No. 23-7174

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD LEE DAVID BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in admitting two of petitioner's previous convictions into evidence under Federal Rule of Evidence 404(b) to demonstrate knowledge and intent.

2. Whether the court of appeals was required to grant petitioner's motion to expand the record for purposes of supporting claims that he did not raise in the district court.

3. Whether the district court abused its discretion in declining petitioner's proposal for how to instruct the jury on the possession element of his offense.

RELATED PROCEEDINGS

United States District Court (S.D. Iowa):

United States v. Brown, No. 20-cr-222 (June 23, 2022)

United States Court of Appeals (8th Cir.):

United States v. Brown, No. 22-2343 (Dec. 13, 2023)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 88 F.4th 750. The orders of the district court (Pet. App. 18a-28a, 29a-34a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 13, 2023. A petition for rehearing was denied on January 19, 2024 (Pet. App. 42a). The petition for a writ of certiorari was filed on April 4, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Iowa, petitioner was convicted of possessing cocaine base with intent to distribute, in violation of 21 U.S.C. 841(a)(1), 841(b)(1)(C), and 851. Judgment 1. The district court sentenced him to 264 months of imprisonment, to be followed by six years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-17a.

1. While executing a search warrant at a residence in Des Moines, Iowa, law enforcement officers found petitioner inside the residence as he ran from a nearby bedroom. Presentence Investigation Report (PSR) ¶ 8; Gov't C.A. Br. 2 (citing relevant trial testimony). Inside that bedroom, officers found a bag of methamphetamine, a bag of cocaine, and six bags containing a total of approximately 21.13 grams of cocaine base. PSR ¶ 9; Gov't C.A. Br. 2. The drugs were lying on a bed next to a hat, a red jacket, and a cell phone. PSR ¶ 9; Gov't C.A. Br. 2-3. Petitioner had been observed wearing the hat and jacket the day before the execution of the search warrant, and he subsequently admitted that the cell phone was his. PSR ¶¶ 9, 12; Gov't C.A. Br. 2-3. A later search of the cell phone revealed numerous text messages in which petitioner discussed selling drugs to others, including references to prices and amounts. PSR ¶ 17; Gov't C.A. Br. 3-4.

In addition, in a dresser drawer in the bedroom, officers found a digital scale, plastic bags, and drug paraphernalia. PSR

¶ 9; Gov't C.A. Br. 3. They also found $590 in cash in petitioner's pocket. PSR ¶ 8; Gov't C.A. Br. 3.

2. A federal grand jury charged petitioner with possessing cocaine base with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). Indictment 1.

Before trial, the government filed a motion in limine seeking to admit into evidence, pursuant to Federal Rule of Evidence 404(b), two of petitioner's prior convictions: a 2014 Iowa conviction for possessing cocaine base with the intent to deliver it and a 2019 Iowa conviction for possessing cocaine. D. Ct. Doc. 84, at 1-5 (Nov. 15, 2021). While emphasizing that it did not seek to introduce evidence of other prior convictions, see id. at 1, the government explained that evidence of the 2014 and 2019 cocaine-related convictions was relevant to petitioner's "knowledge, motive, and intent" because it countered his anticipated claim that he did not possess, know about, or intend to distribute the cocaine base found in the bedroom. Id. at 2. Petitioner filed a motion in limine seeking to exclude any evidence of his prior convictions. D. Ct. Doc. 83, at 1 (Nov. 15, 2021).

The district court granted the government's motion and denied petitioner's motion. Pet. App. 19a-22a, 24a-25a. The court explained that the two prior convictions that the government sought to introduce were "relevant to [petitioner's] knowledge that he possessed crack cocaine and his intent to distribute cocaine," noting that those "felony convictions closely mirror the crime

charged in the Indictment" and were thus "'sufficiencly similar to support an inference of criminal intent.'" Id. at 20a-21a (citation omitted). And the court observed that "[a]ny prejudicial effect from the introduction of these convictions will be reduced by a limiting instruction directing the jury as to its use of these prior convictions." Id. at 22a.

Petitioner proceeded to trial, during which the district court admitted evidence of the 2014 and 2019 convictions. See Gov't C.A. Br. 4 (citing trial transcript). When the court admitted the prior-conviction evidence and again when delivering the final charge, the court instructed the jury that it could consider the evidence "only for the limited purpose" of deciding whether petitioner had the "intent," "motive," or "knowledge necessary to commit the crime charged in the indictment," or whether petitioner committed the charged acts "by accident or mistake." D. Ct. Doc. 169, at 16 (July 15, 2022); see D. Ct. Doc. 129, at 9 (Feb. 1, 2022). The court further instructed the jury that even if it found that petitioner had "committed similar acts in the past," that was "not evidence that he committed such an act in this case," and reiterated that the jury could "consider the evidence of prior acts only" for the stated purposes. D. Ct. Doc. 169, at 16-17; see D. Ct. Doc. 129, at 9.

During the trial, petitioner requested that the district court instruct the jury that "mere presence in a house where contraband is located is not sufficient to support a conviction

for possession." D. Ct. Doc. 169, at 121. The court denied that request, explaining that the court's proposed final instructions -- which generally followed the circuit's model instructions on possession with intent to distribute and possession more generally -- were already "accurate and allow [petitioner] the opportunity to argue exactly what he is requesting to argue," namely, that "he did not knowingly possess these items." Id. at 128. The court found that petitioner's "requested instruction is otherwise adequately covered in the instructions." Ibid.

The jury found petitioner guilty. D. Ct. Doc. 131, at 1 (Feb. 1, 2022). The district court sentenced petitioner to 264 months of imprisonment, to be followed by six years of supervised release. Judgment 2-3. Petitioner filed a motion for a new trial under Federal Rule of Criminal Procedure 33(a), arguing, inter alia, that he was entitled to a new trial because the district court did not instruct the jury that mere presence in a house where contraband is located is insufficient to support a conviction for possession of a controlled substance. D. Ct. Doc. 143, at 6-7 (Feb. 15, 2022). The district court denied petitioner's motion, finding that the "final jury instructions as a whole conveyed the Government had to prove more than [petitioner's] proximity to the cocaine base to convict him." Pet. App. 34a.

3. The court of appeals affirmed. Pet. App. 1a-17a.

The court of appeals first denied petitioner's request to expand the record on appeal to include "evidence not presented to

the district court." Pet. App. 4a; see id. at 4a-5a. The court of appeals explained that because the documents that petitioner asked the court to consider were "presented for the first time on appeal," they were "not part of the record for [the court's] review." Id. at 4a (citation omitted). In doing so, the court included a "cf." citation to Federal Rule of Appellate Procedure 10(e)(2), as "allowing errors in, and omissions from, the record to be remedied in limited circumstances not present here." Pet. App. 5a.

On the merits, the court of appeals found that the district court did not abuse its discretion in admitting evidence of petitioner's 2014 and 2019 cocaine-related convictions under Rule 404(b). Pet. App. 7a-8a. The court of appeals observed that the convictions were "relevant to [petitioner's] 'state of mind,' and to the elements of the charge brought against him." Ibid. (citation omitted). The court found that the convictions "thus had some bearing on the case, and were not used solely to prove [petitioner's] propensity to commit criminal acts." Id. at 8a (brackets, citation, and internal quotation marks omitted). And the court of appeals additionally found that "the district court's decision to provide a cautionary instruction before the 404(b) evidence was introduced, as well as a final instruction to the same effect, lessened any unduly prejudicial effect of the convictions." Ibid.

Finally, the court of appeals rejected petitioner's argument that the jury should have received an express "mere-presence" instruction. Pet. App. 10a; see id. at 10a-11a. The court observed that the instructions, as given, had provided petitioner the opportunity to argue "that he did not knowingly possess the drugs and [that] his mere presence was insufficient to support conviction." Id. at 10a. And it determined that "[t]aken as a whole, the final instructions adequately conveyed that more than mere presence was required to convict." Id. at 11a.

ARGUMENT

Petitioner raises three issues, none of which warrants this Court's review. First, petitioner contends (Pet. 8-16) that the district court abused its discretion in admitting evidence of two of his prior drug convictions. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or any other court of appeals. Second, petitioner contends (Pet. 16-20) that the court of appeals improperly denied his motion to expand the record. That argument lacks merit, and petitioner acknowledges that his proposed approach to expansion of the record is not followed by any court of appeals. Finally, petitioner contends (Pet. 20-23) that the district court abused its discretion by declining to give petitioner's proposed "mere presence" instruction. The court of appeals correctly rejected that fact-bound claim, which does not

warrant further review. The petition for a writ of certiorari should be denied.

1. a. Under Federal Rule of Evidence 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). Such evidence may be admissible, however, "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).

Consistent with the Rule itself, this Court has recognized that evidence admissible under Rule 404(b) "may be critical to the establishment of the truth as to a disputed issue, especially when that issue involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct." Huddleston v. United States, 485 U.S. 681, 685 (1988). Accordingly, evidence of a defendant's prior crimes may be admitted if it is relevant for a proper, non-propensity purpose, Fed. R. Evid. 401-402; its probative value is not "substantially outweighed" by the potential for undue prejudice, Fed. R. Evid. 403; and, upon request, the district court instructs the jury that it may consider the other-crimes evidence only for the non-propensity purposes for which it was admitted. See Huddleston, 485 U.S. at 691-692.

The courts below correctly applied those principles here. Petitioner disputed, inter alia, both his knowledge of and his intent to distribute the cocaine base that he was charged with knowingly possessing with intent to distribute. See, e.g., D. Ct. Doc. 169, at 158 (argument from defense counsel that the government had not "proven through the evidence that [petitioner] was in possession of those drugs and dealing them" on the date of the search); id. at 153-154 (argument from defense counsel that materials found in dresser of petitioner's bedroom "are used for smoking crack" and that other evidence showed "that individuals who were dealing in this community typically don't use," raising question about whether petitioner was "a drug dealer or a drug user"). In light of that defense, the government offered evidence that petitioner had committed cocaine-related crimes on at least two other occassions within the past ten years -- possessing cocaine in 2019 and possessing cocaine base with the intent to distribute it in 2014. That evidence tended to undermine the possibilities that petitioner either was unaware of the cocaine base in his bedroom or had stored it in small plastic baggies for personal use rather than distribution. See 1 Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence Manual § 7.01[5][d][ii] (2d ed. 2024 Supp.) ("[W]hen a defendant asserts * * * that he or she just happened to be in the vicinity of the item that he or she is charged with illegally possessing, the defense brings into question both the issue of intent and the issue of knowledge, and

the defendant's other acts are admissible [under Rule 404(b)] to prove those issues."). Accordingly, the evidence was properly admitted for reasons other than to prove "a person's character." Fed. R. Evid. 404(b)(1).

The district court's instructions to the jury -- both when it admitted the evidence and again at the close of trial -- ensured that the evidence was not used for an impermissible purpose. The court instructed the jury that it could consider the evidence of petitioner's 2014 and 2019 convictions "only for the limited purpose[s] of" evaluating petitioner's "intent," "motive," and "knowledge." D. Ct. Doc. 129, at 9; see D. Ct. Doc. 169, at 16. The court also expressly directed the jury that "even if you find that [petitioner] may have committed similar acts in the past, this is not evidence that he committed such an act in this case," and that "[y]ou may not convict a person simply because you believe he may have committed similar acts in the past." Ibid. Particularly in light of those cautionary instructions, the court of appeals correctly determined that the district court's admission of evidence about petitioner's 2014 and 2019 convictions was not an abuse of discretion, see Pet. App. 7a-8a.

b. Petitioner asserts that the circuits are divided on "the appropriate test to apply when considering subsequent use of 404(b) evidence in closing argument." Pet. 12 (emphasis omitted); see Pet. 12-16. But the decisions that petitioner cites merely reflect

the application of Rule 404(b) to different factual scenarios, not a genuine conflict about the proper standard for applying the Rule.

In United States v. Richards, 719 F.3d 746 (2013), for example, the Seventh Circuit concluded that the government improperly used Rule 404(b) evidence to argue propensity in its closing where it "relied solely" on that evidence "to support its characterization of [the defendant] as a drug dealer." Id. at 754; see id. at 764-765. Here, in contrast, the government's statement that petitioner was a "drug dealer" reflected evidence of the charged offense that was recovered during the search, including a scale, baggies of cocaine base that had been pre-measured for sale, and $590 in cash. See D. Ct. Doc. 169, at 144-145, 163-164. There is thus no conflict between the Seventh Circuit's decision in Richards and the decision below.

Petitioner's reliance on United States v. Brown, 327 F.3d 867 (9th Cir. 2003), and United States v. Himelwright, 42 F.3d 777 (3d Cir. 1994), is likewise misplaced. In Brown, the Ninth Circuit found that a prosecutor's statements violated Rule 404(b) where the prosecutor "relied heavily on evidence of other bad acts" in closing argument and the court "failed" to give "'appropriate curative instructions'" to the jury. 327 F.3d at 871 (citation omitted). In Himelwright, the Third Circuit concluded that the district court had erred in admitting evidence of the defendant's previous purchase of two firearms under Rule 404(b) in a prosecution for interstate threats where the prosecution "dwelled

upon the guns at great length when presenting its evidence and making its closing argument" to portray the defendant as "violence-prone" and a "danger to society." 42 F.3d at 785-786.

Here, in contrast, the court of appeals determined that the government's use of petitioner's prior convictions was relevant to specific elements of the charged offense and that the district court's limiting instructions had mitigated any prejudice. Pet. App. 7a-8a. Petitioner's fact-bound claims (Pet. 8-9) of error in how the evidence was presented -- which were neither credited nor even addressed by the court of appeals -- do not warrant review in this Court. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); see also Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

c. Petitioner additionally contends (Pet. 13) that the courts of appeals disagree "about the proper test to use in ruling on the admissibility of prior wrongs through Rule 404(b)." In particular, he asserts (Pet. 14) that the First, Second, Third, Fourth, and Seventh Circuits "require[] the court to specifically consider whether the material will be used for a propensity purpose" and therefore "impose[] a heightened obligation" that the Eighth, Ninth, and Eleventh Circuits do not. The decisions petitioner cites, however, do not set out materially different standards.

In accordance with the text of Rule 404(b), the Eighth, Ninth, and Eleventh Circuit decisions cited by petitioner all recognize that evidence of a prior wrong may not be admitted for propensity purposes. See United States v. Williams, 796 F.3d 951, 958 (8th Cir. 2015) (recognizing that evidence cannot be introduced "solely to prove the defendant's propensity to commit criminal acts") (citation omitted), cert. denied, 577 U.S. 1219 (2016); United States v. Vo, 413 F.3d 1010, 1017 (9th Cir.) (recognizing that "[e]vidence of a prior conviction, wrong, or act is inadmissible under Rule 404(b) for the purpose of proving the character of a person or that a defendant acted in conformity with such character"), cert. denied, 546 U.S. 1053 (2005); United States v. Horner, 853 F.3d 1201, 1203 (11th Cir. 2017) (recognizing that evidence "must be relevant to an issue other than the defendant's character"), cert. denied, 583 U.S. 1069 (2018); see also Pet. 10 (acknowledging that "[t]he applicable Eighth Circuit test * * * -- as does the test in most Circuits -- requires demonstrating the evidence is to be used for a permissible purpose").

The decisions petitioner cites from the First, Second, Third, Fourth, and Seventh Circuits, in turn, recognize the flip side of the same coin -- namely, that Rule 404(b) does allow evidence to be admitted for non-propensity purposes. See Pet. 14; United States v. Santana, 342 F.3d 60, 67 (1st Cir. 2003) ("[T]he past incident must have some relevance other than to show the defendant's propensity to commit the crime.") (citation omitted),

cert. denied, 540 U.S. 1206 (2004); United States v. Inserra, 34 F.3d 83, 89 (2d Cir. 1994) (permitting other-acts evidence for a "purpose other than to show a defendant's criminal propensity"); United States v. Davis, 726 F.3d 434, 441 (3d Cir. 2013) (stating that "[p]rior-acts evidence is admissible only if it is * * * offered for a proper purpose under Rule 404(b)(2)"); United States v. Hall, 858 F.3d 254, 260 (4th Cir. 2017) (other-acts evidence may be admitted when the government establishes "a proper, non-propensity purpose"); United States v. Conner, 583 F.3d 1011, 1021 (7th Cir. 2009) (other-acts evidence must be "directed toward establishing a matter in issue other than the defendant's propensity to commit the crime charged"). There is thus no inconsistency between the two sets of cases.

While petitioner argues (Pet. 13-14) that different courts of appeals emphasize different aspects of the Rule 404(b) inquiry or describe that inquiry in slightly different terms, he has not identified any square disagreement about the proper standard. Nor has he shown that any other circuit would necessarily reach a different result from the courts below on the particular facts of his case.

d. In any event, this case would not be an appropriate vehicle in which to address the first question presented because any error committed by the district court was harmless. See Fed. R. Crim. P. 52(a).

At trial, the evidence established that officers found multiple bags of drugs next to petitioner's clothing and cell phone, along with a scale and plastic bags in the same room; a witness testified that she had purchased drugs from petitioner at the residence; and petitioner's cell phone contained numerous text messages discussing drug sales. See Gov't C.A. Br. 2-4 (citing trial court record). In its closing, the government relied on that overwhelming evidence about the charged crime to urge the jury to find petitioner guilty -- not, as petitioner contends (Pet. 8), the 2014 and 2019 convictions. See D. Ct. Doc. 169, at 135-145. Indeed, the government did not refer to the prior convictions at all during the closing. See ibid. And the jury would have found petitioner guilty irrespective of the Rule 404(b) evidence.

2. There is likewise no need for this Court's review of what petitioner describes as an "issue of first impression" -- namely, "the circumstances under which appellate courts should or must sustain a motion to expand the appellate record." Pet. 16 (emphasis omitted); see Pet. 16-20.

As the court of appeals explained, Federal Rule of Appellate Procedure 10 defines the record on appeal and provides for supplementation of that record "in limited circumstances not present here." Pet. App. 5a; see Fed. R. App. P. 10(e). Petitioner suggests (Pet. 18) that courts should also provide for supplementation where a defendant raises a new constitutional claim on appeal concerning "the non-disclosure of the proposed

materials or information" because of ineffective assistance of counsel or prosecutorial misconduct. See Pet. 16-17. But as petitioner acknowledges (Pet. 18 n.13), no court of appeals has adopted his proposed approach. Instead, where a defendant contends that he was unable to raise a claim at trial because of ineffective assistance of counsel or the prosecution's allegedly improper withholding of evidence, "a motion brought under [28 U.S.C.] 2255 is preferable to direct appeal" because it allows for consideration "in the first instance in the district court, the forum best suited to developing the facts necessary to" evaluate the claim, Massaro v. United States, 538 U.S. 500, 504-505 (2003) (ineffective assistance claim); see, e.g., United States v. Bagley, 473 U.S. 667, 671 (1985) (considering Section 2255 motion based on non-disclosure of impeachment evidence).

Contrary to petitioner's suggestion (Pet. 16-17), this Court's decisions in Greer v. United States, 593 U.S. 503 (2021), and Davis v. United States, 589 U.S. 345 (2020) (per curiam), do not require courts of appeals to add evidence to the appellate record that was never presented in the district court. In Greer, the Court stated that "an appellate court conducting plain-error review may consider the entire record" and is not limited to the record of the particular phase of the district-court proceedings "where the error occurred." 593 U.S. at 511 (emphasis omitted). Accordingly, the record for plain-error review there included not only the evidence introduced at trial but also "information

contained in a presentence report" prepared for the district court. Ibid. But the Court did not suggest that the court of appeals was required to consider additional evidence, outside the existing record, that had never been presented to the district court and was proferred for the first time on appeal. And in Davis, the Court simply stated that its cases "do not purport to shield any category of errors from plain-error review." 589 U.S. at 347. The Court did not address the scope of the record that appellate courts must consider in performing that review, let alone hold that appellate courts must admit new evidence never offered below.

3. Finally, the court of appeals correctly determined that the district court did not abuse its discretion by declining to give petitioner's proposed "mere presence" instruction. Pet. App. 10a-11a.

Petitioner contends (Pet. 5) that the district court erred in declining to instruct the jury that his "'mere presence' or association is an insufficient basis to return a guilty verdict." See Pet. 20-23. The court instructed the jury, however, that it could find petitioner guilty only if it found that petitioner "knew that he possessed a controlled substance." Pet. App. 33a (citation omitted). The court also defined "constructive possession" (a form of possession) to include "both the power and the intention at a given time to exercise dominion or control over a thing." Id. at 34a. As the court of appeals observed, the "'unmistakable implication'" of the instruction on constructive possession was

that "'something more than mere presence was required in order to convict.'" Id. at 10a-11a (citation omitted). Given those instructions, the jury could not have been under any misapprehension that it could find petitioner guilty based upon his "mere presence" near a controlled substance.

Petitioner argues (Pet. 20-23) that the court of appeals improperly relied on cases involving differing factual circumstances in rejecting his claim. But petitioner acknowledges (Pet. 22) that "the theory of defense instruction -- like all instructions ultimately given -- must be catered to the specific evidence offered at trial." And here, the court of appeals reviewed the specific circumstances of the case and determined that "[t]aken as a whole, the final instructions adequately conveyed that more than mere presence was required to convict [petitioner]," thereby enabling petitioner to argue his theory of the case. Pet. App. 11a. That factbound determination was correct and does not warrant this Court's review. See Sup. Ct. R. 10; United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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