Undue Prejudice**

Mr. Reynoso argues the district court should have excluded the other acts evidence under Rule 403 because it served primarily to inflame the jury's passion. "Evidence is unfairly prejudicial if it makes a conviction more likely because it provokes an emotional response in the jury or otherwise tends to affect adversely the jury's attitude toward the defendant *wholly apart* from its judgment as to his guilt or [innocence] of the crime charged." *United States v. Tan*, 254 F.3d 1204, 1211-12 (10th Cir. 2001) (alteration and internal quotation marks omitted). The district court concluded the evidence of Mr. Reynoso's later drug-related acts was highly probative of identity, knowledge, and intent, and was not outweighed by any potential prejudice from its admission. In particular, the court concluded that the Rule 404(b) evidence "may indeed elicit a reaction from the jury, but likely no more so than other allegations of involvement in drug trafficking that will already be presented at trial." R., Vol. I at 39. The court also indicated it would give a limiting instruction. Mr. Reynoso fails to show an abuse of discretion.

B. *Sufficiency of the Evidence*

Mr. Reynoso argues the evidence was insufficient to support his conviction. We review this issue do novo. *See United States v. Walker*, 137 F.3d 1217, 1220 (10th Cir. 1998). "Evidence is sufficient to support a conviction if the evidence and

the reasonable inferences drawn therefrom, viewed in the light most favorable to the government, would allow a reasonable jury to find defendant guilty beyond a reasonable doubt." *Id.* "[W]e will not overturn a jury's finding unless no reasonable juror could have reached the disputed verdict." *Id.*

Focusing, as Mr. Reynoso does, on the issue of his identity as the driver of the gray Ford Fusion involved in the May 8 drug sale, we hold that the evidence was sufficient to support the jury's verdict. Agent Lujan testified that he positively identified Mr. Reynoso as the person who sold him drugs on that date. Although Mr. Reynoso argues Agent Lujan may have been mistaken or the jury might not have credited his testimony, we do not weigh conflicting evidence or evaluate witness credibility, *see United States v. Khan*, 989 F.3d 806, 827 (10th Cir. 2021) ("We accept at face value the jury's credibility determinations and its balancing of conflicting evidence." (internal quotation marks omitted)).

C. *Substantively Reasonable Sentence*

Mr. Reynoso contends his below-guidelines sentence is substantively unreasonable given his mental health conditions, substance abuse, and difficult childhood. He also maintains that his 280-month sentence (less than 24 years), which was imposed when he was 41 years old, "is essentially a life sentence." Aplt. Br. at 20. "We review the substantive reasonableness of a sentence for abuse of discretion." *United States v. Chavez*, 723 F.3d 1226, 1233 (10th Cir. 2013). A sentence is substantively reasonable unless "it exceeds the bounds of permissible choice, given the facts and the applicable law." *Id.* (brackets and internal quotation

marks omitted). Moreover, a below-guidelines sentence is presumptively reasonable. *See United States v. Balbin-Mesa*, 643 F.3d 783, 788 (10th Cir. 2011).

Mr. Reynoso's contentions do not demonstrate that the district court exceeded the bounds of permissible choice in imposing a sentence that is 80 months below the bottom of the applicable guidelines range.

III. CONCLUSION

We affirm the district court's judgment.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge

United States v. Mario Reynoso

ATTACHMENT B

Decision
of U.S. Court of Appeals for the Tenth Circuit

FILED
United States Court of Appeals
Tenth Circuit

June 29, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MARIO REYNOSO,
a/k/a Mario Hernandez,

Defendant - Appellant.

No. 20-2130
(D.C. No. 2:19-CR-00137-RB-1)
(D. N.M.)

ORDER AND JUDGMENT*

Before **MATHESON**, **BRISCOE**, and **CARSON**, Circuit Judges.

Mario Reynoso appeals his conviction and sentence for distributing five grams or more of methamphetamine in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B). He argues (1) the district court abused its discretion in admitting evidence of other acts under Federal Rule of Evidence 404(b) to prove his identity, knowledge, and intent; (2) the trial evidence was insufficient to support his conviction; and (3) his sentence

---

* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

is substantively unreasonable. Exercising jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, we affirm.

I. BACKGROUND

A. *Facts Underlying the Charged Offense*

A confidential source informed federal agents that someone named "Mario" was selling methamphetamine in the area around Las Cruces, New Mexico, and El Paso, Texas. The source did not know Mario's last name but provided the agents with Mario's phone number and a photograph of the license plate from Mario's gray 2011 Ford Fusion. Agents determined that the vehicle and the phone number were both registered to defendant, Mario Reynoso, at the same address. From a photo line-up including Mr. Reynoso's driver's license photograph, the confidential source identified Mr. Reynoso as the person he knew as "Mario."

Working undercover, Agent Omar Lujan began calling and texting the phone number registered to Mr. Reynoso, communicating with a person identifying himself as "Mario." Mario agreed to sell Agent Lujan two ounces of methamphetamine for $800, and they arranged to meet at a casino named Sunland Park on May 8, 2018. On that day, Agent Lujan was provided with a picture of Mr. Reynoso. He exchanged additional text messages and phone calls with Mario to coordinate the meeting.

At the agreed location, Agent Lujan saw a gray Ford Fusion with the same license plate registered to Mr. Reynoso. He approached the driver's door and spoke to the driver through the rolled-down window. At that point, Agent Lujan identified

the driver as Mr. Reynoso based on the photograph he had been provided. At the driver's direction, Agent Lujan got into the Ford Fusion and sat in the middle of the back seat. The driver turned to face Agent Lujan, who asked about the meth. The driver pointed to a Band-Aid box on the center console. Agent Lujan pulled from that box a plastic bag containing what appeared to be two ounces of methamphetamine. Agent Lujan gave the driver $800. The driver said he needed to leave and told Agent Lujan to call him later.

That same day, Agent Lujan called the phone number registered to Mr. Reynoso and spoke to Mario. Agent Lujan indicated the bag of methamphetamine was less than two ounces, and Mario agreed he owed Agent Lujan another gram. Agent Lujan contacted Mario again in June 2018 to set up a second drug buy, but no further transaction occurred. Mr. Reynoso was later charged in a superseding indictment with distributing five grams or more of methamphetamine on May 8, 2018.[1]

B. *Rule 404(b) Evidence*

The government notified the district court of its intent to introduce Rule 404(b) evidence relevant to Mr. Reynoso's identity as the person who sold the methamphetamine to Agent Lujan on May 8, as well as to Mr. Reynoso's knowledge and intent. It sought to introduce evidence related to Mr. Reynoso's arrest on August 22, 2018, by sheriff's deputies conducting a narcotics investigation in a hotel parking

[1] Mr. Reynoso does not dispute that the methamphetamine sold to Agent Lujan on May 8 amounted to five grams or more.

lot in El Paso. At that time, Mr. Reynoso was driving his 2011 gray Ford Fusion that had been used in the May 8 drug sale. In the car, the deputies found what appeared to be 2.5 ounces of methamphetamine, as well as other types of illegal drugs, drug paraphernalia, and a digital scale. They also seized over $4,000 from Mr. Reynoso's person.

The government also sought to introduce evidence related to Mr. Reynoso's arrest in El Paso on January 30, 2019, on a warrant following his indictment in this case. At that time, he was driving the same gray Ford Fusion, but with a different license plate. Agents found over $4,000 in cash on his person and seven one-ounce bags of methamphetamine in the vehicle. Agents also seized from Mr. Reynoso a cell phone containing text messages that discussed various drug transactions. The seized cellphone used a different phone number than the number registered to Mr. Reynoso that Agent Lujan had used to communicate with "Mario" regarding the May 8 drug sale. But both phone numbers had been used to contact the same 33 individuals, including Mr. Reynoso's wife.

Finally, the government sought to introduce evidence of jail phone calls recorded while Mr. Reynoso was awaiting trial, in which he discussed various ongoing drug trafficking activities.

Mr. Reynoso moved to exclude the proffered evidence. He first argued it was not relevant to prove his knowledge and intent because the identity of the person who sold methamphetamine to Agent Lujan on May 8 would be the main issue in the case. The district court disagreed, holding that the government could introduce evidence of

his knowledge and intent in the absence of a stipulation that these elements of the charged offense were uncontested. The court further held that evidence of Mr. Reynoso's arrests, his cell phone texts, and his jail phone calls was admissible under Rule 404(b) to prove knowledge and intent because Mr. Reynoso's "subsequent possession of large quantities of methamphetamine in his vehicle" was "quite similar" to the charged offense, "and his alleged use of a cell phone and jail phone calls to coordinate narcotics trafficking are likewise quite similar to his alleged use of the first phone to coordinate the drug buy with [Agent Lujan]." R., Vol. I at 38.

Mr. Reynoso also contended that the evidence was not admissible to prove his identity because his arrests shared no signature quality elements with the May 8 drug sale to Agent Lujan. The district court again disagreed, holding that the 2011 gray Ford Fusion registered to Mr. Reynoso at his address constituted a sufficiently specific and distinctive device to render the evidence of his later drug-related acts involving that same vehicle relevant to prove his identity in the charged offense.

Finally, the district court held under Federal Rule of Evidence 403 that the probative value of the Rule 404(b) evidence was not substantially outweighed by its potential for unfair prejudice, and the court said it would give the jury a limiting instruction on its use of that evidence.

C. *Conviction and Sentence*

The jury convicted Mr. Reynoso on the charged offense. At sentencing, the district court calculated his applicable guidelines range as 360 months to life in

prison. The court then sentenced Mr. Reynoso below the guidelines range to 280 months.

II. DISCUSSION

On appeal, Mr. Reynoso contends that (A) the district court erred in admitting the Rule 404(b) evidence, (B) the trial evidence was insufficient to support his conviction, and (C) his sentence is substantively unreasonable.

A. *Rule 404(b) Evidence*

We review the district court's evidentiary ruling for an abuse of discretion. *See United States v. Merritt*, 961 F.3d 1105, 1111 (10th Cir. 2020). "Under this standard, we will not disturb a trial court's decision unless we have a definite and firm conviction that the trial court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Id.* (brackets and internal quotation marks omitted).

Under Rule 404(b), "[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 the character." Fed. R. Evid. 404(b)(1). But such "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). In determining admissibility under Rule 404(b), courts consider four factors:

> (1) the evidence must be offered for a proper purpose; (2) the evidence must be relevant; (3) the trial court must make a Rule 403 determination of whether the probative value of the similar acts is substantially

> outweighed by its potential for unfair prejudice; and (4) pursuant to [Federal Rule of Evidence] 105, the trial court shall, upon request, instruct the jury that evidence of similar acts is to be considered only for the proper purpose for which it was admitted.

United States v. Smalls, 752 F.3d 1227, 1237 (10th Cir. 2014) (internal quotation marks omitted). Rule 404(b) "is one of inclusion, rather than exclusion, unless the evidence is introduced for the impermissible purpose or is unduly prejudicial." *Id*. (internal quotation marks omitted).

1. Knowledge and Intent

The district court held that all of the proffered Rule 404(b) evidence was admissible to prove Mr. Reynoso's knowledge and intent. He contends his knowledge and intent were irrelevant because the sole issue in the case was whether he was the person who sold methamphetamine to Agent Lujan on May 8. But under our reasoning in *United States v. Shumway*, 112 F.3d 1413, 1421-22 (10th Cir. 1997), the district court did not err in holding that the evidence was admissible because, absent a stipulation by Mr. Reynoso that knowledge and intent were uncontested, the government bore the burden of proving these elements of the charged offense.

Mr. Reynoso nonetheless asserts the evidence was not relevant to his knowledge and intent under the reasoning in *United States v. Commanche*, 577 F.3d 1261 (10th Cir. 2009). The defendant in *Commanche* was charged with assault with a dangerous weapon with intent to do bodily harm. *Id.* at 1264. The government sought to introduce evidence of the facts underlying his two prior aggravated battery convictions—specifically that he had brandished sharp cutting instruments—to prove

his intent regarding the charged offense. *Id.* We held that the district court erred in admitting such evidence, concluding it was immaterial to the defendant's claim of self-defense, which was "the sole disputed issue in the case." *Id.* at 1268. We reasoned that "the details of [the defendant's] prior aggravated battery convictions demonstrate nothing about his intent; they simply show that he is violent." *Id.* at 1269. And we noted that "the present case is not one in which intent is proven circumstantially based on repeated substantially similar acts" because there was "no indication in the record that [the defendant] claimed self defense on the two other occasions." *Id.*

Commanche is readily distinguishable. First, we did not address the precise issue presented here: whether evidence relevant to an element of the charged offense is admissible absent the defendant's stipulation that the element is uncontested. On that issue, Mr. Reynoso neither acknowledges our holding in *Shumway* nor attempts to distinguish it. Second, unlike *Commanche*, this case does involve evidence of repeated substantially similar acts relevant to intent. *See United States v. Conway*, 73 F.3d 975, 981 (10th Cir. 1995) (affirming admission of evidence of prior drug-related arrests as relevant to proving intent). Yet Mr. Reynoso does not argue that the district court erred in holding that the other acts evidence was sufficiently similar to the charged offense to be relevant to prove his knowledge and intent. He therefore fails to show that the district court abused its discretion in admitting the other acts evidence for these proper purposes.

2. Identity

Mr. Reynoso next argues the district court abused its discretion in admitting evidence of his two arrests to prove his identity as the driver of the gray Ford Fusion who sold methamphetamine to Agent Lujan on May 8. According to Mr. Reynoso, the court erred because his later arrests shared no signature quality elements with the charged offense.

"We have held that to prove identity, evidence of prior illegal acts need not be identical to the crime charged, so long as, based on a totality of the comparison, the acts share enough elements to constitute a signature quality. *Shumway*, 112 F.3d at 1420 (internal quotation marks omitted). "Elements relevant to a signature quality determination include . . . geographic location, the skill necessary to commit the acts, or use of a distinctive device." *Id.* (citations and internal quotation marks omitted). "[T]he weight to be given to any one element and the number of elements necessary to constitute a 'signature' are highly dependent on the elements' uniqueness in the context of a particular case." *Id.* Here, the district court concluded that the gray Ford Fusion registered to Mr. Reynoso at his address was a sufficiently distinctive device to render evidence of his later drug-related bad acts involving that same vehicle relevant to proving his identity for the charged offense.

Mr. Reynoso asserts that "[a]nyone could have driven [his] car on May 18, 2018 to deliver the drugs." Aplt. Br. at 14. But he acknowledges that the use of his car was a "common unique fact[]" between the May 8 drug sale and his later arrests. *Id.* And he does not challenge the district court's conclusion regarding the

distinctiveness of the 2011 gray Ford Fusion as the basis for admitting the evidence to prove his identity. He therefore fails to show that the district court abused its discretion.

3. **No Undue Prejudice**

Mr. Reynoso argues the district court should have excluded the other acts evidence under Rule 403 because it served primarily to inflame the jury's passion. "Evidence is unfairly prejudicial if it makes a conviction more likely because it provokes an emotional response in the jury or otherwise tends to affect adversely the jury's attitude toward the defendant *wholly apart* from its judgment as to his guilt or [innocence] of the crime charged." *United States v. Tan*, 254 F.3d 1204, 1211-12 (10th Cir. 2001) (alteration and internal quotation marks omitted). The district court concluded the evidence of Mr. Reynoso's later drug-related acts was highly probative of identity, knowledge, and intent, and was not outweighed by any potential prejudice from its admission. In particular, the court concluded that the Rule 404(b) evidence "may indeed elicit a reaction from the jury, but likely no more so than other allegations of involvement in drug trafficking that will already be presented at trial." R., Vol. I at 39. The court also indicated it would give a limiting instruction. Mr. Reynoso fails to show an abuse of discretion.

B. *Sufficiency of the Evidence*

Mr. Reynoso argues the evidence was insufficient to support his conviction. We review this issue do novo. *See United States v. Walker*, 137 F.3d 1217, 1220 (10th Cir. 1998). "Evidence is sufficient to support a conviction if the evidence and

the reasonable inferences drawn therefrom, viewed in the light most favorable to the government, would allow a reasonable jury to find defendant guilty beyond a reasonable doubt." *Id.* "[W]e will not overturn a jury's finding unless no reasonable juror could have reached the disputed verdict." *Id.*

Focusing, as Mr. Reynoso does, on the issue of his identity as the driver of the gray Ford Fusion involved in the May 8 drug sale, we hold that the evidence was sufficient to support the jury's verdict. Agent Lujan testified that he positively identified Mr. Reynoso as the person who sold him drugs on that date. Although Mr. Reynoso argues Agent Lujan may have been mistaken or the jury might not have credited his testimony, we do not weigh conflicting evidence or evaluate witness credibility, *see United States v. Khan*, 989 F.3d 806, 827 (10th Cir. 2021) ("We accept at face value the jury's credibility determinations and its balancing of conflicting evidence." (internal quotation marks omitted)).

C. *Substantively Reasonable Sentence*

Mr. Reynoso contends his below-guidelines sentence is substantively unreasonable given his mental health conditions, substance abuse, and difficult childhood. He also maintains that his 280-month sentence (less than 24 years), which was imposed when he was 41 years old, "is essentially a life sentence." Aplt. Br. at 20. "We review the substantive reasonableness of a sentence for abuse of discretion." *United States v. Chavez*, 723 F.3d 1226, 1233 (10th Cir. 2013). A sentence is substantively reasonable unless "it exceeds the bounds of permissible choice, given the facts and the applicable law." *Id.* (brackets and internal quotation

marks omitted). Moreover, a below-guidelines sentence is presumptively reasonable. *See United States v. Balbin-Mesa*, 643 F.3d 783, 788 (10th Cir. 2011).

Mr. Reynoso's contentions do not demonstrate that the district court exceeded the bounds of permissible choice in imposing a sentence that is 80 months below the bottom of the applicable guidelines range.

III. CONCLUSION

We affirm the district court's judgment.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge

United States v. Mario Reynoso

ATTACHMENT C

Memorandum and Order
of the U.S. District Court for the District of New Mexico

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

v. **No. 19-cr-137 RB**

MARIO REYNOSO,

Defendant.

MEMORANDUM OPINION AND ORDER

This matter is before the Court on Defendant Mario Reynoso's Motion in Limine to exclude evidence of prior bad acts and evidence of a prior felony conviction for importation of marijuana. (Doc. 76.) Defendant's Motion is in response to the Government's Notice of Intent to Introduce Evidence of Bad Acts Under Rule 404(b) (Doc. 44) and Notice Regarding Rule 609 Evidence as to Defendant Mario Reynoso (Doc. 58). Defendant is charged with a single count of distributing methamphetamine, and the Government seeks to introduce evidence in its case-in-chief of two instances following the charged offense in which narcotics were seized from Defendant's vehicle, as well as Defendant's telephone communications subsequent to the charged offense that suggest he was engaged in the distribution of narcotics leading up to and following his arrest. (Doc. 44 at 5–6.) The Government also seeks a ruling that if Defendant elects to testify, evidence regarding his 2003 conviction for felony importation of marijuana may be elicited as impeachment evidence on cross examination. Having considered the submissions of counsel and relevant law, the Court will **deny** Defendant's Motion in Limine.

I. Relevant Facts

Defendant is charged in a single count Superseding Indictment with "unlawfully, knowingly and intentionally distribut[ing] a controlled substance, 5 grams and more of

methamphetamine . . . [i]n violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B)." (Doc. 48 at 1.) The Government bears the burden of proving beyond a reasonable doubt that Defendant knowingly and intentionally distributed the controlled substance as charged, that the substance was in fact methamphetamine and that the amount distributed was at least 5 grams, and that methamphetamine is a controlled substance within the meaning of the law. *See* Tenth Circuit's Pattern Criminal Jury Instructions (2011 ed., Feb. 2018 update) § 2.85.1.

The Government asserts that in March 2018, a source of information (SOI) identified an individual named "Mario" to Homeland Security Investigations (HSI) and informed HSI that Mario was involved in drug trafficking with the Barrio Azteca gang in El Paso, Texas and southern New Mexico. (Doc. 44 at 1.) The SOI did not know Mario's surname, but directed agents to a Facebook page under the name "Mario Hernandez" and suggested that it "might" belong to the Mario the SOI was referring to. (*Id.*) The SOI then "provided HSI with the suspect's vehicle color, make, model, and license plate information—a gray Ford Fusion bearing license plate number KNJ-4185." (*Id.* at 2.) HSI agents performed a registration check and determined that the vehicle was registered to Defendant Mario Reynoso. (*Id.*) The registration check also revealed Defendant's driver's license photo and residential address. (*Id.*) According to the Government, when agents placed Defendant's driver's license photo in a "six-pack" photo lineup, the SOI identified Defendant as the "Mario" the SOI was referring to. (*Id.*)

The SOI provided Mario[1] with the telephone number of an undercover agent (UC) approximately one month later, "under the guise of connecting [him] with a potential

[1] Because Defendant has indicated that his main defense will be an alibi defense and identity will be a major issue in this case, the Court refers to the individual the SOI interacted with as "Mario" so as to avoid the appearance of making a judgment on the issue of identity. The Government clearly argues that this individual was Defendant Mario Reynoso (*see*, *e.g.*, Doc. 44), and the Defendant has indicated that he will argue it was not (*see* Doc. 76 at 4–5).

methamphetamine buyer[,]" and gave the UC Mario's number. (*Id.* at 2.) The Government alleges that the telephone number for Mario that the SOI provided HSI was registered at the same address listed on Defendant's vehicle registration. (*Id.* at 2.) Through phone calls and text messages, the UC and Mario coordinated a sale of two ounces of methamphetamine for $800 on May 8, 2018, at the Sunland Park Casino in Sunland Park, New Mexico. (*Id.*) Upon meeting in the parking lot, the UC entered the backseat of the gray Ford Fusion Mario was driving and asked for the methamphetamine. (*Id.* at 3.) Mario "pointed to a Band Aid box laying on top of the center console . . . [and t]he UC took the box, opened it, and discovered a translucent plastic bag of what appeared to be two ounces of methamphetamine." (*Id.*) The UC gave Mario $800 and left the car, but later called Mario to tell "him that he had weighed the methamphetamine" and asked why the amount he purchased was less than two ounces. (*Id.*) Mario eventually conceded the amount was less than agreed upon and "told the UC that he would make it up to the UC upon his next purchase." (*Id.*)

The New Mexico Department of Public Safety Southern Forensic Laboratory analyzed the contents of the bag the UC purchased from Mario, but labeled the evidence receipt "HERNANDEZ, MARIO." (*Id.* at 3–4.) HSI recorded video and audio of the transaction between Mario and the UC that took place in the gray Ford Fusion and recorded all phone calls between the two coordinating the drug buy and their conversation following the sale. (*Id.* at 2–3.) The UC identified the "Mario" he purchased the methamphetamine from as Defendant based on his driver's license, as did the HSI agents who observed the transaction from the parking lot. (*Id.* at 3.)

I. The Government's Proffered Rule 404(b) Evidence

A. Background

Pursuant to Federal Rule of Evidence 404(b), the Government seeks to introduce evidence in its case-in-chief of several "bad acts" that Defendant engaged in subsequent to the charged drug

sale on May 8, 2018, to prove Defendant's identity, knowledge, and intent related to the offense. (*See* Doc. 44.) First, the Government seeks to introduce evidence that on August 22, 2018—approximately three and a half months after the charged drug sale at the Sunland Park Casino, two officers in the Narcotics Unit of the El Paso County Sherriff's Office were conducting a narcotics investigation in the parking lot of a hotel in El Paso and recognized Defendant as a "current investigative target." (*Id.* 5.) The Government alleges that the officers then "initiated a consensual encounter" and Defendant allowed them to conduct a pat down and canine inspection of the exterior of his vehicle, leading to the discovery of "a stack of U.S. currency in Defendant's pocket, as well as 74 grams of methamphetamine, 37.10 grams of heroin, 32.60 grams of cocaine, 0.76 ounces of marijuana, drug paraphernalia, and a digital scale inside of his vehicle." (*Id.* at 5.) The officers seized the narcotics and arrested Defendant, but he was not prosecuted. (*Id.*)

Next, the Government intends to offer evidence surrounding Defendant's January 30, 2019 arrest on an outstanding warrant that had been issued following his indictment in the current case. (*Id.*) Defendant was apprehended in the same gray Ford Fusion registered under his name and address that the SOI had alerted agents to in March, but bearing a different license plate. (*Id.* at 5–6.) Officers found $4,545 in cash on Defendant's person and "seven ounces of methamphetamine, divided into seven plastic bags, containing approximately one ounce of methamphetamine each," in the vehicle. (*Id.* at 6.)

Finally, the Government seeks to introduce text messages found on a cellular phone seized from Defendant during his January 30, 2010 arrest that "confirm that Defendant continued to sell methamphetamine after the instant offense and up until the arrest." (*Id.*) The cellular phone has a different number than the number through which the UC coordinated the May 8, 2018 drug purchase from "Mario." (*Id.*) In addition, the Government seeks to introduce "[r]ecorded jail calls

between Defendant and his wife that show that Defendant has continued to coordinate sales of methamphetamine while in the custody of the U.S. Marshal." (*Id.* at 6.) The Government asserts that in these text messages and calls Defendant uses "the same communication style" that Mario used when communicating with the UC to coordinate the charged drug sale in May 2018, including use of "code words" rather than referring to drugs by name. (*Id.*)

The Government argues that each of these subsequent "bad acts"—(i) possession of 74 grams of methamphetamine, other narcotics, and a digital scale in his gray Ford Fusion; (ii) possession of seven ounces of methamphetamine divided into multiple one-ounce bags in his gray Ford Fusion; and (iii) various coded communications suggesting involvement in narcotics trafficking—are all admissible to show Defendant's identity, knowledge, and intent regarding the charged count of distribution of methamphetamine on May 8, 2018. (*See id.* at 6–7.) Defendant urges the Court to exclude all such evidence because it is unduly prejudicial and irrelevant since knowledge and intent are not at issue in the case. (*See* Doc. 76 at 4–5.) Further, Defendant argues that none of the proffered evidence of subsequent bad acts rises to the level of "signature quality" and thus cannot be properly admitted to prove identity in this case. (*Id.* at 6.)

B. Legal Standard for Rule 404(b) Evidence

Under Federal Rule of Evidence 404(b)(1), "[e]vidence of a crime, wrong, or other 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." But such evidence may be admissible if offered to prove something other than criminal propensity, including "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b)(2). In the Tenth Circuit, courts apply the four-part test articulated in *Huddleston v. United States*, 485 U.S. 681, 691–92 (1988), to determine the admissibility of Rule 404(b) evidence:

> (1) [the] evidence of other crimes, wrongs, or acts must be introduced for a proper purpose; (2) the evidence must be relevant; (3) the court must make a Rule 403 determination whether the probative value of the similar acts is substantially outweighed by its potential for unfair prejudice; and (4) the court, upon request, must instruct the jury that the evidence of similar acts is to be considered only for the limited purpose for which it was admitted.

United States v. Diaz, 679 F.3d 1183, 1190 (10th Cir. 2012) (quotation omitted).

The Tenth Circuit has held that relevant evidence of other crimes or acts should be admitted "except that which tends to prove *only* criminal disposition." *United States v. Tan*, 254 F.3d 1204, 1208 (10th Cir. 2001) (quotation and citation omitted). Under this "inclusive" approach, "[t]he government bears the burden of showing that the proffered evidence is relevant to an issue other than character[,]" *United States v. Youts*, 229 F.3d 1312, 1317 (10th Cir. 2000) (citation omitted), and must "articulate precisely the evidentiary hypothesis by which a fact of consequence may be inferred . . . ." *United States v. Kendall*, 766 F.2d 1426, 1436 (10th Cir. 1985); *see also United States v. Commanche*, 577 F.3d 1261, 1226 (10th Cir. 2009). "It is settled in the Tenth Circuit that evidence of 'other crimes, wrongs, or acts' may arise from conduct that occurs *after* the charged offense." *United States v. Mares*, 441 F.3d 1152, 1157 (10th Cir. 2006); *see also United States v. Olivo*, 80 F.3d 1466, 1469 (10th Cir. 1996) ("Regardless of whether 404(b) evidence is of a prior or subsequent act, its admissibility involves a case-specific inquiry that is within the district court's broad discretion.") (citation omitted); *United States v. Zamora*, 222 F.3d 756, 762 (10th Cir. 2000)).

C. Analysis

i. The evidence is offered for a proper purpose.

Under the first *Huddleston* factor, the evidence is offered for a proper purpose because the Government seeks to use it to prove "that the Defendant had the knowledge and intent necessary to commit the May 8, 2018[] offense charged, in addition to proving his identity." (Doc. 44 at 7.)

"Evidence is admitted for a proper purpose if allowed for one or more of the enumerated purposes in Rule 404(b)." *Mares*, 441 F.3d at 1156. Knowledge, intent, and identity are all valid purposes listed under Rule 404(b)(2), and the Court thus finds that the Government seeks to introduce evidence of Defendant's prior or subsequent bad acts to prove much more than Defendant's character or criminal disposition.

ii. The evidence is relevant to identity, knowledge, and intent.

Evidence is relevant if it has "any tendency to make a fact [of consequence] more or less probable." Fed. R. Evid. 401. The Court turns first to the issue of identity, which Defendant has made clear will be a fact of consequence at trial. (*See* Docs. 76 at 4; 59.) The Tenth Circuit has upheld the admission of evidence of other crimes and acts to prove identity under Rule 404(b) "[i]f the crimes share elements that possess 'signature quality . . . .'" *United States v. Gutierrez*, 696 F.2d 753, 755 (10th Cir. 1982). "[T]o prove identity, evidence of prior illegal acts need not be identical to the crime charged, so long as, based on a 'totality of the comparison,' the acts share enough elements to constitute a 'signature quality.'" *United States v. Shumway*, 112 F.3d 1413, 1420 (10th Cir. 1997) (citations omitted). "Elements relevant to a 'signature quality' determination include the following: geographic location; the unusual quality of the crime; the skill necessary to commit the acts; or use of a distinctive device." *United States v. Smalls*, 752 F.3d 1227, 1238 (10th Cir. 2014) (quoting *Shumway*, 112 F.3d at 1420). "This list is not exhaustive, but it does underscore the requirement that the characteristics of the crimes 'be so unusual and distinctive as to be like a signature.'" *Id.* (quoting *United States v. Connelly*, 874 F.2d 412, 417 (7th Cir. 1989)).

Defendant avers that "[o]ther than [his] car, his May 22, 2018 arrest by El Paso authorities shares no signature quality elements with the instant case." (Doc. 76 at 6–7.) Defendant points out the arrest related to his possession of methamphetamine following a consensual interaction with

law enforcement agents in August 2018 did *not* involve Defendant selling the agents drugs, did *not* take place at a casino, and merely resulted from "a fortuitous claimed consensual encounter while agents were looking for another suspected drug dealer." (*Id.* at 7.) Further, he argues that the seizure of methamphetamine during his arrest on January 30, 2019, was "uneventful and not unique," and thus does not constitute any type of "signature quality" that would make the evidence admissible to prove his identity. (*Id.*)

The Court acknowledges that Defendant's drug-related activities subsequent to the charged offense do not share the more colorful or unique "signature qualities" that the Tenth Circuit has previously recognized as admissible to prove identity under Rule 404(b). *See*, *e.g.*, *Smalls*, 752 F.3d at 1239 ("[a] plan to use asthma as an excuse to cover up a victim's true cause of death is sufficiently 'unusual and distinctive' to constitute a signature quality"); *compare United States v. Patterson*, 20 F.3d 809, 813 (10th Cir. 1994) ("[t]he hijacker in both cases was similarly dressed in a tan coat and cowboy boots. Hijacking is an unusual crime and these two hijackings were very similar; therefore, these crimes are probative of the identity issue"), *with United States v. Rios-Morales*, No. 14-20117-02-JAR, 2015 WL 5637532, at *4 (D. Kan. Sept. 24, 2015), *aff'd*, 878 F.3d 978 (10th Cir. 2017) ("the use of shipping entities, the sale of methamphetamine, wire transfers, and purchases on credit . . . are not sufficiently 'distinctive' or 'unique' to constitute a 'signature quality.' Indeed, these are common elements of many drug conspiracies.").

Yet Defendant himself has acknowledged the most important factor that makes his later drug-related activity "distinctive" and "unique" enough as to be relevant to the issue of identity—the presence of his car. (*See* Doc. 76 at 6–7). Defendant is correct that possession and distribution of methamphetamine are unfortunately not distinctive or unusual crimes—especially in this region. However, the Court notes that one of the factors to be considered in "the totality of the

comparison," test for determining admissibility to prove identity is "use of a distinctive device . . . ." *See Shumway*, 112 F.3d at 1420. The specific vehicle in which "Mario" conducted the charged methamphetamine sale was then linked to two subsequent incidents in which large quantities of methamphetamine (either divided into baggies or accompanied by a digital scale and accompanied by large quantities of cash) were seized from the same vehicle.

A gray sedan may seem far from a "distinctive device" when compared to "distinctive devices" in the caselaw, such as a highly complex and unique homemade explosive device. (*See* Doc. 76 at 6 (citing *United States v. Trenkler*, 61 F.3d 45, 54–55 (1st Cir. 1995).) Yet the Government has indicated that it intends to introduce evidence that the *exact same gray Ford Fusion*, registered to the Defendant at his residential address, was the site of distribution in the May 2018 methamphetamine sale as well as the site of possession of large quantities of methamphetamine later seized in two separate incidents. That the facts of this case do not appear to fit perfectly with existing caselaw on identity-related Rule 404(b) evidence is perhaps because cases in which such specific evidence links a defendant to the charged crime rarely turn on the issue of identity. Still, the Court finds that the gray Ford Fusion registered under Defendant's name and address is a sufficiently specific device to render evidence of Defendant's subsequent drug-related bad acts involving the vehicle relevant to prove identity in the charged crime.

The relevance of text messages on a phone seized during Defendant's arrest and recorded jail calls between Defendant and his wife are a closer call when it comes to proving identity. The Government asserts that the coded language Defendant used in such calls is relevant to prove identity as well as knowledge and intent (Doc. 44 at 6–7), while Defendant argues that "[i]t is no stretch that a purported drug dealer would use 'code words' to conduct his clandestine business. Such is not unique and surely does not qualify as a signature quality." (Doc. 76 at 7.) The Court is

inclined to agree with Defendant on this point. Defendant's use of coded language in his calls and texts following the charged crime, such as referring to the number of ounces for sale rather than referring to the narcotics by name, is likely not unique or distinctive enough to render the coded language a "signature quality" that can link Defendant to the individual who sold the methamphetamine to the UC on May 8, 2018. However, as discussed below, the recorded phone calls and text messages, to the extent they prove Defendant's subsequent involvement in distribution of narcotics, will be relevant to prove knowledge and intent and are admissible on that ground. If Defendant seeks a narrow limiting instruction on the issue of the phone calls and text messages—instructing the jury to consider them as evidence of knowledge and intent but not as evidence of identity—he may so move. However, finding that the evidence will be admissible either way, the Court will not impose such a narrow limiting instruction unless Defendant specifically requests it.

Though Defendant intends to call an alibi witness (*see* Doc. 59), the Government may still introduce evidence to prove intent and knowledge because they are elements of the offense that the Government bears the burden of proving beyond a reasonable doubt. Defendant argues that his main defense will involve an alibi and thus "[i]t appears the sole issue in this matter is whether the Defendant was elsewhere during the commission of this offense . . . [and] knowledge and intent are irrelevant . . . ." (Doc. 76 at 5.) However, introducing a notice of alibi witness and surmising that "it appears" intent and knowledge are not in dispute is not the same as formally stipulating to those elements. *See United States v. Harrison*, 942 F.2d 751, 760 (10th Cir. 1991) ("Faced with a plea of not guilty, the government need not await the defendant's denial of intent on the witness stand before offering evidence of similar relevant acts.") Thus, Rule 404(b) evidence may be introduced to prove intent or knowledge when they are required elements of the charged crime,

even before those elements are "actively contested." *See id.* In *Shumway*, the Tenth Circuit upheld a trial court's decision to admit Rule 404(b) evidence to prove knowledge and intent in a similar scenario where the defendant argued those elements were not at issue. 112 F.3d at 1421 ("since knowledge and intent were required elements, and since Mr. Shumway had not stipulated that the only contested issue was identity, the 404(b) evidence was admissible to show knowledge and intent as well as identity").

In analyzing what qualifies as relevant evidence to prove knowledge and intent, "prior narcotics involvement is relevant when [it] is close in time, highly probative, and similar to the activity with which the defendant is charged." *United States v. Becker*, 230 F.3d 1224, 1232 (10th Cir. 2000) (quotation marks and citations omitted); *see also United States v. Conway*, 73 F.3d 975, 981 (10th Cir. 1995) ("The Tenth Circuit has long recognized the relevance of previous wrongs and crimes in the context of narcotics violations." (quotation omitted)). However, a fact-specific comparison of the circumstances surrounding the prior acts and later offenses is important in determining relevance. *See Becker*, 230 F.3d at 1232.

Each of Defendant's alleged subsequent bad acts involving narcotics trafficking—the August 22, 2018 arrest and seizure of methamphetamine, the January 30, 2019 arrest and seizure of methamphetamine, and the text messages on the phone seized from Defendant on January 30, 2019—all took place within nine months of the May 8, 2018 charged methamphetamine sale. They are thus sufficiently "close in time" to the charged offense to be relevant to knowledge and intent to distribute methamphetamine. Though the Government does not state the exact dates of the recorded jail calls between Defendant and his wife, they necessarily occurred at some point between Defendant's arrest on January 30, 2019, and May 3, 2019, when the Government filed its notice of intent to introduce the recordings as Rule 404(b) evidence. Any calls made before May

3, 2019, also took place within a year of the charged offense. *See*, *e.g.*, *Becker*, 230 F.3d at 1232 ("[f]our to six years transcends our conception of 'close in time'"); *United States v. Ramirez*, 63 F.3d 937, 943–44 (10th Cir. 1995) (upholding the admission of prior acts that occurred one year earlier).

Next, a fact-specific comparison of the circumstances surrounding the charged offense and later bad acts reveals that each of the three contested instances of Defendant's subsequent involvement with narcotics are indeed similar enough to the charged May 8, 2018 drug sale to be probative of Defendant's knowledge and intent. *See Becker*, 230 F.3d at 1232. The Government anticipates that if identity is either conceded or successfully proven at trial, "Defendant may claim that he lacked knowledge of the specific contents of the Band Aid box that was inside his vehicle on May 8, 2018, as Defendant never identified the drug by name in his communications with the UC leading up to or following the buy." (Doc. 44 at 7.) Evidence that in the months following the alleged May 8, 2018, transaction, Defendant was in possession of large quantities of methamphetamine on two occasions—in one instance divided into smaller baggies like the one in the Band Aid box and at other times accompanied by indicia of drug trafficking like large amounts of cash a digital scale—serve to make it more likely that Defendant had knowledge of the contents of the Band Aid box on May 8, 2018, and intended to engage in methamphetamine trafficking.

Defendant's recorded phone calls and seized text messages, if the Government can prove that they are probative of involvement in narcotics trafficking, would also help prove that Defendant had the intent to engage in methamphetamine distribution including and following the May 8, 2018 sale. The Court finds that the Government has met its burden of "articulat[ing] precisely the evidentiary hypothesis by which a fact of consequence may be inferred" to show that

the proffered evidence of subsequent bad acts will be relevant to proving the required elements of the charged crime. *See Kendall*, 766 F.2d at 1436.

Tenth Circuit caselaw also supports a finding that the evidence of Defendant's subsequent bad acts is similar enough to the charged offense to be relevant to prove knowledge and intent in this case. In *United States v. Wilson*, the Tenth Circuit held that a prior conviction for possession of cocaine during a traffic stop "taken alone does little to support an inference that Mr. Wilson either possessed, knew he possessed, or intended to distribute the cocaine found at [a residence]." 107 F.3d 774, 785 (10th Cir. 1997), *abrogated on other grounds in United States v. King*, 632 F.3d 646, 651 n.5 (10th Cir. 2011). Here, however, Defendant's alleged distribution of methamphetamine and subsequent possession of methamphetamine all took place in the same *vehicle* registered under his name and address.

In *Becker*, the court reasoned that the "prior recovery of methamphetamine trafficking paraphernalia from [the defendant's] residence and his prior convictions for conspiracy to possess methamphetamine . . . involve only possession and distribution, not manufacturing, and thus lack a common scheme" to support a manufacturing charge. 230 F.3d at 1232–33. Here, on the other hand, the charged distribution of methamphetamine offense and Defendant's subsequent possession of large quantities of methamphetamine in his vehicle are quite similar, and his alleged use of a cell phone and jail phone calls to coordinate narcotics trafficking are likewise quite similar to his alleged use of the first phone to coordinate the drug buy with the UC. *See also United States v. Ramirez*, 63 F.3d 937, 943 (10th Cir. 1995) ("Each of the offenses for which defendant was charged required the government to prove either knowledge or intent with respect to defendant's possession of the cocaine, its distribution, or his participation in the conspiracy[,]" so testimony that the "defendant previously had been arrested for drug trafficking and found in possession of

eight ounces of cocaine and $43,000 in cash—was probative of defendant's knowledge and intent with respect to the offenses charged.")

iii. The probative value of Defendant's subsequent bad acts is not outweighed by any potential for prejudice.

Finally, under Rule 403, the Court may exclude evidence if its probative value is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403. Evidence may be unfairly prejudicial if it "makes a conviction more likely because it provokes an emotional response in the jury or otherwise tends to affect adversely the jury's attitude toward the defendant *wholly apart* from its judgment as to his guilt or innocence of the crime charged." *Tan*, 254 F.3d at 1211–12 (quotation omitted); *see also United States v. Smith* 534 F.3d 1211, 1219 (10th Cir. 2008).

As discussed above, the Tenth Circuit has held that prior involvement with narcotics is relevant Rule 404(b) evidence demonstrating intent if it is sufficiently similar and close in time to the charged acts. *See Becker*, 230 F.3d at 1232; *see also Conway*, 73 F.3d at 981. The evidence that Defendant possessed large amounts of methamphetamine and other narcotics may indeed elicit a reaction from the jury, but likely no more so than other allegations of involvement in drug trafficking that will already be presented at trial. As such, the admissibility of subsequent drug-related acts that are highly probative of identity, knowledge, and intent to distribute are not outweighed by any potential prejudice their admission may cause. To ensure that Defendant is not unduly prejudiced by the introduction of the Rule 404(b) evidence, however, the Court will instruct the jury to consider this evidence only for the purposes for which it is offered and not to draw from it any general conclusions about Defendant's character or his propensity to commit crimes.

II. The Government's Proffered Rule 609 Evidence

Next the Government has given notice that it intends to introduce evidence of Defendant's three prior felony convictions if he elects to testify at trial. (*See* Doc. 58 at 1.) The Government states that on June 6, 2003, Defendant was convicted in the Western District of Texas on one count of Importation of a Controlled Substance Involving 50 Kilograms or More of a Mixture or Substance Containing a Detectable Amount of Marijuana. (*Id.* at 4.) The Government also asserts that on November 2, 2012, Defendant was convicted in El Paso County District Court of one count of Robbery and on July 8, 2015, he was convicted in El Paso County District Court of one count of Possession of Less Than 1 Gram of a Controlled Substance. (*Id.*)

Pursuant to Federal Rule of Evidence 609, a crime that was punishable by imprisonment for more than one year and occurred less than ten years before the currently charged offense "must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant." Fed. R. Civ. P. 609(a)(1)(b). If more than ten years have passed since the felony conviction, however, evidence of such a conviction is only admissible if the proponent of the evidence gives the adverse party reasonable written notice and "its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect . . . ." Fed. R. Civ. P. 609(b).

In the context of Rule 609(a)(1), the Tenth Circuit considers the following five factors to determine if the probative value of a defendant-witness's prior conviction outweighs its prejudicial effect on the defendant:

> (1) the impeachment value of the defendant's prior crimes; (2) the dates of the convictions and the defendant's subsequent history; (3) the similarity between the past crime and charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the defendant's credibility at trial.

Smalls, 752 F.3d at 1240 (citation omitted).

Defendant has not objected to the introduction of his prior convictions for Robbery and Possession of Less Than 1 Gram of a Controlled Substance. (*See* Doc. 76.) Noting the lack of objection, the Court finds that, if Defendant testifies, his credibility and testimony will be central to trial and his felony convictions are not so similar to the charged offense that the jury might be confused or misled. Thus, if Defendant elects to testify in his own defense, the Government may elicit details of his robbery and 2015 possession felonies. Of course, because defendants stand to be uniquely prejudiced by the introduction of impeachment evidence when they choose to testify in their own defense, in this Circuit "only the prior conviction[s], [their] general nature, and punishment of felony range [are] fair game for testing the defendant's credibility." *United States v. Commanche*, 577 F.3d 1261, 1271 (10th Cir. 2009) (quoting *United States v. Albers*, 93 F.3d 1469 (10th Cir. 1996)).

Defendant does object, however, to the introduction of his 2003 felony conviction for importation of marijuana because the conviction is more than ten years old and thus "generally do[es] not have much probative value." (*See* Doc. 76 at 9 (quoting *United States v. Chapman*, No. CR 14-1065 JB, 2015 WL 4042177, at *12 (D.N.M. June 29, 2015)).) He argues that the introduction of his 2003 conviction as impeachment evidence would be highly prejudicial because it is a drug trafficking offense similar to the charged crime "and would surely invite improper inferences." (*Id.*) The Court finds that a felony offense for importing narcotics is highly probative of Defendant's credibility as a witness, and that while it is a drug trafficking crime, it is an *importation* offense, not a *distribution* offense, and thus remains highly relevant to Defendant's credibility but carries less potential to confuse or mislead the jury. Further, Defendant's 2003 importation offense and the resulting sentence served are currently enumerated in the Superseding Indictment in this case as a sentencing enhancement allegation. (*See* Doc. 48 at 1.) The

Government's proposed jury instructions even include provisions instructing the jury to determine whether Defendant was indeed convicted of the importation offense and whether he was "released from any term of imprisonment for the serious drug felony conviction within 15 years of the date of the commencement of the offense charged in the indictment . . . ." (Doc. 72 at 2–3.) Since the details of the importation offense that Defendant seeks to exclude under Rule 609(b) are currently included in the Superseding Indictment, the Court does not find that the introduction of the same information as impeachment evidence would be significantly prejudicial. Thus, in this case the probative value of the 2003 importation conviction to Defendant's credibility—should he take the stand—substantially outweighs its current potential for prejudice.

However, at the pretrial motion hearing currently set for 8:30 a.m. on Monday, July 8, 2019, the Court will take up the issue of whether Defendant's 2003 conviction for importation of marijuana is properly presented to the jury as part of the superseding indictment, jury instructions, and verdict form. Should the Court find that the inclusion of such information is unduly prejudicial to Defendant, the Court will entertain argument from Defendant to reconsider whether the 2003 felony conviction's probative value as impeachment evidence still substantially outweighs its potential for prejudice.

THEREFORE,

IT IS ORDERED that Defendant Mario Reynoso's Motion in Limine (Doc. 76) is **DENIED**;

IT IS FURTHER ORDERED the Government may introduce evidence of Defendant's subsequent involvement with narcotics as proffered in its Notice of Intent to Introduce Evidence of Bad Acts Under Rule 404(b) (Doc. 44); and

IT IS FURTHER ORDERED that, pending further notice, if Defendant elects to testify at trial, the Government may introduce evidence of Defendant's 2003 conviction for importation of marijuana and other prior convictions as impeachment evidence pursuant to Rule 609 (*see* Doc. 58).

ROBERT C. BRACK
SENIOR U.S. DISTRICT JUDGE

United States v. Mario Reynoso

ATTACHMENT D

Petitioner's Brief
to the U.S. Court of Appeals for the Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MARIO REYNOSO, Defendant-Appellant.	Case No. 20-2130

On Appeal from the United States District Court for the District of New Mexico;
19-CR-01370 RB; The Honorable Robert Brack

APPELLANT'S OPENING BRIEF

Respectfully submitted,

Russell Dean Clark, LLC
P.O. Box 576
Las Cruces, NM 88004
Tel: 575-526-9000
Fax: 575-526-9800
Email: russelldeanclark@gmail.com
Counsel for Appellant

ORAL ARGUMENT IS NOT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

U.S. CONSTITUTION AND STATUTES

ORDERS AND JUDGMENTS APPEALED

Attachment 1, Trial Court Document #83, Memorandum Opinion and Order denying Appellant's Motion in Limine to exclude other bad acts evidence.

Attachment 2, Trial Court Document #116, Trial Court Judgment and Sentence

Attachment 3, Trial Court Document #117, Notice of Appeal

STATEMENT OF RELATED CASES

There are no related cases in this matter.

JURISDICTIONAL STATEMENT

The United States District Court for the District of New Mexico, had jurisdiction over this matter pursuant to 18 U.S.C. §3231. Mario Reynoso was convicted after a jury trial of distribution of five grams and more of methamphetamine. His sentence was enhanced pursuant to 21 U.S.C. §851.

Prior to trial the district judge denied appellant's motion in limine. (rec. v. I, Doc. 83)(Attachment 1) After he was sentenced the judgment and imprisonment order was entered on the docket on September 1, 2020. (rec. v. I, doc. 116) (Attachment 2) The notice of appeal was timely filed in accordance with Rule 4(b)(1). F.R.A.P. on September 11, 2020. (rec. v. I, doc. 117) This appellate court's jurisdiction derives from 28 U.S.C. §1291 and 18 U.S.C. §3742.

ISSUES PRESENTED FOR REVIEW

Whether the district court abused its discretion when it denied Mario Reynoso's motion in limine to exclude other bad acts evidence.

Whether the evidence is legally insufficient to support the verdict against Mario Reynoso.

Whether Mario Reynoso's sentence is substantively unreasonable.

STATEMENT OF THE CASE

On January 16, 2019 an Indictment was filed against Mario Reynoso charging him with distribution of five grams and more of methamphetamine, contrary to 21 U.S.C. §841(a)(1) and (b)(1)(B), and 18 U.S.C. §2.

On May 7, 2019 a superseding indictment was filed in this matter charging Mr. Reynoso with distribution of five grams and more of methamphetamine, contrary to 21 U.S.C. §841(a)(1) and (b)(1)(B), and 18 U.S.C. §2 and including a sentencing allegation that the defendant was previously convicted of importing a controlled substance within fifteen years of the commencement of this offense.

At the jury trial, the government presented its case against Mario Reynoso largely through numerous law enforcement agents and introduced numerous audio recordings, photos, videos, and the drugs alleged to have been obtained during a controlled buy.

At the conclusion of trial, the jury found Mario Reynoso guilty of the single count and the sentencing enhancement.

A presentence report was prepared. (rec. v. II, doc. 100, PSR) Mr. Reynoso filed a sentencing memorandum. With an offense level of 37 and criminal history category VI his Guidelines imprisonment range was 360 months to life. The Court imposed a term of 280 months. (rec. v. I, doc 116)

STATEMENT OF FACTS

Appellant Mario Reynoso survived a truly difficult upbringing. His life has been one sad event after another. He is a U.S. Citizen who was born in El Paso, Texas. Mr. Reynoso has never known his father and his mother abandoned him to the care of his grandmother at an early age. At approximately fifteen years old, Mr. Reynoso left his grandmother's care and set out on his own. (rec. v. II, doc.100, PSR, paragraph 52)

Almost as if on cue, due to his instability at home, Mr. Reynoso dropped out of school. (rec. v. II, doc. 100, PSR, paragraph 65). He has limited education and limited work experience. Sadly, what Mr. Reynoso does have in abundance are mental health and substance abuse issues. (rec. v. II, doc. 100, PSR, paragraphs 59 and 60) While his difficult childhood is no excuse for his conduct in this matter, it surely contributed to his presence before the District Court.

The government alleged that in April of 2018 agents began an investigation of Mr. Reynoso after learning he was allegedly selling methamphetamine in the Las Cruces, New Mexico and El Paso, Texas areas. A confidential source allegedly provided agents with Mr. Reynoso's license plate information for the gray Ford Fusion car he drove. Agents then confirmed Mr. Reynoso' identity by "running his plates." After agents obtained the driver's license photo of Mr.

Reynoso, they included it in a "six-pac" photo lineup and the confidential source allegedly identified Mr. Reynoso from that photo as the alleged drug dealer.

The confidential source later allegedly provided Mr. Reynoso the phone number for an undercover agent who posed as a person wishing to buy methamphetamine. Over the course of several days in May, 2018, the undercover agent exchanged a series of text messages and calls with Mr. Reynoso and eventually set up a drug deal in which the government alleged Mr. Reynoso delivered approximately 47.78 grams of methamphetamine to the agent in the parking lot of the Sunland Park Casino. Mr. Reynoso was not arrested at that time.

Over three months later, on August 22, 2018, agents in El Paso encountered Mr. Reynoso at a hotel in El Paso. Agents searched his vehicle a found methamphetamine, cocaine, heroin, marijuana and $4890.00 in cash.

Even later still, on January 30, 2019, when agents arrested Mr. Reynoso on a warrant in this matter, they found him in possession of approximately 159 grams of methamphetamine and $4545.00 in cash.

Prior to the trial in this matter, Mr. Reynoso filed a *motion in limine* to prohibit the government from introducing other bad acts under Federal Rule of Evidence 404b in its case in chief. (rec. vol. II, doc. 76) The appellant asked the trial judge to exclude any evidence of the August 22, 2018 and January 30, 2019 drug finds and any jail calls that were not related to the indictment in this matter.

By Memorandum Opinion and Order, The district judge denied Mr. Reynoso's motion and allowed the government to introduce evidence of two the other drug finds that took place after the events in this case. (rec. v. I, Doc. 83)

At trial, the government's first witness was agent Omar Lujan. After discussing Agent Lujan's career and training the government moved to the facts of the case. Agent Lujan testified that in his undercover capacity he exchanged a series of text messages and calls with Mr. Reynoso in order to set up the purchase of drugs from him.

Agent Lujan testified he arranged for Mr. Reynoso to meet him at the Sunland Park Casino to purchase drugs from him on May 8th, 2018. Agent Lujan testified that Mr. Reynoso arrived that day in a gray Ford Fusion with a female in the car with him.

Agent Lujan testified that he was positive the driver of the car was Mario Reynoso.

On cross examination, Agent Lujan testified that he had not seen Mr. Reynoso before and he was first shown a picture of Mr. Reynoso around 10:30 in the morning on May 8th, the date of the drug sale. (rec. v. III (transcript of trial, vol. I of II) p. 84 lines 3-9)

Agent Lujan testified he was wearing sunglasses when he met Mr. Reynoso on May 8th. (rec. v. III (transcript of trial, vol. I of II) p. 88 lines 11-12)

Agent Lujan testified that when he approached Mr. Reynoso he was outside his vehicle for approximately 10-15 seconds before he got into Mr. Reynoso's vehicle. (rec. v. III (transcript of trial, vol. I of II) p. 88 lines 2-7)

Agent Lujan testified that after approximately 10-15 seconds outside Mr. Reynoso' vehicle he entered the vehicle and got in the back seat. (rec. v. III (transcript of trial, vol. I of II) p. 88 lines 2-10, p. 89 lines 4-15)

Agent Lujan testified he spent approximately another 5-10 seconds in Mr. Reynoso's back seat and the entire transaction took place in approximately 30 seconds. (rec. v. III (transcript of trial, vol. I of II) p. 90 lines 3-10)

During his earlier brief it appears agent Lujan was informed Mr. Reynoso had certain tattoos. Agent Lujan testified that based on his meeting with Mr. Reynoso on May 8th, he could not "tell you exactly what the tattoos were" and that he could not testify with 100% certainty the driver's tattoos were the same as he saw in the earlier photo. (rec. v. III (transcript of trial, vol. I of II) p. 90 lines 15-25)

Agent Lujan testified he was unaware if the box that contained the drugs that day had Mr. Reynoso's DNA or fingerprints. (rec. v. III (transcript of trial, vol. I of II) p. 93 lines 11-21)

Agent Lujan testified that eyewitness identification is not always accurate and he had seen other cases where other detectives had cases where a suspect as

misidentified. (rec. v. III (transcript of trial, vol. I of II) p. 85 lines 16-18 and p. 87 lines 2-6)

The next agent to testify was Agent Daniel Ortiz. Agent Ortiz testified that he was providing cover for the drug sale on May 8th and it was obvious the windows on the car the government claims Mr. Reynoso drove to deliver drugs were tinted and were fairly dark. (rec. v. III (transcript of trial, vol. I of II) p. 110 lines 16-22)

Agent Ortiz testified that from where he was, due to the tint of the windows, he could not identify the occupants of the car. (rec. v. III (transcript of trial, vol. I of II) p. 110 line 23 – p. 111 line 4)

Later in the trial, the government called Deputy Samuel Magallanes to testify. Deputy Magallanes testified, over appellant's objection via motion in limine, that on August 22, 2018, several months after the May 8th encounter that gave rise to this case, he was a part of the team that arrested Mr. Reynoso in an unrelated event.

Deputy Magallanes testified that he found approximately $4890.00 and methamphetamine, heroin and cocaine in Mr. Reynoso's car that day.

Deputy Magallanes testified, over appellant's objection via motion in limine, that even later on January 20, 2019, many months after the May 8, 2018 event, he was a part of a team that arrested Mr. Reynoso on a federal warrant. Deputy

Magallanes testified that when Mr. Reynoso was arrested that day agents found $4545.00 on his and approximately 976 grams of methamphetamine.

At trial the government introduced certain audio recordings (jail calls) in which it claimed the appellant, Mr. Reynoso, asked the person he was talking to who was with him that day in order to further prove his identity.

SUMMARY OF THE ARGUMENT

This Court should vacate judgment and sentence in this matter because the judge abused his discretion when he failed to exclude evidence of the August 22, 2018 and January 30, 2019 drug transactions, and jail calls unrelated to this case.

Mr. Reynoso was unfairly prejudiced by introduction of the other bad acts detailed above.

Additionally, this Court should vacate the judgment and sentence as to count I of the indictment, distribution of five grams and more of methamphetamine in violation of 21 U.S.C. §841, because the evidence is insufficient to support the verdict. There was insufficient evidence to prove Mr. Reynoso was the driver of the car who delivered the drugs to the undercover agent on May 8, 2018.

Finally, this Court should vacate the sentence in this matter as it is substantively unreasonable.

ARGUMENT

The District Judge Should Have Granted Mario Reynoso's Motion to Exclude Other Bad Acts Evidence.

The standard of review of a district court's evidentiary rulings under Rule 404(b) is whether the trial judge abused his discretion. *United States v. Moran*, 503 F.3d 1135, 1143. (10th Cir. 2007)

Pursuant to Fed. R. Evid. 404(b) "other acts" evidence "is *not* admissible to prove the character of a person in order to show action in conformity therewith." (Emphasis added) "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). Additionally, the court must determine whether the evidence is "sufficient to support a finding" the defendant committed the act in question. *Id.*

This rule is based on the presumption of innocence and the recognition that "[i}t is fundamental to American jurisprudence that a defendant must be tried for what he did, not for who he is." *United States v. Myers,* 550 F.2d 1036, 1044 (5th Cir. 1977). Likewise, no one should be convicted of a crime based on his or her previous misdeeds. *United States v. Daniels*, 770 F. 2d. 1111, 1116 (D.C. Cir. 1985).

In *United States v. Diaz*, 679 F.3d 1183, (10th Cir. 2012) this Court pointed out a Rule 404(b) analysis requires a familiar four-part test:

> (1) evidence of other crimes, wrongs, or acts must be introduced for a proper purpose;
> (2) the evidence must be relevant;
> (3) the court must make a Rule 403 determination whether the probative value of the similar acts is substantially outweighed by its potential for unfair prejudice; and
> (4) the court, upon request, must instruct the jury that the evidence of similar acts is to be considered only for the limited purpose for which it was admitted.

Id at 1190.

In this case, none of the Government's other bad acts evidence was offered for a proper purpose, it was not relevant, and its probative value was substantially outweighed by the potential for unfair prejudice.

The Defendant's Knowledge and Intent Were Not in Issue.

The Government alleged the other bad acts evidence was to show the appellant had the knowledge and intent to commit the drug transaction on May 8, 2018. The government asserted at trial the appellant would argue he did not sell the methamphetamine to the undercover agent on May 8, 2018 and the true perpetrator was another person. In fact, the appellant provided a Notice of Alibi Defense. It appears the sole issue in this matter was whether the appellant was elsewhere during the commission of this offense in this matter.

Since Mario Reynoso's defense was the government did not prove it was him who actually delivered the drugs on May 8, 2018, other bad acts evidence introduced to prove knowledge and intent were irrelevant. As Mr. Reynoso's knowledge and intent were irrelevant, there was no need to introduce other bad acts prove them.

It should be noted, after the Court denied the appellant's *motion in limine* and allowed the Government to present evidence of the August 22, 2018 and January 30, 2019 drug finds, the appellant did not present his alibi defense.

The analysis is the same however. The other bad acts introduced were irrelevant to appellant's position that the government did not prove it was him who drove the gray Ford Fusion to deliver drugs on May 8, 2018.

Mr. Reynoso's contention is similar to that in *United States v. Commanche*, 577 F.3d 1261, 1268 (10th Cir. 2009). In *Commanche* the Defendant was indicted on two counts of assault with a dangerous weapon with intent to do bodily harm in Indian Country in violation of 18 U.S.C. §§ 1153 and 113(a)(3), as well as two counts of assault resulting in serious bodily injury in Indian Country in violation of 18 U.S.C. §§ 1153 and 113(a)(6). It appears the Defendant cut two people with what appeared to be a box cutter. At trial, the government introduced evidence that Commanche had twice been convicted of aggravated battery after altercations

in which he brandished sharp cutting instruments. The sole issue in *Commanche* was whether the Defendant was acting in self- defense.

In reversing the verdict, this Court pointed out that although Commanche had twice been convicted of battering people in the past using a sharp object such evidence had no direct bearing on whether he acted in self-defense in this particular instance. Thus, it was irrelevant to the self-defense inquiry that Commanche carried a box cutter on at least one other occasion.

In this case, the sole issue was whether the appellant was the person who delivered the drugs on May 8, 2018. Any evidence of other drug possession or bad acts as noticed by the Government was irrelevant to appellant's defense that he was not properly identified and was not the driver.

Therefore, the trial judge should have prohibited the Government from introducing evidence of the August 22, 2018 and January 30, 2019 drug findings pursuant to Rule 404(b) evidence to prove knowledge and intent and his failure to do so was an abuse of discretion. Furthermore, appellant was prejudiced by the Court's ruling.

The Elements of Appellant's Other Acts Do Not Constitute a Signature Quality.

Evidence of other illegal acts can be introduced to prove identity so long as, based on a "totality of the comparison," the acts share enough elements to

constitute a "signature quality." *United States v. Shumway*, 112 F.3d 1413, 1420 (10th Cir. 1997).

Some examples of crimes sharing "signature quality" elements include the following: separate burglaries in a small Kansas town, in the early morning hours and the perpetrator cut the lines to the alarm systems prior to the act, *United States v. Porter,* 881 F.2d 878, 887 (10th Cir.1989), separate cases of someone wearing a tan coat and cowboy boots and using a gun to hijack a small, private, single aircraft that handles similarly and taking them to an uncontrolled airfield, *United States v. Patterson,* 20 F.3d 809, 813 (10th Cir. 1994), and utilizing two bombs that were remote-controlled, radio-activated, electronic explosive devices. Both were homemade mechanisms, comprising, in general, electronic components easily purchased at a hobby store. Both had similar, though not identical, firing and fusing circuits with separate battery power supplies for each. Both had switches in their fusing circuits to disconnect the radio receivers. To energize their respective radio receivers, both devices utilized similar power supplies, consisting of four AA batteries. Both employed many similar components such as batteries, duct tape, toggle switches, radio receivers, antennas, solder, electrical tape, and large round speaker magnets. Both used a distinctive method (*i.e.,* twisting, soldering, and taping) to connect some, though not all, of the wires used. *United States v. Trenkler*, 61 F.3d 45, 54–55 (1st Cir. 1995).

Other than the use of Mr. Reynoso's car, his May 22, 2018 arrest by El Paso authorities shared no signature quality elements with the instant case. The May 22, 2018 arrest resulted from a fortuitous claimed consensual encounter while agents were looking for another suspected drug dealer. Mr. Reynoso did not speak to or arrange a drug deal with the agents May 22, 2018. Mr. Reynoso simply stumbled into a group of agents as they were looking for someone else. The location was not a casino and the drugs were different. There are no unique facts common to both cases that would suggest a common perpetrator. Anyone could have driven Mr. Reynoso's car on May 18, 2018 to deliver the drugs.

Although he was again in his car when was arrested on January 30, 2019, the drugs allegedly found in his possession were uneventful and not unique. That arrest did not take place at a casino. With the exception of Mr. Reynoso's car at the scene, that incident shares no common unique facts that would suggest a common perpetrator. Anyone could have used his car on May 18, 2018.

Finally, Mr. Reynoso's text messages and recorded jail calls after this arrest shared no common unique facts with the underlying offense in this matter. The Government alleged the defendant used "code words" or referred to the numbers of ounces in his recorded jail calls and during the drug transaction for which he has been charged in this matter. It is no stretch that a purported drug dealer would use

"code words" to conduct his clandestine business. Such is not unique and surely does not qualify as a signature quality.

For the reasons above, the trial judge abused his discretion by allowing the introduction of the Government's other bad acts evidence under Rule 404(b). Mr. Reynoso was prejudiced by the trial courts erroneous ruling.

The Probative Value of the Government's Rule 404(b) Other Acts Evidence was Substantially Outweighed by the Risk of Unfair Prejudice to the Defendant Pursuant to Rule 403.

Fed. R. Evid. 403provides:

> The 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.

In the Rule 403 context, "[e]vidence is unfairly prejudicial if it makes a conviction more likely because it provokes an emotional response in the jury or otherwise tends to affect adversely the jury's attitude toward the defendant *wholly apart* from its judgment as to his guilt or innocence of the crime charged." *United States v. Tan*, 254 F.3d 1204, 1211–12 (10th Cir. 2001).

In this case, introduction of the government's other bad acts evidence under rule 404(b) served primarily to invoke the jury's passion. The unfair prejudice Mr. Reynoso suffered cannot be overstated. The government introduced not one, but two, previous drug related incidents and purported text messages and jail calls

related to other drug transactions. No reasonable jurror could avoid being enflamed by such information. Thusly enflamed, the jurrors surely convicted the defendant based on emotion as opposed to the facts of the case. Therefore, the Court should have prohibited the Government from introducing any of other bad acts evidence relating to the August 22 and January 30 drug finds under Rule 404(b) and Rule 403.

The Evidence Presented Was Insufficient to Support Mario Reynoso's Conviction for Distribution of Five Grams and More of Methamphetamine in Violation of 21 U.S.C. §841, as Charged in Count I of the Superseding Indictment.

Claims that the evidence presented at trial was insufficient to support a conviction are reviewed de novo. *United States v. Walker,* 137 F.3d 1217, 1220 (10th Cir.1998). Evidence is sufficient to support a conviction if the evidence and the reasonable inferences drawn therefrom, viewed in the light most favorable to the government, would allow a reasonable jury to find the defendant guilty beyond a reasonable doubt. *Id.* This Court's review is very deferential; it should not overturn a jury's verdict unless no reasonable juror could have concluded, on the basis of the evidence presented, that the defendant was guilty of the crime charged. *Id.*

In this case, Agent Lujan testified he was certain that he positively identified Mr. Reynoso as the person who he purchased drugs from on May 8, 2018. However, as pointed out above, Agent Lujan also testified that he was aware of

other cases of false identification. Agent Lujan testified he needed to avoid bias in his investigation. He testified he had never seen Mr. Reynoso before and was given a picture of him the very same day of the transaction. He testified the entire transaction was approximately 30 seconds long. He testified that he spent 10-15 seconds outside Mr. Reynoso's vehicle before climbing into the back seat. Agent Lujan testified he was wearing sunglasses and did not know if the car widows were tinted. Agent Ortiz testified it was obvious the windows were darkly tinted.

In this case, Agent Lujan had but one picture of appellant and no prior interactions with him. The interaction on May 8, 2018 was short and quick. It should be clear Agent Lujan's identification was suspect and was insufficient to prove it was in fact Mario Reynoso who delivered drugs on May 18, 2018.

The government may lean heavily on a certain jail call to verify Agent Lujan's identification of the appellant in May 18, 2018. This Court should not do the same.

In a jail call that was played for the jury, Mr. Reynoso asked a person on the line who was with him that day it happened. Mr. Reynoso told the other person on the line to ask another person if she was with him if she was with him in the car the day it happened referring to the charge he had. Mr. Reynoso told her to ask the other person if she remembered going to Sunland Park because they could not identify the passenger because the visor was down.

At first blush this might tend to corroborate the agent's identification of Mr. Reynoso as the driver. However this Court should not give great weight to the phone call as helping identify the driver that day. There was no mention of selling drugs in the call. There was no mention of drugs at all.

Simply put, Mr. Reynoso could have been at Sunland Park on unrelated business earlier or he could have dropped his car off with the unknown female who then picked up someone else.

Mario Reynoso's Sentence is Substantively Unreasonable
Standard of Review

The substantive reasonableness of a sentence, like its procedural reasonableness, is subject to review for abuse of discretion. *Gall v. United States,* 552 U.S. 38, 51, 128 S. Ct. 586 (2007); *United States v. Chavez,* 723 F. 3d. 1226, 1233 (10th Cir. 2013). Under the abuse of discretion standard, this Court will reverse a sentence that is "arbitrary, capricious, whimsical, or manifestly unreasonable." *United States v. Munoz-Nava*, 524 F. 3d. 1137, 1146 (10th Cir. 2008). A defendant need not object at the time of sentencing to an error that implicates the substantive reasonableness of a sentence. *United States v. Torres-Duenas,* 461 F. 3d. 1178, 1183 (10th Cir.) *cert. denied,* 551 U.S. 1166 (2007).

This Court presumes that a sentence within the properly calculated Guidelines range is reasonable. *United States v. Trent,* 767 F. 3d. 1046, 1051 (10th

Cir. 2004); *Chavez,* 723 F. 3d at 1233. The defendant bears the burden of rebutting this presumption in the light of the 18 U.S.C. §3553(a) factors. *Id.*

Mario Reynoso's Sentence is Substantively Unreasonable Because it is Substantially Longer Than Necessary to Accomplish the Sentencing Goals Found in 18 U.S.C. §3553(a).

A substantively unreasonable sentence is illegal and must be set aside. A sentencing decision is substantively unreasonable if it "exceeds the bounds of permissible choice, given the facts and the applicable law." In considering whether a defendant's sentence is substantively reasonable, this Court examines the reasonableness of the length of the sentence in light of all the circumstances of the case and the factors set forth in 18 U.S.C. §3553(a)." *Chavez,* 723 F. 3d. 1233; *United States v. Reyes-Alfonso,* 653 F. 3d. 1137, 1145 (10th Cir.) *cert. denied,* 132 S. Ct, 828 (2011).

Although a district court "should begin all sentencing proceedings by correctly calculating the applicable Guidelines range," it must also consider the 18 U.S.C. §3553(a) statutory factors-including the defendant's personal history, the nature of the offense, and various policy considerations-"to determine whether they support the sentence requested by a party." *United States v. Lucero,* 747 F. 3d. 1242, 1250 (10th Cir. 2014)(quoting *Gall,* 552 U.S. at 49-50). In evaluating the §3553(a) factors a district judge may not presume that the Guidelines range is reasonable. He or she must make an individualized assessment based on the facts

presented. *Gall,* 552. U.S. at 50. Sentencing judges should aim to impose a sentence " 'sufficient, but not greater than necessary, to comply with the purposes' of criminal punishment." *United States v. Martinez-Barragan,* 545 F. 3d. 894, 904 (10th Cir. 2008) (quoting 18 U.S.C. §3553(a)).

In this case the district court did vary downward from the guideline range from 360 months to 280 months. While the trial judge's downward variance is clearly laudable, it still exceeds the bounds of permissible choice given the facts of this case, the applicable law and it is greater than necessary to comply with the purposes of criminal punishment.

At his sentencing hearing (and the PSR and in his Sentencing Memorandum and Request for Downward Variance) Mr. Reynoso pointed out the true difficulties he experienced as a minor. He was 41 years old at sentencing. He never knew his father and was abandoned to his grandmother who died in his early teens. Basically Mr. Reynoso became a child of the streets.

Mr. Reynoso quit school and had limited employment opportunities. He suffered numerous serious mental health conditions. He suffered substance abuse issues. Simply put, Mr. Reynoso was all but doomed from the beginning.

A sentence of 280 months exceeds the bounds of permissible choice because it is essentially a life sentence. If Mr. Reynoso qualifies for good time and even the RDAP program he will be facing nearly two decades in federal prison. He

could easily be treated for his mental health issues, his substance abuse issues, and learn a trade within a few years of incarceration. He could be rehabilitated to a useful place in society with a much shorter sentence.

For all these reasons this Court should vacate the sentence of 280 months imposed and remand to the district court for a sentence consistent with the factors outlined in 18 U.S.C. §3553(a).

CONCLUSION

For all the above reasons, this Court should reverse and vacate the verdict, judgment and sentence in this matter.

Respectfully submitted,

/s/ Russell Dean Clark

Russell Dean Clark, LLC
P.O. Box 576
Las Cruces, NM 88004
Tel: 575-526-9000
Fax: 575-526-9800
Email: russelldeanclark@gmail.com
Counsel for Appellant

CERTIFICATE OF SERVICE

I, Russell Dean Clark, attorney for appellant, hereby certify that on January 14, 2021 I served a copy of the foregoing **Opening Brief,** to Tiffany Walters, at P.O. Box 607 Albuquerque, NM 87103, the last known address/email address, by CM/ECF.

/s/ Russell Dean Clark
Signature
January 14,2021
Date
Russell Dean Clark
Attorney at Law
P.O. Box 576
Las Cruces, NM 88004

CERTIFICATE OF DIGITAL SUBMISSION

I, Russell Dean Clark, hereby certify that with respect to the foregoing:

1. All required privacy redactions have been made per 10th Cir. R. 25.5;
2. If required to file additional hard copies, that the ECF submission is an exact copy of those documents;
3. The digital submissions have been scanned for viruses with the most recent version of ESET Endpoint Antivirus and according to the program are free of virus.

/S/ Russell Dean Clark
Russell Dean Clark

CERTIFICATE OF COMPLIANCE

Section 1. Word Count.

As required by Fed. R. App. P. 32.(a)(7)(c), I certify this brief is proportionally spaced and contains 5413 Words.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

v. **No. 19-cr-137 RB**

MARIO REYNOSO,

Defendant.

MEMORANDUM OPINION AND ORDER

This matter is before the Court on Defendant Mario Reynoso's Motion in Limine to exclude evidence of prior bad acts and evidence of a prior felony conviction for importation of marijuana. (Doc. 76.) Defendant's Motion is in response to the Government's Notice of Intent to Introduce Evidence of Bad Acts Under Rule 404(b) (Doc. 44) and Notice Regarding Rule 609 Evidence as to Defendant Mario Reynoso (Doc. 58). Defendant is charged with a single count of distributing methamphetamine, and the Government seeks to introduce evidence in its case-in-chief of two instances following the charged offense in which narcotics were seized from Defendant's vehicle, as well as Defendant's telephone communications subsequent to the charged offense that suggest he was engaged in the distribution of narcotics leading up to and following his arrest. (Doc. 44 at 5–6.) The Government also seeks a ruling that if Defendant elects to testify, evidence regarding his 2003 conviction for felony importation of marijuana may be elicited as impeachment evidence on cross examination. Having considered the submissions of counsel and relevant law, the Court will **deny** Defendant's Motion in Limine.

I. Relevant Facts

Defendant is charged in a single count Superseding Indictment with "unlawfully, knowingly and intentionally distribut[ing] a controlled substance, 5 grams and more of

ATTACHMENT 1

methamphetamine . . . [i]n violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B)." (Doc. 48 at 1.) The Government bears the burden of proving beyond a reasonable doubt that Defendant knowingly and intentionally distributed the controlled substance as charged, that the substance was in fact methamphetamine and that the amount distributed was at least 5 grams, and that methamphetamine is a controlled substance within the meaning of the law. *See* Tenth Circuit's Pattern Criminal Jury Instructions (2011 ed., Feb. 2018 update) § 2.85.1.

The Government asserts that in March 2018, a source of information (SOI) identified an individual named "Mario" to Homeland Security Investigations (HSI) and informed HSI that Mario was involved in drug trafficking with the Barrio Azteca gang in El Paso, Texas and southern New Mexico. (Doc. 44 at 1.) The SOI did not know Mario's surname, but directed agents to a Facebook page under the name "Mario Hernandez" and suggested that it "might" belong to the Mario the SOI was referring to. (*Id.*) The SOI then "provided HSI with the suspect's vehicle color, make, model, and license plate information—a gray Ford Fusion bearing license plate number KNJ-4185." (*Id.* at 2.) HSI agents performed a registration check and determined that the vehicle was registered to Defendant Mario Reynoso. (*Id.*) The registration check also revealed Defendant's driver's license photo and residential address. (*Id.*) According to the Government, when agents placed Defendant's driver's license photo in a "six-pack" photo lineup, the SOI identified Defendant as the "Mario" the SOI was referring to. (*Id.*)

The SOI provided Mario[1] with the telephone number of an undercover agent (UC) approximately one month later, "under the guise of connecting [him] with a potential

[1] Because Defendant has indicated that his main defense will be an alibi defense and identity will be a major issue in this case, the Court refers to the individual the SOI interacted with as "Mario" so as to avoid the appearance of making a judgment on the issue of identity. The Government clearly argues that this individual was Defendant Mario Reynoso (*see, e.g.*, Doc. 44), and the Defendant has indicated that he will argue it was not (*see* Doc. 76 at 4–5).

methamphetamine buyer[,]" and gave the UC Mario's number. (*Id.* at 2.) The Government alleges that the telephone number for Mario that the SOI provided HSI was registered at the same address listed on Defendant's vehicle registration. (*Id.* at 2.) Through phone calls and text messages, the UC and Mario coordinated a sale of two ounces of methamphetamine for $800 on May 8, 2018, at the Sunland Park Casino in Sunland Park, New Mexico. (*Id.*) Upon meeting in the parking lot, the UC entered the backseat of the gray Ford Fusion Mario was driving and asked for the methamphetamine. (*Id.* at 3.) Mario "pointed to a Band Aid box laying on top of the center console . . . [and t]he UC took the box, opened it, and discovered a translucent plastic bag of what appeared to be two ounces of methamphetamine." (*Id.*) The UC gave Mario $800 and left the car, but later called Mario to tell "him that he had weighed the methamphetamine" and asked why the amount he purchased was less than two ounces. (*Id.*) Mario eventually conceded the amount was less than agreed upon and "told the UC that he would make it up to the UC upon his next purchase." (*Id.*)

The New Mexico Department of Public Safety Southern Forensic Laboratory analyzed the contents of the bag the UC purchased from Mario, but labeled the evidence receipt "HERNANDEZ, MARIO." (*Id.* at 3–4.) HSI recorded video and audio of the transaction between Mario and the UC that took place in the gray Ford Fusion and recorded all phone calls between the two coordinating the drug buy and their conversation following the sale. (*Id.* at 2–3.) The UC identified the "Mario" he purchased the methamphetamine from as Defendant based on his driver's license, as did the HSI agents who observed the transaction from the parking lot. (*Id.* at 3.)

I. The Government's Proffered Rule 404(b) Evidence

A. Background

Pursuant to Federal Rule of Evidence 404(b), the Government seeks to introduce evidence in its case-in-chief of several "bad acts" that Defendant engaged in subsequent to the charged drug

sale on May 8, 2018, to prove Defendant's identity, knowledge, and intent related to the offense. (*See* Doc. 44.) First, the Government seeks to introduce evidence that on August 22, 2018—approximately three and a half months after the charged drug sale at the Sunland Park Casino, two officers in the Narcotics Unit of the El Paso County Sherriff's Office were conducting a narcotics investigation in the parking lot of a hotel in El Paso and recognized Defendant as a "current investigative target." (*Id.* 5.) The Government alleges that the officers then "initiated a consensual encounter" and Defendant allowed them to conduct a pat down and canine inspection of the exterior of his vehicle, leading to the discovery of "a stack of U.S. currency in Defendant's pocket, as well as 74 grams of methamphetamine, 37.10 grams of heroin, 32.60 grams of cocaine, 0.76 ounces of marijuana, drug paraphernalia, and a digital scale inside of his vehicle." (*Id.* at 5.) The officers seized the narcotics and arrested Defendant, but he was not prosecuted. (*Id.*)

Next, the Government intends to offer evidence surrounding Defendant's January 30, 2019 arrest on an outstanding warrant that had been issued following his indictment in the current case. (*Id.*) Defendant was apprehended in the same gray Ford Fusion registered under his name and address that the SOI had alerted agents to in March, but bearing a different license plate. (*Id.* at 5–6.) Officers found $4,545 in cash on Defendant's person and "seven ounces of methamphetamine, divided into seven plastic bags, containing approximately one ounce of methamphetamine each," in the vehicle. (*Id.* at 6.)

Finally, the Government seeks to introduce text messages found on a cellular phone seized from Defendant during his January 30, 2010 arrest that "confirm that Defendant continued to sell methamphetamine after the instant offense and up until the arrest." (*Id.*) The cellular phone has a different number than the number through which the UC coordinated the May 8, 2018 drug purchase from "Mario." (*Id.*) In addition, the Government seeks to introduce "[r]ecorded jail calls

between Defendant and his wife that show that Defendant has continued to coordinate sales of methamphetamine while in the custody of the U.S. Marshal." (*Id.* at 6.) The Government asserts that in these text messages and calls Defendant uses "the same communication style" that Mario used when communicating with the UC to coordinate the charged drug sale in May 2018, including use of "code words" rather than referring to drugs by name. (*Id.*)

The Government argues that each of these subsequent "bad acts"—(i) possession of 74 grams of methamphetamine, other narcotics, and a digital scale in his gray Ford Fusion; (ii) possession of seven ounces of methamphetamine divided into multiple one-ounce bags in his gray Ford Fusion; and (iii) various coded communications suggesting involvement in narcotics trafficking—are all admissible to show Defendant's identity, knowledge, and intent regarding the charged count of distribution of methamphetamine on May 8, 2018. (*See id.* at 6–7.) Defendant urges the Court to exclude all such evidence because it is unduly prejudicial and irrelevant since knowledge and intent are not at issue in the case. (*See* Doc. 76 at 4–5.) Further, Defendant argues that none of the proffered evidence of subsequent bad acts rises to the level of "signature quality" and thus cannot be properly admitted to prove identity in this case. (*Id.* at 6.)

B. Legal Standard for Rule 404(b) Evidence

Under Federal Rule of Evidence 404(b)(1), "[e]vidence of a crime, wrong, or other 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." But such evidence may be admissible if offered to prove something other than criminal propensity, including "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b)(2). In the Tenth Circuit, courts apply the four-part test articulated in *Huddleston v. United States*, 485 U.S. 681, 691–92 (1988), to determine the admissibility of Rule 404(b) evidence:

> (1) [the] evidence of other crimes, wrongs, or acts must be introduced for a proper purpose; (2) the evidence must be relevant; (3) the court must make a Rule 403 determination whether the probative value of the similar acts is substantially outweighed by its potential for unfair prejudice; and (4) the court, upon request, must instruct the jury that the evidence of similar acts is to be considered only for the limited purpose for which it was admitted.

United States v. Diaz, 679 F.3d 1183, 1190 (10th Cir. 2012) (quotation omitted).

The Tenth Circuit has held that relevant evidence of other crimes or acts should be admitted "except that which tends to prove *only* criminal disposition." *United States v. Tan*, 254 F.3d 1204, 1208 (10th Cir. 2001) (quotation and citation omitted). Under this "inclusive" approach, "[t]he government bears the burden of showing that the proffered evidence is relevant to an issue other than character[,]" *United States v. Youts*, 229 F.3d 1312, 1317 (10th Cir. 2000) (citation omitted), and must "articulate precisely the evidentiary hypothesis by which a fact of consequence may be inferred . . . ." *United States v. Kendall*, 766 F.2d 1426, 1436 (10th Cir. 1985); *see also United States v. Commanche*, 577 F.3d 1261, 1226 (10th Cir. 2009). "It is settled in the Tenth Circuit that evidence of 'other crimes, wrongs, or acts' may arise from conduct that occurs *after* the charged offense." *United States v. Mares*, 441 F.3d 1152, 1157 (10th Cir. 2006); *see also United States v. Olivo*, 80 F.3d 1466, 1469 (10th Cir. 1996) ("Regardless of whether 404(b) evidence is of a prior or subsequent act, its admissibility involves a case-specific inquiry that is within the district court's broad discretion.") (citation omitted); *United States v. Zamora*, 222 F.3d 756, 762 (10th Cir. 2000)).

C. Analysis

i. The evidence is offered for a proper purpose.

Under the first *Huddleston* factor, the evidence is offered for a proper purpose because the Government seeks to use it to prove "that the Defendant had the knowledge and intent necessary to commit the May 8, 2018[] offense charged, in addition to proving his identity." (Doc. 44 at 7.)

"Evidence is admitted for a proper purpose if allowed for one or more of the enumerated purposes in Rule 404(b)." *Mares*, 441 F.3d at 1156. Knowledge, intent, and identity are all valid purposes listed under Rule 404(b)(2), and the Court thus finds that the Government seeks to introduce evidence of Defendant's prior or subsequent bad acts to prove much more than Defendant's character or criminal disposition.

ii. The evidence is relevant to identity, knowledge, and intent.

Evidence is relevant if it has "any tendency to make a fact [of consequence] more or less probable." Fed. R. Evid. 401. The Court turns first to the issue of identity, which Defendant has made clear will be a fact of consequence at trial. (*See* Docs. 76 at 4; 59.) The Tenth Circuit has upheld the admission of evidence of other crimes and acts to prove identity under Rule 404(b) "[i]f the crimes share elements that possess 'signature quality . . . .'" *United States v. Gutierrez*, 696 F.2d 753, 755 (10th Cir. 1982). "[T]o prove identity, evidence of prior illegal acts need not be identical to the crime charged, so long as, based on a 'totality of the comparison,' the acts share enough elements to constitute a 'signature quality.'" *United States v. Shumway*, 112 F.3d 1413, 1420 (10th Cir. 1997) (citations omitted). "Elements relevant to a 'signature quality' determination include the following: geographic location; the unusual quality of the crime; the skill necessary to commit the acts; or use of a distinctive device." *United States v. Smalls*, 752 F.3d 1227, 1238 (10th Cir. 2014) (quoting *Shumway*, 112 F.3d at 1420). "This list is not exhaustive, but it does underscore the requirement that the characteristics of the crimes 'be so unusual and distinctive as to be like a signature.'" *Id.* (quoting *United States v. Connelly*, 874 F.2d 412, 417 (7th Cir. 1989)).

Defendant avers that "[o]ther than [his] car, his May 22, 2018 arrest by El Paso authorities shares no signature quality elements with the instant case." (Doc. 76 at 6–7.) Defendant points out the arrest related to his possession of methamphetamine following a consensual interaction with

law enforcement agents in August 2018 did *not* involve Defendant selling the agents drugs, did *not* take place at a casino, and merely resulted from "a fortuitous claimed consensual encounter while agents were looking for another suspected drug dealer." (*Id.* at 7.) Further, he argues that the seizure of methamphetamine during his arrest on January 30, 2019, was "uneventful and not unique," and thus does not constitute any type of "signature quality" that would make the evidence admissible to prove his identity. (*Id.*)

The Court acknowledges that Defendant's drug-related activities subsequent to the charged offense do not share the more colorful or unique "signature qualities" that the Tenth Circuit has previously recognized as admissible to prove identity under Rule 404(b). *See*, *e.g.*, *Smalls*, 752 F.3d at 1239 ("[a] plan to use asthma as an excuse to cover up a victim's true cause of death is sufficiently 'unusual and distinctive' to constitute a signature quality"); *compare United States v. Patterson*, 20 F.3d 809, 813 (10th Cir. 1994) ("[t]he hijacker in both cases was similarly dressed in a tan coat and cowboy boots. Hijacking is an unusual crime and these two hijackings were very similar; therefore, these crimes are probative of the identity issue"), *with United States v. Rios-Morales*, No. 14-20117-02-JAR, 2015 WL 5637532, at *4 (D. Kan. Sept. 24, 2015), *aff'd*, 878 F.3d 978 (10th Cir. 2017) ("the use of shipping entities, the sale of methamphetamine, wire transfers, and purchases on credit . . . are not sufficiently 'distinctive' or 'unique' to constitute a 'signature quality.' Indeed, these are common elements of many drug conspiracies.").

Yet Defendant himself has acknowledged the most important factor that makes his later drug-related activity "distinctive" and "unique" enough as to be relevant to the issue of identity—the presence of his car. (*See* Doc. 76 at 6–7). Defendant is correct that possession and distribution of methamphetamine are unfortunately not distinctive or unusual crimes—especially in this region. However, the Court notes that one of the factors to be considered in "the totality of the

comparison," test for determining admissibility to prove identity is "use of a distinctive device . . . ." *See Shumway*, 112 F.3d at 1420. The specific vehicle in which "Mario" conducted the charged methamphetamine sale was then linked to two subsequent incidents in which large quantities of methamphetamine (either divided into baggies or accompanied by a digital scale and accompanied by large quantities of cash) were seized from the same vehicle.

A gray sedan may seem far from a "distinctive device" when compared to "distinctive devices" in the caselaw, such as a highly complex and unique homemade explosive device. (*See* Doc. 76 at 6 (citing *United States v. Trenkler*, 61 F.3d 45, 54–55 (1st Cir. 1995).) Yet the Government has indicated that it intends to introduce evidence that the *exact same gray Ford Fusion*, registered to the Defendant at his residential address, was the site of distribution in the May 2018 methamphetamine sale as well as the site of possession of large quantities of methamphetamine later seized in two separate incidents. That the facts of this case do not appear to fit perfectly with existing caselaw on identity-related Rule 404(b) evidence is perhaps because cases in which such specific evidence links a defendant to the charged crime rarely turn on the issue of identity. Still, the Court finds that the gray Ford Fusion registered under Defendant's name and address is a sufficiently specific device to render evidence of Defendant's subsequent drug-related bad acts involving the vehicle relevant to prove identity in the charged crime.

The relevance of text messages on a phone seized during Defendant's arrest and recorded jail calls between Defendant and his wife are a closer call when it comes to proving identity. The Government asserts that the coded language Defendant used in such calls is relevant to prove identity as well as knowledge and intent (Doc. 44 at 6–7), while Defendant argues that "[i]t is no stretch that a purported drug dealer would use 'code words' to conduct his clandestine business. Such is not unique and surely does not qualify as a signature quality." (Doc. 76 at 7.) The Court is

inclined to agree with Defendant on this point. Defendant's use of coded language in his calls and texts following the charged crime, such as referring to the number of ounces for sale rather than referring to the narcotics by name, is likely not unique or distinctive enough to render the coded language a "signature quality" that can link Defendant to the individual who sold the methamphetamine to the UC on May 8, 2018. However, as discussed below, the recorded phone calls and text messages, to the extent they prove Defendant's subsequent involvement in distribution of narcotics, will be relevant to prove knowledge and intent and are admissible on that ground. If Defendant seeks a narrow limiting instruction on the issue of the phone calls and text messages—instructing the jury to consider them as evidence of knowledge and intent but not as evidence of identity—he may so move. However, finding that the evidence will be admissible either way, the Court will not impose such a narrow limiting instruction unless Defendant specifically requests it.

Though Defendant intends to call an alibi witness (*see* Doc. 59), the Government may still introduce evidence to prove intent and knowledge because they are elements of the offense that the Government bears the burden of proving beyond a reasonable doubt. Defendant argues that his main defense will involve an alibi and thus "[i]t appears the sole issue in this matter is whether the Defendant was elsewhere during the commission of this offense . . . [and] knowledge and intent are irrelevant . . . ." (Doc. 76 at 5.) However, introducing a notice of alibi witness and surmising that "it appears" intent and knowledge are not in dispute is not the same as formally stipulating to those elements. *See United States v. Harrison*, 942 F.2d 751, 760 (10th Cir. 1991) ("Faced with a plea of not guilty, the government need not await the defendant's denial of intent on the witness stand before offering evidence of similar relevant acts.") Thus, Rule 404(b) evidence may be introduced to prove intent or knowledge when they are required elements of the charged crime,

even before those elements are "actively contested." *See id.* In *Shumway*, the Tenth Circuit upheld a trial court's decision to admit Rule 404(b) evidence to prove knowledge and intent in a similar scenario where the defendant argued those elements were not at issue. 112 F.3d at 1421 ("since knowledge and intent were required elements, and since Mr. Shumway had not stipulated that the only contested issue was identity, the 404(b) evidence was admissible to show knowledge and intent as well as identity").

In analyzing what qualifies as relevant evidence to prove knowledge and intent, "prior narcotics involvement is relevant when [it] is close in time, highly probative, and similar to the activity with which the defendant is charged." *United States v. Becker*, 230 F.3d 1224, 1232 (10th Cir. 2000) (quotation marks and citations omitted); *see also United States v. Conway*, 73 F.3d 975, 981 (10th Cir. 1995) ("The Tenth Circuit has long recognized the relevance of previous wrongs and crimes in the context of narcotics violations." (quotation omitted)). However, a fact-specific comparison of the circumstances surrounding the prior acts and later offenses is important in determining relevance. *See Becker*, 230 F.3d at 1232.

Each of Defendant's alleged subsequent bad acts involving narcotics trafficking—the August 22, 2018 arrest and seizure of methamphetamine, the January 30, 2019 arrest and seizure of methamphetamine, and the text messages on the phone seized from Defendant on January 30, 2019—all took place within nine months of the May 8, 2018 charged methamphetamine sale. They are thus sufficiently "close in time" to the charged offense to be relevant to knowledge and intent to distribute methamphetamine. Though the Government does not state the exact dates of the recorded jail calls between Defendant and his wife, they necessarily occurred at some point between Defendant's arrest on January 30, 2019, and May 3, 2019, when the Government filed its notice of intent to introduce the recordings as Rule 404(b) evidence. Any calls made before May

3, 2019, also took place within a year of the charged offense. *See*, *e.g.*, *Becker*, 230 F.3d at 1232 ("[f]our to six years transcends our conception of 'close in time'"); *United States v. Ramirez*, 63 F.3d 937, 943–44 (10th Cir. 1995) (upholding the admission of prior acts that occurred one year earlier).

Next, a fact-specific comparison of the circumstances surrounding the charged offense and later bad acts reveals that each of the three contested instances of Defendant's subsequent involvement with narcotics are indeed similar enough to the charged May 8, 2018 drug sale to be probative of Defendant's knowledge and intent. *See Becker*, 230 F.3d at 1232. The Government anticipates that if identity is either conceded or successfully proven at trial, "Defendant may claim that he lacked knowledge of the specific contents of the Band Aid box that was inside his vehicle on May 8, 2018, as Defendant never identified the drug by name in his communications with the UC leading up to or following the buy." (Doc. 44 at 7.) Evidence that in the months following the alleged May 8, 2018, transaction, Defendant was in possession of large quantities of methamphetamine on two occasions—in one instance divided into smaller baggies like the one in the Band Aid box and at other times accompanied by indicia of drug trafficking like large amounts of cash a digital scale—serve to make it more likely that Defendant had knowledge of the contents of the Band Aid box on May 8, 2018, and intended to engage in methamphetamine trafficking.

Defendant's recorded phone calls and seized text messages, if the Government can prove that they are probative of involvement in narcotics trafficking, would also help prove that Defendant had the intent to engage in methamphetamine distribution including and following the May 8, 2018 sale. The Court finds that the Government has met its burden of "articulat[ing] precisely the evidentiary hypothesis by which a fact of consequence may be inferred" to show that

the proffered evidence of subsequent bad acts will be relevant to proving the required elements of the charged crime. *See Kendall*, 766 F.2d at 1436.

Tenth Circuit caselaw also supports a finding that the evidence of Defendant's subsequent bad acts is similar enough to the charged offense to be relevant to prove knowledge and intent in this case. In *United States v. Wilson*, the Tenth Circuit held that a prior conviction for possession of cocaine during a traffic stop "taken alone does little to support an inference that Mr. Wilson either possessed, knew he possessed, or intended to distribute the cocaine found at [a residence]." 107 F.3d 774, 785 (10th Cir. 1997), *abrogated on other grounds in United States v. King*, 632 F.3d 646, 651 n.5 (10th Cir. 2011). Here, however, Defendant's alleged distribution of methamphetamine and subsequent possession of methamphetamine all took place in the same *vehicle* registered under his name and address.

In *Becker*, the court reasoned that the "prior recovery of methamphetamine trafficking paraphernalia from [the defendant's] residence and his prior convictions for conspiracy to possess methamphetamine . . . involve only possession and distribution, not manufacturing, and thus lack a common scheme" to support a manufacturing charge. 230 F.3d at 1232–33. Here, on the other hand, the charged distribution of methamphetamine offense and Defendant's subsequent possession of large quantities of methamphetamine in his vehicle are quite similar, and his alleged use of a cell phone and jail phone calls to coordinate narcotics trafficking are likewise quite similar to his alleged use of the first phone to coordinate the drug buy with the UC. *See also United States v. Ramirez*, 63 F.3d 937, 943 (10th Cir. 1995) ("Each of the offenses for which defendant was charged required the government to prove either knowledge or intent with respect to defendant's possession of the cocaine, its distribution, or his participation in the conspiracy[,]" so testimony that the "defendant previously had been arrested for drug trafficking and found in possession of

eight ounces of cocaine and $43,000 in cash—was probative of defendant's knowledge and intent with respect to the offenses charged.")

iii. The probative value of Defendant's subsequent bad acts is not outweighed by any potential for prejudice.

Finally, under Rule 403, the Court may exclude evidence if its probative value is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403. Evidence may be unfairly prejudicial if it "makes a conviction more likely because it provokes an emotional response in the jury or otherwise tends to affect adversely the jury's attitude toward the defendant *wholly apart* from its judgment as to his guilt or innocence of the crime charged." *Tan*, 254 F.3d at 1211–12 (quotation omitted); *see also United States v. Smith* 534 F.3d 1211, 1219 (10th Cir. 2008).

As discussed above, the Tenth Circuit has held that prior involvement with narcotics is relevant Rule 404(b) evidence demonstrating intent if it is sufficiently similar and close in time to the charged acts. *See Becker*, 230 F.3d at 1232; *see also Conway*, 73 F.3d at 981. The evidence that Defendant possessed large amounts of methamphetamine and other narcotics may indeed elicit a reaction from the jury, but likely no more so than other allegations of involvement in drug trafficking that will already be presented at trial. As such, the admissibility of subsequent drug-related acts that are highly probative of identity, knowledge, and intent to distribute are not outweighed by any potential prejudice their admission may cause. To ensure that Defendant is not unduly prejudiced by the introduction of the Rule 404(b) evidence, however, the Court will instruct the jury to consider this evidence only for the purposes for which it is offered and not to draw from it any general conclusions about Defendant's character or his propensity to commit crimes.

II. The Government's Proffered Rule 609 Evidence

Next the Government has given notice that it intends to introduce evidence of Defendant's three prior felony convictions if he elects to testify at trial. (*See* Doc. 58 at 1.) The Government states that on June 6, 2003, Defendant was convicted in the Western District of Texas on one count of Importation of a Controlled Substance Involving 50 Kilograms or More of a Mixture or Substance Containing a Detectable Amount of Marijuana. (*Id.* at 4.) The Government also asserts that on November 2, 2012, Defendant was convicted in El Paso County District Court of one count of Robbery and on July 8, 2015, he was convicted in El Paso County District Court of one count of Possession of Less Than 1 Gram of a Controlled Substance. (*Id.*)

Pursuant to Federal Rule of Evidence 609, a crime that was punishable by imprisonment for more than one year and occurred less than ten years before the currently charged offense "must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant." Fed. R. Civ. P. 609(a)(1)(b). If more than ten years have passed since the felony conviction, however, evidence of such a conviction is only admissible if the proponent of the evidence gives the adverse party reasonable written notice and "its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect . . . ." Fed. R. Civ. P. 609(b).

In the context of Rule 609(a)(1), the Tenth Circuit considers the following five factors to determine if the probative value of a defendant-witness's prior conviction outweighs its prejudicial effect on the defendant:

> (1) the impeachment value of the defendant's prior crimes; (2) the dates of the convictions and the defendant's subsequent history; (3) the similarity between the past crime and charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the defendant's credibility at trial.

Smalls, 752 F.3d at 1240 (citation omitted).

Defendant has not objected to the introduction of his prior convictions for Robbery and Possession of Less Than 1 Gram of a Controlled Substance. (*See* Doc. 76.) Noting the lack of objection, the Court finds that, if Defendant testifies, his credibility and testimony will be central to trial and his felony convictions are not so similar to the charged offense that the jury might be confused or misled. Thus, if Defendant elects to testify in his own defense, the Government may elicit details of his robbery and 2015 possession felonies. Of course, because defendants stand to be uniquely prejudiced by the introduction of impeachment evidence when they choose to testify in their own defense, in this Circuit "only the prior conviction[s], [their] general nature, and punishment of felony range [are] fair game for testing the defendant's credibility." *United States v. Commanche*, 577 F.3d 1261, 1271 (10th Cir. 2009) (quoting *United States v. Albers*, 93 F.3d 1469 (10th Cir. 1996)).

Defendant does object, however, to the introduction of his 2003 felony conviction for importation of marijuana because the conviction is more than ten years old and thus "generally do[es] not have much probative value." (*See* Doc. 76 at 9 (quoting *United States v. Chapman*, No. CR 14-1065 JB, 2015 WL 4042177, at *12 (D.N.M. June 29, 2015)).) He argues that the introduction of his 2003 conviction as impeachment evidence would be highly prejudicial because it is a drug trafficking offense similar to the charged crime "and would surely invite improper inferences." (*Id.*) The Court finds that a felony offense for importing narcotics is highly probative of Defendant's credibility as a witness, and that while it is a drug trafficking crime, it is an *importation* offense, not a *distribution* offense, and thus remains highly relevant to Defendant's credibility but carries less potential to confuse or mislead the jury. Further, Defendant's 2003 importation offense and the resulting sentence served are currently enumerated in the Superseding Indictment in this case as a sentencing enhancement allegation. (*See* Doc. 48 at 1.) The

Government's proposed jury instructions even include provisions instructing the jury to determine whether Defendant was indeed convicted of the importation offense and whether he was "released from any term of imprisonment for the serious drug felony conviction within 15 years of the date of the commencement of the offense charged in the indictment . . . ." (Doc. 72 at 2–3.) Since the details of the importation offense that Defendant seeks to exclude under Rule 609(b) are currently included in the Superseding Indictment, the Court does not find that the introduction of the same information as impeachment evidence would be significantly prejudicial. Thus, in this case the probative value of the 2003 importation conviction to Defendant's credibility—should he take the stand—substantially outweighs its current potential for prejudice.

However, at the pretrial motion hearing currently set for 8:30 a.m. on Monday, July 8, 2019, the Court will take up the issue of whether Defendant's 2003 conviction for importation of marijuana is properly presented to the jury as part of the superseding indictment, jury instructions, and verdict form. Should the Court find that the inclusion of such information is unduly prejudicial to Defendant, the Court will entertain argument from Defendant to reconsider whether the 2003 felony conviction's probative value as impeachment evidence still substantially outweighs its potential for prejudice.

THEREFORE,

IT IS ORDERED that Defendant Mario Reynoso's Motion in Limine (Doc. 76) is **DENIED**;

IT IS FURTHER ORDERED the Government may introduce evidence of Defendant's subsequent involvement with narcotics as proffered in its Notice of Intent to Introduce Evidence of Bad Acts Under Rule 404(b) (Doc. 44); and

IT IS FURTHER ORDERED that, pending further notice, if Defendant elects to testify at trial, the Government may introduce evidence of Defendant's 2003 conviction for importation of marijuana and other prior convictions as impeachment evidence pursuant to Rule 609 (*see* Doc. 58).

ROBERT C. BRACK
SENIOR U.S. DISTRICT JUDGE

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT
District of New Mexico

UNITED STATES OF AMERICA

V.

MARIO REYNOSO
aka: Mario Hernandez

Judgment in a Criminal Case

Case Number: **2:19CR00137-001RB**
USM Number: **33835-180**
Defendant's Attorney: **Russell Dean Clark (Appointed)**

THE DEFENDANT:

☐ pleaded guilty to count(s) .
☐ pleaded nolo contendere to count(s) which was accepted by the court.
☒ was found guilty on count(s) **Superseding Indictment** after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title and Section	*Nature of Offense*	*Offense Ended*	*Count*
21 U.S.C. Sec. 841(b)(1)(B)	Distribution of 5 Grams and More of Methamphetamine	05/08/2018	

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 .

☐ The defendant has been found not guilty on count(s) .
☐ Count(s) dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

09/01/2020
Date of Imposition of Judgment

/s/ Robert C. Brack
Signature of Judge

Honorable Robert C. Brack
Senior United States District Judge
Name and Title of Judge

09/01/2020
Date

ATTACHMENT 2

DEFENDANT: **MARIO REYNOSO**
CASE NUMBER: **2:19CR00137-001RB**

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: **280 months**.

☒ The court makes the following recommendations to the Bureau of Prisons:

service of sentence at Federal Correctional Institution (FCI) El Reno, El Reno, Oklahoma.
The Court recommends the defendant participate in the Bureau of Prisons 500 hour drug and alcohol treatment program.

☒ The defendant is remanded to the custody of the United States Marshal.
☐ The defendant shall surrender to the United States Marshal for this district:
  ☐ at on .
  ☐ as notified by the United States Marshal.
☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
  ☐ before 2 p.m. on .
  ☐ as notified by the United States Marshal.
  ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to

_____ at _____ with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **MARIO REYNOSO**
CASE NUMBER: **2:19CR00137-001RB**

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of: **10 years** .

MANDATORY CONDITIONS

1. You must not commit another federal, state, or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(Check, if applicable.)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state, local, or tribal sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(Check, if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may, after obtaining Court approval, require you to notify that person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

DEFENDANT: **MARIO REYNOSO**
CASE NUMBER: **2:19CR00137-001RB**

SPECIAL CONDITIONS OF SUPERVISION

You must not use or possess alcohol.

You must not knowingly purchase, possess, distribute, administer, or otherwise use any psychoactive substances (e.g., synthetic cannabinoids, synthetic cathinones, etc.) that impair your physical or mental functioning, whether or not intended for human consumption.

You must not possess, sell, offer for sale, transport, cause to be transported, cause to affect interstate commerce, import, or export any drug paraphernalia, as defined in 21 U.S.C. 863(d).

You must participate in a mental health treatment program and follow the rules and regulations of that program. The probation officer, in consultation with the treatment provider, will supervise your participation in the program. You may be required to pay all, or a portion, of the costs of the program.

You shall waive your right of confidentiality and allow the treatment provider to release treatment records to the probation officer and sign all necessary releases to enable the probation officer to monitor your progress. The probation officer may disclose the presentence report, any previous mental health evaluations and/or other pertinent treatment records to the treatment provider.

You must take all mental health medications that are prescribed by your treating physician. You may be required to pay all, or a portion, of the costs of the program.

You must provide the probation officer access to any requested financial information and authorize the release of any financial information. The probation office may share financial information with the U.S. Attorneys Office.

You must reside in a residential reentry center for a term of (up to) six (6) months. You must follow the rules and regulations of the center.

You must complete one hundred (100) hours hours of community service during your term of supervision . The probation officer will supervise the participation in the program by approving the program (agency, location, frequency of participation, etc.). You must provide written verification of completed hours to the probation officer.

You must meet any legal obligation to support or make payment toward the support of any person, including any dependent child, the co-parent or caretaker of a dependent child, or a spouse or former spouse.

You must participate in an outpatient substance abuse treatment program and follow the rules and regulations of that program. The probation officer will supervise your participation in the program (provider, location, modality, duration, intensity, etc.). You may be required to pay all, or a portion, of the costs of the program.

You shall waive your right of confidentiality and allow the treatment provider to release treatment records to the probation officer and sign all necessary releases to enable the probation officer to monitor your progress. The probation officer may disclose the presentence report, any previous substance abuse evaluations and/or other pertinent treatment records to the treatment provider.

You must submit to substance abuse testing to determine if you have used a prohibited substance. Testing may include urine testing, the wearing of a sweat patch, a remote alcohol testing system, an alcohol monitoring technology program, and/or any form of prohibited substance screening or testing. You must not attempt to obstruct or tamper with the testing methods. You may be required to pay all, or a portion, of the costs of the testing.

You must participate in an educational or vocational services program and follow the rules and regulations of that program. The probation officer will approve the program (agency, location, frequency of participation, etc.) and supervise your level of participation. You may be required to pay all, or a portion, of the costs of the program.

You must submit to a search of your person, property, residence, vehicle, papers, computers (as defined in 18 U.S.C. 1030(e)(1)), other electronic communications or data storage devices or media, or office under your control. The probation officer may conduct a search under this condition only when reasonable suspicion exists, in a reasonable manner and at a reasonable time, for the purpose of detecting alcohol, drugs, weapons, ammunition, or any other illegal contraband . You must inform any residents or occupants that the premises may be subject to a search.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: **MARIO REYNOSO**
CASE NUMBER: **2:19CR00137-001RB**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments.

☐ The Court hereby remits the defendant's Special Penalty Assessment; the fee is waived and no payment is required.

Totals:	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
	$100.00	$	$	$	$

☐ The determination of the restitution is deferred until . An *Amended Judgment in a Criminal Case* will be entered after such determination.
☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☒ In full immediately; or

B ☐ $ due immediately, balance due (see special instructions regarding payment of criminal monetary penalties).

Special instructions regarding the payment of criminal monetary penalties: Criminal monetary penalties are to be made payable by cashier's check, bank or postal money order to the U.S. District Court Clerk, 333 Lomas Blvd. NW, Albuquerque, New Mexico 87102 unless otherwise noted by the court. Payments must include defendant's name, current address, case number and type of payment.

Based on the defendant's lack of financial resources, the Court will not impose a fine or a portion of a fine. However, in accordance with U.S.S.G. 5E1.2(e), the Court has imposed as a special condition that the defendant complete community service and reside at a residential reentry center. The Court concludes the total combined sanction without a fine or alternative sanction, other than the defendant complete community service and reside at a residential reentry center, is sufficiently punitive.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,	§	
	§	
Plaintiff,	§	
	§	
vs.	§	**Case No. 19-CR-137-RB**
	§	
MARIO REYNOSO,	§	
	§	
Defendant.	§	

NOTICE OF APPEAL

Comes now Mario Reynoso, Defendant in the above-entitled case, and hereby appeals his conviction, sentence, and judgment entered on September 1, 2020. This Appeal is taken to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

RUSSELL DEAN CLARK, L.L.C

/s/ R.D. Clark
Russell Dean Clark
Attorney for Defendant
P.O. Box 576
Las Cruces, NM 88004
Phone: (575) 526-9000
Fax: (575) 526-9800

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing pleading was filed electronically through the CM/ECF and notice of filing has been electronically mailed to the U.S. Attorney's Office and all counsel of record, on this 11th day of September, 2020.

R.D. Clark
RUSSELL DEAN CLARK

ATTACHMENT 3

United States v. Mario Reynoso

ATTACHMENT E

Orders of Post-Conviction Relief
by U.S. Court of Appeals for the Tenth Circuit

FILED
United States Court of Appeals
Tenth Circuit

May 16, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MARIO REYNOSO, a/k/a Mario Hernandez,

Defendant - Appellant.

No. 20-2130
(D.C. No. 2:19-CR-00137-RB-1)
(D. N.M.)

ORDER

This matter is before the court on receipt of a letter from defendant-appellant Mario Reynoso in which he requests an extension of time to file a motion to recall the mandate in this case and vacate and reissue this court's judgment affirming his criminal conviction and sentence to allow him an opportunity to file a timely petition for certiorari in the Supreme Court as this court suggested in *United States v. Reynoso*, No. 22-2119, 2023 WL 3017136, at *6 (10th Cir. April 20, 2023).

Upon consideration, the court denies the motion for extension of time as unnecessary. *See* 10th Cir. R. 41.2 ("When a motion to recall the mandate is tendered for filing more than one year after issuance of the mandate, the Clerk shall not accept the motion for filing unless the motion states with specificity why it was not filed sooner. The court will not grant the request unless the movant has established good cause for the delay in filing the motion." (emphasis added)); *see also Reynoso*, 2023 WL 31017136,

at *6 ("[H]aving carefully reviewed Mr. Reynoso's arguments and the evidence he has submitted, we are left to conclude that Mr. Reynoso should file a motion in his criminal proceeding [Appeal No. 20-2130] to request the relief he seeks and suggest that any such motion should receive due consideration."); *Reynoso,* 2023 WL 3101713, at *6 n.8 ("If Mr. Reynoso pursues a motion in his criminal appeal [Appeal No. 20-2130], we recommend he include a copy of [the April 20, 2023 order and judgment in Appeal No. 22-2119] with any such motion.").

The court encourages Mr. Reynoso to use his best efforts to expeditiously file a motion in this appeal to request the relief he seeks.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

U.S. COURT OF APPEALS
2023 JUL 11 PM 1:35

CERTIFICATE OF GOOD FAITH

I, MARIO REYNOSO, a Pro se litigant, currently being housed at FCC Forrest City Correctional Complex certify (state, declare or verify) that this Motion for APPOINTMENT OF COUNSEL is presented to Tenth Circuit Court of Appeals in "good faith" and "not for delay".

The United States Supreme Court has held that CJA failure counsel claims such as the dellimma presented in this motion is remedied through such motion as the one I am currently presenting. This motion comes of a substantial nature and raises an important concern to the public concerning a Federal Prisoner's CJA "right" to timely petition the United States Supreme Court via a Writ of Certiorari. Appellant supports this motion with conclusive sufficient evidence for this court to take action in light of the Criminal Justice Act pursuant to 18 U.S.C. 3006A and in accordance to United States Supreme Court cases Wilkins v. United States, 441 U.S. 468, 470 (1979); Sotelo v. United States, 474 U.S. 806, 807 (1985); Schreiner v. United States, 404 U.S. 67, 68 (1971); Doherty v. United States, 404 U.S. 28 29 (1971); and also United States v. Diaz, No. 20-1269, 2022 WL 1043623 at *1 (10th Cir. April 7, 2022)(unpublished).

Please give this motion due consideration.

Respectfully Requested,

MARIO REYNOSO, Pro se.

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT COURT

MARIO REYNOSO,
Defendant-Appellant,

No. 20-2130
(D.C. No. 2:19-CR-00137-RB-1)

v.

UNITED STATES OF AMERICA,
Plaintiff-Appellee.

Motion For Appointment Of Counsel
Pursuant to 28 U.S.C. 3006A(c)

COMES NOW, MARIO REYNOSO, Pro se, in such styled motion form to humbly request for this United States Tenth Circuit Court of Appeals to appoint him CJA Counsel or instruct CJA Counsel of the record to assist him with filing a "timely" Writ of Certiorari Petition to the United States Supreme Court after this Circuit Court [vacates] only to [re-instate] the Order and Judgment of June 29, 2021 and July 21, 2021, so that Appellant can seek a "timely" review in the United States Supreme Court of this Court's Affirmance Judgment.

In support of this pro se request Appellant shows this Court as follows;

I. SUMMARY OF PROCEEDINGS

In a proceeding giving rise to an earlier direct criminal appeals, the district court sentence Mario Reynoso to 280 months' imprisonment after a jury found him guilty of distribution of five grams or more of methamphetamine. Mr. Reynoso appealed, and a panel of this court

affirmed. Mr. Reynoso's time for filing a Writ of Certiorari to the United States Supreme Court has now passed.

II. NATURE OF ISSUE TO SUPPORT MOTION

Reynoso brings this motion to this court requesting for this court to recall its July 21, 2021, MANDATE, and to vacate the June 29, 2021, AFFIRMANCE JUDGMENT of his criminal direct appeals. On October 16, 2020, Judges Bacharach and Matheson issued an ORDER re-appointing CJA counsel of the record Russell Dean Clark to represent Appellant on his criminal direct appeals proceeding. The ORDER of APPOINTMENT states as follows: "this appointment is effective [nunc pro tunc] to counsel Russell Dean Clark's filed notice of appeal on Mario Reynoso's behalf". On June 29, 2021, this Circuit Court's three judges merits panel [affirmed] Appellant's judgment of conviction and sentences.

On August 19, 2021, CJA counsel of the record Mr. Russell Dean Clark, wrote Appellant a letter regarding this court's affirmination judgment of his criminal direct review. In this letter (which is attached hereto as ATTACHMENT A) appointed CJA counsel stated: "As your case has now been affirmed, my appointment terminates and I no longer represent you." See ATTACHMENT A. The letter did not mention anything about Appellant's "right" to file a petition for Writ of Certiorari in the United States Supreme Court or identify the deadline for him to do so.

Appellant now submits this request for APPOINTMENT OF COUNSEL to present his dilemma of his appointed CJA counsel's failure to inform him of his CJA "right" to file a "timely" petition for a writ of certiorari with the United States Supreme Court after this

Circuit Court issued its [adverse] judgment against him on his Federal Criminal Direct Review Process on July 21, 2021. For that matter appointed CJA counsel of the record failed to do three things required under this Tenth Circuit's Criminal Justice Act Plan: (1) promptly notify Mr. Reynoso of this court's decision affirming the conviction and sentence, (2) move to withdraw from representing Mr. Reynoso, and (3) advise Mr. Reynoso of his "right" to file a pro se petition for a writ of certiorari. CJA counsel's letter to Appellant is incorrect and incomplete. See ATTACHMENT A; also compare CRIMINAL JUSTICE ACT PLAN FOR THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, TENTH CIRCUIT RULES at 196-97 (2021). For these three reasons shown above Appellant argues that he has been [deprived] of his CJA "right" to be informed of and to "timely" petition the United States Supreme Court via a writ of certiorari to seek one last review of this circuit court's adverse judgment in his criminal direct appeals review.

The United States Supreme Court has consistently held that the remedy for an Appellant represented by an CJA attorney who did not follow the writ of certiorari petition provisions in a circuit court's CJA plan is for the Court of Appeals to recall the mandate, vacate and re-issue its judgment, and if appropriate, appoint counsel to assist the appellant in seeking timely review of the circuit court's judgment. See Wilkins v. United States, 441 U.S. 468. 470 (1979); also see Sotelo v. United States, 474 U.S. 806, 807 (1985); Gordon v. United States, 429 U.S 1085,1086 (1977); Terrell v. United States, 419 U.S. 813, 814 (1974); Schreiner v. United States, 404 U.S. 67, 68 (1971); Doherty v. United States, 404 U.S. 28, 29 (1971). Various circuit court of appeals have likewise applied this remedy.

See, e.g., Nnebe v. United States, 543 F.3d 87, 90-92 (2nd Cir. 2008); United States v. Howell, 37 F.3d 1207, 1210 (7th Cir. 1994); United States v. James, 990 F.2d 804, 805 (5th Cir. 1993); United States v. Masters, 976 F.2d 728, 1992 WL 232466, at *3 (4th Cir. 1992)(unpublished); Wilson v. United States, 554 F.2d 893, 894-95 (8th Cir. 1997). And, in at least one instance, this Tenth Circuit Court of Appeals have recalled a mandate and vacated and re-issued a judgment pursuant to Wilkins. See United States v. Diaz, No. 20-1269, 2022 WL 1043623, at *1 (10th Cir. April 7, 2022)(unpublished).

In short this Circuit Court should be willing to accept the ATTACHED "evidence" presented by Appellant as ATTACHMENT A, which is a letter provided to Appellant from his CJA appointed counsel which fails to properly inform Appellant of his CJA "right" pursuant to the Criminal Justice Act Plan, and provide him with the relief that every other failure of this matter has received. It is clearly recognized by the authority of the United States Supreme that the Court of Appelas should make appropriate relief available so that defendants are not disadvantaged by the failures in representation by CJA counsel. See United States v. Joseph, 350 F. App'x 814, 815 (4th Cir. 2009) (unpublished) ("[T]he district court in this case correctly found it was without authority to order an appropriate remedy, such as recalling the mandate and re-issuing this court's opinion.").

Lastly, A three judge panel who although denied Appellant's appeal of a Motion For Appointment of Counsel, recommended that Appellant should re-file this Motion for Appointment of Counsel back to the Clerk of this Circuit Court and ask that this court give his motion due consideration in light of the Criminal Justice

Act of Federal Policy. Appellant has attached a copy of this Tenth Circuit Court's April 20, 2023, ORDER AND JUDGMENT, as ATTACHMENT B, as instructed by the panel who determined Appellant's appeal in this Tenth Circuit Court of Appeals.

Judges Tymkovich, McHugh and Carson, Circuit Judges, found that Appellant did provide evidence that his attorney did not follow the CJA plan adopted by this court, and that case law supports the relief Appellant is now requesting from this circuit's three judge panel who affirmed his criminal direct appeal, for his CJA attorney failing to follow this circuit's CJA plan. See ATTACHMENT B.

Appellant humbly requested for this court to give due consideration to this motion and grant him the relief that he seeks for his CJA appointed attorney's failure to abide by this circuit's CJA plan in light of the Criminal Justice Act of Federal Policy.

REQUESTED RELIEF

Appellant is requesting that this Circuit Court appoint him CJA counsel to assist him with filing a Motion to recall and Vacate this Circuit Court's June 29, 2021, and July 21, 2021, ORDER AND JUDGMENT, and the MANDATE issued on this court's [adverse] judgment of his criminal direct appeals proceedings so that he may be allowed a new time frame to be able to file a "timely" petition for Writ of Certiorari in the United States Supreme Court, or petition this circuit court with a pro se rehearing en banc petition after his CJA counsel moves to withdraw from his representation as this circuit's CJA Plan holds.

Respectfully Submitted,

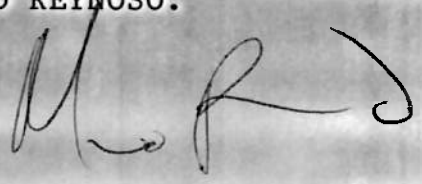
MARIO REYNOSO, Pro se.

CERTIFICATE OF SERVICE

I, Mario Reynoso, certify (state, verify or declare) that I have served one true copy of this motion titled [Appointment of Counsel to Assist Defendant with Filing A Writ of Certiorari Petition] upon the Clerk of the United States Tenth Circuit Court, after being affixed with First-Class pre-paid postage, and it was deposited in the internal mail system here at FCC Forrest City Complex, on this 17th day in May, 2023.

Respectfully Signed,

MARIO REYNOSO.



ATTACHMENT A

LETTER FROM CJA COUNSEL RUSSELL DEAN CLARK

ATTACHMENT A

RUSSELL DEAN CLARK, L.L.C.

Attorney at Law

Licensed in Texas, New Mexico and Arizona

Office Location:
755 S. Telshor, Ste. R-202
Las Cruces, NM 88011

Mailing Address:
P.O. Box 576
Las Cruces, NM 88004

August 19, 2021

Via U.S. Mail

Mario Reynoso
Reg. No. 33835-180
P.O. Box 3000-Medium
Forrest City, AR 72336

RE: Appeal Documents and Termination of Representation

Dear Mario:

I hope this letter finds you doing well. Please pardon the delay. As you are aware, COVID has slowed everything down. There were days, and even weeks, when my office was closed.

Enclosed are your appeal documents. The most important are my brief, the government's response, and the Tenth Circuit opinion affirming your case. That means the appellate court agreed with the government, affirmed Judge Brack's trial rulings, affirmed your conviction and the sentence.

Mario, I truly wish you had listened to, and accepted the advice of, your previous appointed counsel. Before I was appointed in your case, against the advice of your prior attorneys, you rejected all plea offers. I suspect you rejected the plea offers in part on bad advice by the people you were talking to, who were not your appointed counsel. Those people did not help you.

As your case has now been affirmed, my appointment terminates and I no longer represent you.

Good luck and I wish you well.

Sincerely,

Russell Dean Clark

Enclosures as stated
cc: File

Tel: (575) 526-9000 ♦ Fax: (575) 526-9800 ♦ e-mail: russelldeanclark@gmail.com

ATTACHMENT B

ORDER AND JUDGMENT

BEFORE TYMKOVICH, McHUGH, AND CARSON, Circuit Judges.

ATTACHMENT B

FILED
United States Court of Appeals
Tenth Circuit

April 20, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MARIO REYNOSO,

Defendant - Appellant.

No. 22-2119
(D.C. No. 2:19-CR-00137-RB-1)
(D. N.M.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, **McHUGH**, and **CARSON**, Circuit Judges.

In a proceeding giving rise to an earlier appeal, the district court sentenced Mario Reynoso to 280 months' imprisonment after a jury found him guilty of distribution of five grams or more of methamphetamine. Mr. Reynoso appealed, and a panel of this court affirmed. After missing the deadline to file a petition for writ of certiorari in the Supreme Court, Mr. Reynoso asked this court to recall its mandate, vacate and reissue its judgment, and appoint counsel to assist him in filing a timely

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.

petition for writ of certiorari. In making this request, Mr. Reynoso alleged that his court-appointed counsel did not inform him of his right to petition for writ of certiorari or the deadline to do so. Mr. Reynoso supported this allegation with a letter from his counsel. Our clerk of court informed Mr. Reynoso that the court would not take any action on his request.

Subsequently, Mr. Reynoso, proceeding pro se,[1] returned to district court and commenced the proceeding giving rise to this appeal by filing a motion for appointment of counsel to assist him with filing a writ of certiorari petition. The district court denied the motion. On appeal, Mr. Reynoso argues the district court abused its discretion by denying his motion to appoint counsel. Mr. Reynoso also argues this court should recall its mandate and vacate and reissue its judgment affirming his criminal conviction to allow him an opportunity to file a timely petition for certiorari in the Supreme Court. Additionally, Mr. Reynoso has filed motions to proceed in forma pauperis and to file a reply brief out of time.

We affirm the district court's order denying Mr. Reynoso's motion to appoint counsel on the alternative ground that the district court lacked subject matter jurisdiction over the motion. But we grant Mr. Reynoso's motion to proceed in forma pauperis and his motion to file a reply brief out of time.

[1] Because Mr. Reynoso appears pro se, "we liberally construe his filings, but we will not act as his advocate." *James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013).

I. BACKGROUND

In 2020, the district court sentenced Mr. Reynoso to 280 months' imprisonment after a jury found him guilty of distribution of five grams or more of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B). Mr. Reynoso appealed the conviction and sentence. On June 29, 2021, this court affirmed the district court's judgment, and the mandate issued on July 21, 2021. *See United States v. Reynoso*, 861 F. App'x 204, 210 (10th Cir. 2021).

Nearly two months after this court issued its decision, Mr. Reynoso received a letter from his attorney, dated August 19, 2021, informing him of the affirmation of the district court's judgment. In the letter, Mr. Reynoso's attorney stated: "As your case has now been affirmed, my appointment terminates and I no longer represent you." ROA Vol. 2 at 14. The letter did not mention Mr. Reynoso's right to file a petition for writ of certiorari in the Supreme Court or identify the deadline for him to do so.

In February 2022, over two months after the deadline for the timely filing of a petition for writ of certiorari,[2] Mr. Reynoso asked this court to have counsel appointed pursuant to the Criminal Justice Act ("CJA") and to vacate our judgment "only to reinstate the court's June 29, 2021, affirmation Judgment, so that newly

[2] For judgments issued prior to July 19, 2021, the Supreme Court extended the 90-day deadline for filing a petition for a writ of certiorari to 150 days because of the COVID-19 pandemic. *See Miscellaneous Order Rescinding COVID-19 Orders*, 338 F.R.D. 801 (2021). Because we issued our judgment on June 29, 2021, Mr. Reynoso had until November 26, 2021, 150 days after our judgment, to file a petition for writ of certiorari.

appointed CJA counsel can assist Appellant with filing a timely Writ of Certiorari petition to the United States Supreme Court." Miscellaneous correspondence received from Mario Reynoso but not filed, Motion for Appointment of Counsel at 3, *United States v. Reynoso*, No. 20-2130 (10th Cir. Feb. 16, 2022). The same day as receipt of Mr. Reynoso's request, the clerk of court responded to Mr. Reynoso via letter stating: "This case has reached its end in this court. Our rules do not permit this court to appoint new counsel for you at this point in the proceedings. As a result, the court will not file or take any action on your motion." Miscellaneous correspondence received from Mario Reynoso but not filed, Letter in resp. at 1, *United States v. Reynoso*, No. 20-2130 (10th Cir. Feb. 16, 2022).

In April 2022, Mr. Reynoso filed a pro se writ of certiorari petition. Mr. Reynoso explained that he filed his writ of certiorari because there was a breakdown of the judicial process in violation of the CJA and that he was seeking review of the clerk of court's letter refusing to take action on his filing. Pet. for a Writ of Cert., *United States v. Reynoso*, (No. 21-7644), Apr. 13, 2022. The Supreme Court denied the petition. The Supreme Court also denied Mr. Reynoso's petition for rehearing.

Thereafter, Mr. Reynoso submitted another document in this court—this time a request to compel his CJA counsel of record to file a motion to withdraw and a motion for an extension of time so Mr. Reynoso could file any pro se pleadings to further litigate his criminal cause. The clerk of court again responded to Mr. Reynoso, telling him that the "proceedings are at an end" and this court

"therefore cannot accept your motion for filing and no further action will be taken on it." Miscellaneous correspondence received from Mario Reynoso but not filed, letter in resp., *United States v. Reynoso*, No. 20-2130 (10th Cir. Aug. 25, 2022).

Having not obtained relief in this court, Mr. Reynoso returned to district court and filed a motion for appointment of counsel to assist him with filing a petition for a writ of certiorari. The district court denied Mr. Reynoso's motion, explaining that defendants do not have a right to counsel to pursue discretionary review and that "[Mr.] Reynoso's appointed CJA counsel was not required to file a petition for writ of certiorari on [Mr.] Reynoso's behalf, nor was he required to file a motion to withdraw at the conclusion of the appeal." ROA Vol. 2 at 19.

Mr. Reynoso timely filed this appeal from the district court's denial of his motion to appoint counsel. On appeal, Mr. Reynoso argues the district court abused its discretion by denying his motion to appoint counsel. Mr. Reynoso also argues this court should vacate and reissue the judgment affirming his criminal conviction to allow him an opportunity to file a timely petition for certiorari in the Supreme Court. Finally, Mr. Reynoso has filed motions in this court to proceed in forma pauperis and to file a reply brief out of time.

II. DISCUSSION

We start by discussing Mr. Reynoso's appeal from the denial of his motion to appoint counsel. We then address Mr. Reynoso's motion to proceed in forma pauperis. We conclude by discussing Mr. Reynoso's argument that we should vacate

and reissue this court's judgment affirming his criminal conviction to allow him an opportunity to file a timely petition for certiorari in the Supreme Court.

A. Motion to Appoint Counsel

We review a district's court decision whether to appoint counsel under an abuse of discretion standard. *Miller v. Glanz*, 948 F.2d 1562, 1572 (10th Cir. 1991); *see also United States v. Baker*, 586 F. App'x 458, 460 (10th Cir. 2014). To obtain appointment of counsel for the purpose of filing a petition for certiorari, the defendant must demonstrate that counsel could pursue a non-frivolous argument in the petition. *United States v. Seretti*, 754 F.2d 817, 817 (9th Cir. 1985); *see also McCarthy v. Weinberg*, 753 F.2d 836, 838 (10th Cir. 1985) ("The burden is upon the applicant to convince the court that there is sufficient merit to his claim to warrant the appointment of counsel.").

Here, the district court denied Mr. Reynoso's motion to appoint counsel, reasoning that because defendants have no right to counsel to pursue discretionary review, Mr. Reynoso had no right to have counsel file a petition for writ of certiorari on his behalf. We affirm the district court's decision to deny Mr. Reynoso's motion for appointment of counsel. However, we do so on alternative subject matter jurisdiction grounds, without addressing the reasoning offered by the district court.

Federal courts "have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006). Thus, "a court may *sua sponte* raise the question of whether there is subject matter jurisdiction 'at any stage in the

litigation.'" *Image Software, Inc. v. Reynolds & Reynolds Co.*, 459 F.3d 1044, 1048 (10th Cir. 2006) (quoting *Arbaugh*, 546 U.S. at 506).

A federal court lacks subject matter jurisdiction "if a case is moot." *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1109 (10th Cir. 2010). Simply stated, a controversy is moot "when the issues presented are no longer 'live.'" *Schutz v. Thorne*, 415 F.3d 1128, 1138 (10th Cir. 2005) (quoting *Cnty. of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)).

Furthermore, "[f]ederal courts only have subject matter jurisdiction over cases and controversies ripe for adjudication." *United States v. Doe*, 58 F.4th 1148, 1154 (10th Cir. 2023). "A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580–81 (1985)).

Mr. Reynoso's motion to appoint counsel is moot. A panel of this court has affirmed Mr. Reynoso's conviction, the mandate for Mr. Reynoso's criminal proceeding issued, and the deadline for Mr. Reynoso to file a timely petition for certiorari in the Supreme Court passed long before he filed his motion to appoint counsel in the district court. Additionally, Mr. Reynoso has already filed an untimely pro se writ of certiorari petition, which the Supreme Court denied. Thus, under present circumstances, the time for any appointed counsel to file a petition for writ of certiorari passed, no petition for a writ of certiorari can presently be filed, and

Mr. Reynoso's motion for the appointment of counsel to assist in the proceeding identified is moot.[3]

Alternatively, Mr. Reynoso's motion to appoint counsel is unripe because he has no open proceedings for which counsel could be appointed. Further, because this court has not recalled the mandate and vacated and reissued the judgment affirming Mr. Reynoso's conviction and sentence (and there is no certainty that it will do so), no live controversy exists in which counsel could assist. And Mr. Reynoso does not argue that he needs the assistance of counsel to file a motion in his criminal case to request that this court recall the mandate and vacate and reissue the judgment in that case. Rather, Mr. Reynoso has demonstrated he is fully capable of making such a request in this court. Therefore, Mr. Reynoso's motion for the appointment of counsel is alternatively unripe.

Because Mr. Reynoso's motion for appointment of counsel has been moot and unripe since the time he filed it in the district court, we affirm the district court's order denying the motion to appoint counsel.

B. Motion to Proceed In Forma Pauperis

Before us, Mr. Reynoso moves to proceed in forma pauperis. To proceed in forma pauperis on appeal, an appellant must seek review in "good faith . . . judged by

[3] "An exception to the mootness doctrine . . . arises when the case is 'capable of repetition, yet evading review.'" *United States v. Seminole Nation of Okla.*, 321 F.3d 939, 943 (10th Cir. 2002) (quoting *Gannett Co. v. DePasquale*, 443 U.S. 368, 377 (1979)). This exception does not apply here because Mr. Reynoso could have filed his motion to appoint counsel before the deadline to file a petition for certiorari elapsed, thus avoiding a mootness problem in the district court.

an objective standard." *Coppedge v. United States*, 369 U.S. 438, 445 (1962). And "a defendant's good faith . . . [is] demonstrated when he seeks appellate review of any issue not frivolous." *Id.*; *see also DeBardeleben v. Quinlan*, 937 F.2d 502, 505 (10th Cir. 1991) ("[A]n appellant must show . . . the existence of a reasoned, nonfrivolous argument on the law and facts in support of the issues raised on appeal.").

Mr. Reynoso has advanced a reasoned, nonfrivolous argument with respect to both the law and facts in this proceeding. Mr. Reynoso argues that his attorney did not follow the rules laid out in this court's CJA plan. The CJA requires federal courts to "place in operation . . . a plan for furnishing representation for any person financially unable to obtain adequate representation[.]" 18 U.S.C. § 3006A(a). As it relates to filing a petition for writ of certiorari in the Supreme Court, the Tenth Circuit's CJA plan provides that a court-appointed lawyer must either (1) represent the defendant in filing a petition for certiorari if the defendant wishes to seek review and there are reasonable grounds for counsel to assert in the petition or (2) notify the defendant that there are no reasonable grounds for filing a petition, move to withdraw from representing the defendant, promptly notify the defendant of such, and advise the defendant of his or her right to file a pro se petition for certiorari. Criminal Justice Act Plan for the United States Court of Appeals for the Tenth Circuit, Tenth Circuit Rules at 196–97 (2021).[4]

[4] The CJA plan adopted by the Court of Appeals for the Tenth Circuit provides:

Mr. Reynoso's appointed attorney did not follow the Tenth Circuit's CJA plan. Assuming Mr. Reynoso's attorney determined there were no reasonable grounds for filing a petition of certiorari,[5] counsel failed to do three things required under our plan: (1) promptly notify Mr. Reynoso of this court's decision affirming the conviction and sentence, (2) move to withdraw from representing Mr. Reynoso, and (3) advise Mr. Reynoso of his right to file a pro se petition for writ of certiorari.

Instead, fifty-one days after this court affirmed Mr. Reynoso's conviction and sentence, Mr. Reynoso's attorney sent Mr. Reynoso a letter stating: "As your case has now been affirmed, my appointment terminates and I no longer represent you." ROA Vol. 2 at 14. This statement is incorrect and incomplete. Our CJA plan provides definitively that "counsel's appointment does not terminate until . . . counsel informs

---

> Counsel's appointment does not terminate until, if the person loses the appeal, counsel informs the person of his or her right to petition for certiorari in the United States Supreme Court and the deadline for filing the petition. Additionally, counsel must prepare and file the petition if the person requests it and there are reasonable grounds for counsel properly to do so (*see* Rule 10 of the Rules of the Supreme Court of the United States).
>
> If counsel determines that there are no reasonable grounds for filing a petition and declines the person's request to file a petition, counsel shall inform the person and, after entry of judgment, shall move to withdraw under 10th Cir. R. 46.4. Upon entry of an order terminating the appointment, counsel *shall promptly notify* the represented person *and advise the person of his or her right to file a pro se petition for certiorari.*

Criminal Justice Act Plan for the United States Court of Appeals for the Tenth Circuit, Tenth Circuit Rules at 196–97 (2021) (emphasis added).

[5] Counsel's letter never states a determination there were no reasonable grounds for filing a petition for certiorari, but such might be inferred from the tenor of the letter.

the person of his or her right to petition for certiorari in the United States Supreme Court and the deadline for filing the petition." Criminal Justice Act Plan for the United States Court of Appeals for the Tenth Circuit, Tenth Circuit Rules at 196 (2021). The letter sent by Mr. Reynoso's attorney failed to do so. And, in so failing, Mr. Reynoso's counsel left Mr. Reynoso ninety-nine days to exercise his right to file a timely pro se petition for writ of certiorari—a right and a deadline not identified in counsel's letter. Accordingly, the issue raised by Mr. Reynoso on appeal has a non-frivolous factual basis.

Mr. Reynoso has also sought the correct remedy for the shortfalls in counsel's letter. The Supreme Court has consistently held that the remedy for an appellant represented by an attorney who did not follow the writ of certiorari petition provisions in a circuit court CJA plan is for the Court of Appeals to recall the mandate, vacate and reissue its judgment, and, if appropriate, appoint counsel to assist the appellant in seeking timely review of the circuit court's judgment. *Wilkins v. United States*, 441 U.S. 468, 470 (1979); *see also Sotelo v. United States*, 474 U.S. 806, 806 (1985); *Gordon v. United States*, 429 U.S. 1085, 1085 (1977); *Terrell v. United States*, 419 U.S. 813, 813 (1974); *Schreiner v. United States*, 404 U.S. 67, 67 (1971); *Doherty v. United States*, 404 U.S. 28, 29 (1971). Various circuit courts have likewise applied this remedy. *See, e.g.*, *Nnebe v. United States*, 534 F.3d 87, 90–92 (2d Cir. 2008); *United States v. Howell*, 37 F.3d 1207, 1210 (7th Cir. 1994); *United States v. James*, 990 F.2d 804, 805 (5th Cir. 1993); *United States v. Masters*, 976 F.2d 728, 1992 WL 232466, at *3 (4th Cir. 1992) (unpublished); *Wilson v. United*

It is not surprising that Mr. Reynoso did not present this issue to the district court as this court, not the district court, has the authority to grant the relief Mr. Reynoso now seeks.[7] *See Wilkins*, 441 U.S. at 469 ("Had the petitioner presented his dilemma to the Court of Appeals by way of a motion for the appointment of counsel to assist him in seeking review here, the court then could have vacated its judgment affirming the convictions and entered a new one, so that this petitioner . . . could file a timely petition for certiorari."); *Nnebe*, 534 F.3d at 91 ("The Supreme Court in *Wilkins* clearly signaled that the Courts of Appeals should make appropriate relief available so that defendants are not disadvantaged by the failures in representation by CJA counsel."); *see also United States v. Joseph*, 350 F. App'x 814, 815 (4th Cir. 2009) (unpublished) ("[T]he district court in this case correctly found it was without authority to order an appropriate remedy, such as recalling the mandate and reissuing this court's opinion.").

While we recognize counsel may not have complied with this court's CJA plan such that we are sympathetic to Mr. Reynoso's request for us to recall the mandate and vacate and reissue this court's judgment, this appeal is not the appropriate proceeding through which to do so. Rather, that matter is best left to the panel of judges who presided over Mr. Reynoso's direct appeal. Thus, to seek the relief he desires, Mr. Reynoso should file a motion in his previous criminal proceeding

[7] Even if Mr. Reynoso needed to present this matter to the district court to preserve the issue, the Government, by responding to the issue directly on the merits without presenting a waiver argument, has waived the waiver, *see Schell v. Chief Just. & Justs. of Okla. Supreme Ct.*, 11 F.4th 1178, 1192 n.6 (10th Cir. 2021).

(No. 20-2130), requesting the relief from that panel of this court. We acknowledge Mr. Reynoso previously sought this remedy from this court in his criminal proceeding only to have the clerk of court decline to act on his request. Nonetheless, having carefully reviewed Mr. Reynoso's arguments and the evidence he has submitted, we are left to conclude that Mr. Reynoso should file a motion in his criminal proceeding to request the relief he seeks and suggest that any such motion should receive due consideration.[8]

III. CONCLUSION

We AFFIRM the district court's order denying Mr. Reynoso's motion to appoint counsel. We GRANT Mr. Reynoso's motion to proceed in forma pauperis. We also GRANT Mr. Reynoso's motion to file a reply brief out of time.

Entered for the Court

Carolyn B. McHugh
Circuit Judge

[8] If Mr. Reynoso pursues a motion in his criminal appeal, we recommend he include a copy of this order and judgment with any such motion.

Mario Reynoso #33825-180
Federal Correctional Complex
P.O Box 3000
Forrest City, AR 72336

Scanned by
US Marshal

United States Court of Appe
for the Tenth Circuit
Office Of The Clerk
BYRON White United States
1823 STOUT Street
Denver, Colorado, 80257

FILED
United States Court of Appeals
Tenth Circuit

July 17, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MARIO REYNOSO, a/k/a Mario Hernandez,

Defendant - Appellant.

No. 20-2130
(D.C. No. 2:19-CR-00137-RB-1)
(D. N.M.)

ORDER

Before **MATHESON**, **BRISCOE**, and **CARSON**, Circuit Judges.

This matter is before us on Appellant's *Motion for Appointment of Counsel Pursuant to 28 U.S.C. § 3006A(c)*. We issued an Order and Judgment in this matter on June 29, 2021. The mandate issued on July 21, 2021. Appellant did not timely file a petition for writ of certiorari with the United States Supreme Court. He asserts that his court-appointed attorney failed to advise him of his right to petition for a writ of certiorari and the deadline for filing such a petition, and he attaches a letter he received from counsel following issuance of the Order and Judgment in this case, which supports that assertion. Appellant asks us to recall the mandate, vacate and reissue the judgement, and appoint new counsel to assist him in seeking timely review of the judgment in this appeal.

Upon consideration, the court finds that extraordinary circumstances warrant such relief. *See Wilkins v. United States*, 441 U.S. 468, 470 (1979). Accordingly, the motion is granted. The mandate issued on July 21, 2021 is recalled, and the Order and Judgement issued on June 29, 2021 is vacated. Upon receipt of the mandate, the Clerk shall reissue the Order and Judgment in its original form.

In addition, Attorney Kari Schmidt[1] is appointed pursuant to 18 U.S.C. § 3006A to represent Appellant in connection with a petition for writ of certiorari in accordance with Section VII of this court's Criminal Justice Act Plan. *See* Tenth Circuit Rules, Addendum I. **Within 7 days** of the date of this order, Ms. Schmidt shall enter her appearance in this matter.

Entered for the Court
CHRISTOPHER M. WOLPERT, Clerk

by: Jane K. Castro
Chief Deputy Clerk

[1] Kari S. Schmidt
Conlee, Schmidt & Emerson
200 West Douglas Avenue, Suite 300
Wichita, KS 67202
karis@fcse.net
(316) 264-3300