No. 24-5240

IN THE SUPREME COURT OF THE UNITED STATES

BRADLEY DALE HULL, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record

NICOLE M. ARGENTIERI
Principal Deputy Assistant
Attorney General

NATASHA K. HARNWELL-DAVIS
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether any error in admitting petitioner's text messages about selling heroin and methamphetamine as "inextricably intertwined" evidence was harmless because the texts were admissible under Federal Rule of Evidence 404(b) as evidence that petitioner possessed drugs on a previous occasion with intent to distribute.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (E.D. Wash.):

United States v. Hull, No. 2:20-cr-128 (July 25, 2022)

United States Court of Appeals (9th Cir.):

United States v. Hull, No. 22-30156 (Nov. 24, 2023)

IN THE SUPREME COURT OF THE UNITED STATES

No. 24-5240

BRADLEY DALE HULL, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is not published in the Federal Reporter but is available at 2023 WL 8166777. The opinion of the district court is not published in the Federal Supplement but is available at 2022 WL 2921000.

JURISDICTION

The judgment of the court of appeals was entered on November 24, 2023. A petition for rehearing was denied on May 7, 2024 (Pet. App. 9). The petition for a writ of certiorari was filed on August 1, 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 Eastern District of Washington, petitioner was convicted on two counts of possessing a controlled substance with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B)(i), (b)(1)(A)(viii). Judgment 1. The district court sentenced him to 200 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed in part and reversed and remanded in part. Pet. App. 1-8.

1. In February 2020, during an investigation of petitioner's girlfriend for selling drugs, officers saw her car parked at petitioner's house. C.A. E.R. 103-106, 110, 259, 335. After watching the house for several hours, an officer saw petitioner leave the house with a large plastic bag, put the bag in his girlfriend's car, and go back inside. Id. at 101, 105, 222, 253-257. Petitioner's girlfriend then left the house, sat for a time in the driver's seat of her car, then also returned inside the house. Id. at 259-260. Moments later, petitioner and his girlfriend hurried out to the car together and drove away. Id. at 234, 260-262, 264.

An officer stopped the car after several blocks, pursuant to an outstanding arrest warrant for petitioner's girlfriend. C.A. E.R. 110, 215-216, 226. Later, pursuant to a search warrant, officers searched the bag petitioner had placed in the car. Id. at 113-114. They found approximately 640 grams of a mixture or

substance containing a detectable amount of heroin and 72.6 grams of methamphetamine, along with more than $13,000 cash; they also found a scale in the car's glovebox. Id. at 117, 119-120, 126-130, 137-138, 294, 310-311.

2. A grand jury in the Eastern District of Washington charged petitioner with, inter alia, one count of knowingly possessing with intent to distribute 100 grams or more of a mixture or substance containing a detectable amount of heroin, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B)(i); and one count of knowingly possessing with intent to distribute 50 grams or more of actual (pure) methamphetamine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A)(viii). C.A. E.R. 527-528.

Before trial, the government provided notice pursuant to Federal Rule of Evidence 404(b) of its intent to introduce text messages that petitioner had sent in April and May 2020 about selling heroin and methamphetamine. Pet. App. 4, 25-26; D. Ct. Doc. 163 (Nov. 22, 2021); D. Ct. Doc. 223 (Mar. 4, 2022); see C.A. E.R. 303-309, 313-315, 473-474, 476-477. The government sought to admit the text messages as evidence of petitioner's intent in connection with the charged drug-distribution offenses. C.A. E.R. 59. The district court admitted the text messages on the ground that the texts were evidence of transactions that were "inextricably intertwined" with the charged drug offenses. Pet. App. 12, 24; C.A. E.R. 57-58.

During trial, the government introduced four text message conversations, two of which established petitioner's identity as the sender and two of which discussed selling heroin and methamphetamine in April and May 2020. C.A. E.R. 303-309; see id. at 473-474, 476-477. During the defense case, a defense witness testified that someone else put the drugs in petitioner's girlfriend's car. Id. at 339-344. Petitioner also testified in his own defense and said that he had "never been involved in selling heroin or methamphetamine." Id. at 399. The government subsequently impeached petitioner with a prior conviction for conspiracy to deliver heroin. Id. at 415-419.

At the close of evidence, the district court instructed the jury that the government was required to prove beyond a reasonable doubt that petitioner knowingly possessed the charged heroin and methamphetamine with intent to distribute. C.A. E.R. 422-423, 426-427, 429. During its closing statement, the government argued that petitioner's text messages could be considered "as part" of the jury's analysis "concerning whether the defendant intended to further distribute the drugs" involved in the charged offenses. Id. at 438. The jury found petitioner guilty on both drug counts. Id. at 488-489.

Petitioner moved for a new trial, arguing (among other things) that the district court had erred in admitting the text messages, on the theory that "he did not contest that whoever possessed the drugs certainly had the intent to distribute." Pet. App. 12. The

court denied the motion. Id. at 13. The court rejected petitioner's argument, observing that petitioner never stipulated to intent at trial and that the jury was instructed on "all the necessary elements that the Government had to prove beyond a reasonable doubt." Id. at 12. The court further found that petitioner -- who had "never sought a limiting instruction" -- had not shown that the text messages were "unduly prejudicial." Id. at 12-13.

The district court sentenced petitioner to 200 months of imprisonment, to be followed by five years of supervised release. C.A. E.R. 3-4.

3. In an unpublished memorandum disposition, the court of appeals affirmed in part and reversed and remanded in part. Pet. App. 1-8. While it set aside the sentence because the district court had erred in calculating petitioner's criminal history score, id. at 6-7, it rejected petitioner's other claims, including his claim that his conviction was infirm due to the court's admission of the text messages, see id. at 1-6.

The court of appeals acknowledged that, as the "government concede[d] on appeal," the text messages were "not 'inextricably intertwined' with the counts of conviction," as the district court had deemed them. Pet. App. 4; see id. at 3-4. But the court of appeals found the error was harmless because the text messages were admissible under Federal Rule of Evidence 404(b) as evidence of petitioner's intent in connection with the charged offenses.

Id. at 3-4. The court explained that the government bore the burden of proof to show petitioner's mental state, including his "specific intent to distribute" drugs, and that "[t]his was the purpose for which the government initially proffered the evidence and for which it provided pretrial notice." Id. at 4 nn.3-4. And the court agreed with the district court that petitioner had "not shown that the evidence was unduly prejudicial." Id. at 4-5.

ARGUMENT

Petitioner contends (Pet. 8-26) that the court of appeals erred in rejecting his challenge to the admission of the text messages. But the court correctly recognized that the messages were admissible. Its factbound decision does not conflict with any decision of this Court or another court of appeals, and this case would, in any event, be an unsuitable vehicle to address the question presented. This Court has recently and repeatedly denied petitions for certiorari raising similar issues.[1] It should follow the same course here.

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.

[1] Brown v. United States, 2024 WL 4426723 (Oct. 7, 2024) (No. 23-7174); Jeune v. United States, 144 S. Ct. 576 (2024) (No. 23-5332); Wilson v. United States, 144 S. Ct. 110 (2023) (No. 22-7204); Drew v. United States, 142 S. Ct. 1159 (2022) (No. 21-6704); Perpall v. United States, 142 S. Ct. 562 (2021) (No. 20-8322).

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). Federal Rule of Evidence 403, in turn, provides that a "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." Fed. R. Evid. 403.

"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). For example, "[e]xtrinsic acts evidence 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." Id. at 685. Then, as required by Rule 403, a court must "determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice." Id. at 691; see id. at 688. One factor that may also be "appropriate" is the "availability of other means of proof." Fed. R. Evid. 403 advisory committee note (1975 Amendment); see Fed. R. Evid. 404 advisory committee note (1975 Amendment) ("The determination must be made whether the danger of undue prejudice

outweighs the probative value of the evidence in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403.") (citation omitted).

Here, the court of appeals' admissibility determination comported with Rules 404(b) and 403. The messages were "probative of a material issue other than character," Huddleston, 485 U.S. at 686 -- namely, petitioner's intent to distribute the drugs found in his girlfriend's car, an element of the charged offenses that the government was required to prove beyond a reasonable doubt. Pet. App. 4; see Pet. 26 (acknowledging that the text messages were "offered for a proper purpose under Rule 404(b)"); see, e.g., United States v. Mehrmanesh, 689 F.2d 822, 832 (9th Cir. 1982) (evidence of defendant's other sales of narcotics is relevant under Rule 404(b) to show defendant's intent to distribute narcotics in charged offense). Accordingly, the evidence was properly introduced for reasons other than to prove "a person's character." Fed. R. Evid. 404(b)(1).

Likewise, the lower courts correctly recognized that the probative value of the messages was not "substantially outweighed by [the] potential for unfair prejudice." Huddleston, 485 U.S. at 691; see Pet. App. 4-5; id. at 13. Although the court of appeals did not cite Rule 403 specifically, it agreed with the district court the petitioner had "not shown that the evidence was unduly prejudicial," Pet. App. 4-5, and the district court, in turn,

correctly understood the inquiry to require both that the text messages be "probative of the elements the Government had to prove" and that "no undue prejudice accrued," id. at 12-13.

The lower courts' fact-specific determinations were correct. Petitioner's text messages were highly probative, because petitioner's "defense rested on" testimony that petitioner was not responsible for the drugs in the car. Pet. App. 13. His knowledge and intent with respect to the drugs involved in the charged offenses were thus directly at issue. The jury also heard that petitioner was previously convicted for conspiracy to deliver heroin, C.A. E.R. 415-419 -- evidence that petitioner does not challenge here -- reducing any prejudicial impact of the text messages.

b. Petitioner's contrary arguments lack merit.

Petitioner principally argues (Pet. 24-25) that his intent was not at issue because his counsel "conceded" the intent-to-distribute element of the charged offenses in his opening statement and in cross-examining a witness. Pet. 24-25. That contention lacks merit. Petitioner's intent to distribute the drugs was indeed contested at trial; in any event, his counsel's statements could not have relieved the government of its burden to prove petitioner's intent; and even if petitioner had offered to stipulate to his mental state, the government was free to decline.

This Court has recognized that as a general matter, for evidence to be relevant, "[t]he fact to which the evidence is

directed need not be in dispute." Old Chief v. United States, 519 U.S. 172, 179 (1997) (emphasis added) (quoting Fed. R. Evid. 401, advisory committee note (1975 Amendment)). The government's burden to prove every element of the offense beyond a reasonable doubt is neither eliminated nor lowered when the defendant opts not to rebut the government's evidence on that element at trial. See United States v. Gaudin, 515 U.S. 506, 510 (1995); Estelle v. McGuire, 502 U.S. 62, 69-70 (1991). And by its terms, Rule 404(b) expressly allows the admission of other-act evidence for the purpose of "proving * * * intent," regardless of whether the defendant has explicitly contested the intent element. Fed. R. Evid. 404(b)(2).

In this particular case, however, petitioner's defense at trial did in fact place his knowledge and intent directly at issue. One of the defense witnesses testified that someone else put the drugs in petitioner's girlfriend's car, C.A. E.R. 339-344, and petitioner himself testified that he had "never been involved in selling heroin or methamphetamine," id. at 399. That theory of the defense -- reducing to an assertion that petitioner "just happened to be in the vicinity" of the drugs -- necessarily brought "into question * * * the issue of intent." Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence Manual § 7.01[5][d][ii] (Matthew Bender 2024).

Petitioner points to his counsel's opening statement, in which his attorney recognized that the drugs in the car were

"intended for [] distribution" but argued that petitioner "had nothing to do with it." C.A. E.R. 85. Petitioner also emphasizes his counsel's statement when cross-examining a witness, in which his counsel stated that the heroin and methamphetamine in petitioner's girlfriend's car "[s]eemed bound for distribution." Id. at 183-184. Those statements -- which suggest that the quantity of drugs discovered in the car was consistent with someone's intent to distribute the drugs -- do not eliminate the dispute over whether petitioner intended to distribute the drugs, the fact to which the text messages were directed. In any event, statements made by petitioner's attorney are not admissible evidence on which the government could have relied on to prove an element of the offense, as the jury was instructed here. See id. at 423.

Finally, even if petitioner had in fact offered to stipulate to his intent -- which, unlike his attorney's statements, would have been admissible evidence -- the "accepted rule" is that, except for a defendant's status as a prior convicted felon, "the prosecution is entitled to prove its case free from any defendant's option to stipulate the evidence away." Old Chief, 519 U.S. at 189; see United States v. Tan, 254 F.3d 1204, 1213 (10th Cir. 2001) (collecting cases applying that rule).[2] In short, nothing in the

[2] See, e.g., United States v. Bailey, 840 F.3d 99, 119-120 (3d Cir. 2016), cert. denied, 580 U.S. 1103, 580 U.S. 1137, 580 U.S. 1158, and 580 U.S. 1159 (2017) (defendant's offer to stipulate did not result in unfair prejudice that substantially outweighed probative value of government's proffered evidence

record of this case supports the assertion that the government was not put to its burden to prove petitioner's intent with respect to the drugs that he denied having anything to do with.

2. Petitioner fails to identify a conflict between the decision below and the decision of any other court of appeals that warrants this Court's review. As a threshold matter, the decision below is unpublished and nonprecedential. See Pet. App. 1. And it nowhere even purports to hold, or identify circuit precedent that holds, that the degree to which intent is in dispute is categorically irrelevant to the analysis.

Petitioner errs in asserting (Pet. 13) that the circuits are divided on the "interplay between Rule 403 and Rule 404(b)." All of the courts of appeals follow the same basic approach that this Court's decisions prescribe: "a case-by-case determination" that considers "the probative value of the * * * act to prove present intent," and "weigh[s] that value against the tendency of the evidence to suggest unfairly a propensity to commit similar bad acts," taking into account other available evidence on the relevant

---

because government was entitled to present evidence through testimony); United States v. Queen, 132 F.3d 991, 997 (4th Cir. 1997), cert. denied, 523 U.S. 1101 (1998) (same); United States v. Wright, 866 F.3d 899, 904-905 (8th Cir. 2017), cert. denied, 584 U.S. 992 (2018) (same); United States v. Crowder, 141 F.3d 1202, 1209 (D.C. Cir. 1998) (en banc), cert. denied, 525 U.S. 1149 (1999) and 528 U.S. 1140 (2000) (same).

issue. United States v. Miller, 673 F.3d 688, 697, 699 (7th Cir. 2012).[3]

At most, petitioner has noted some degree of variance in how particular opinions have described the analysis. See Pet. 13-23; compare, e.g., United States v. Jimenez-Chaidez, 96 F.4th 1257, 1266 (9th Cir. 2024) (considering purpose and relevance of evidence under Rule 404(b), then weighing risk of prejudice and probative value under Rule 403), with United States v. Bailey, 840 F.3d 99, 122 (3d Cir. 2016), cert. denied, 580 U.S. 1103, 580 U.S. 1137, 580 U.S. 1158, and 580 U.S. 1159 (2017) (assessing prejudicial effect as part of Rule 404(b) analysis). But petitioner does not explain how any difference in articulation lead to differences in outcome -- let alone why any other circuit's formulation would have resulted in a different outcome on the particular facts of his case.[4]

---

[3] See United States v. Henry, 848 F.3d 1, 8-10 (1st Cir. 2017), cert. denied, 581 U.S. 1022 (2017); United States v. McCallum, 584 F.3d 471, 475-477 (2d Cir. 2009); Queen, 132 F.3d at 993-998; United States v. Kinchen, 729 F.3d 466, 471-473 (5th Cir. 2013); United States v. Hardy, 643 F.3d 143, 150-153 (6th Cir.), cert. denied, 565 U.S. 1063 (2011); United States v. Drew, 9 F.4th 718, 724 (8th Cir. 2021), cert. denied, 142 S. Ct. 1159 (2022); United States v. Silva, 889 F.3d 704, 712-714 (10th Cir. 2018), cert. denied, 139 S. Ct. 1319 (2019); United States v. Colston, 4 F.4th 1179, 1192-1193 (11th Cir. 2021); Crowder, 141 F.3d at 1209-1210.

[4] Several of the decisions that petitioner cites, moreover, are inapposite. United States v. Loughry, 660 F.3d 965, 969 (7th Cir. 2011), addresses Federal Rule of Evidence 414, not Rule 404. Another case, United States v. Bell, 516 F.3d 432 (6th Cir. 2008) has been abrogated. See Hardy, 643 F.3d at 152 ("Bell is inconsistent with prior precedent and is therefore not controlling.").

Petitioner emphasizes (Pet. 14) the First Circuit's approach in Henry v. United States, 848 F.3d 1, 9, cert. denied, 581 U.S. 1022 (2017), as "simple" and "provid[ing] a meaningful test for determining what probative weight to give Rule 404(b) evidence and assessing the amount of unfair prejudice under Rule 403 if the other-act evidence goes to the jury." But in Henry, the court of appeals affirmed "the admission of prior drug dealing by a defendant to prove a present intent to distribute," rejecting the defendant's argument that his prior drug convictions were inadmissible because his "defense centered on possession rather than intent." 848 F.3d at 8, 9.

The First Circuit explained that "[a] defendant's failure to argue lack of knowledge or intent" "does not remove those issues from the case." Henry, 848 F.3d at 9 (citation and internal quotation marks omitted). The court further determined that the district court did not abuse its discretion in determining that Rule 403 did not require exclusion. Id. at 9-10. Petitioner does not explain why he believes his case would have come out differently under the First Circuit's analysis in Henry -- particularly given that petitioner did put his knowledge and intent squarely at issue here. See pp. 9-11, supra.

3. At all events, this case would in any event be a poor vehicle to address the question presented, for multiple reasons.

First, this case is in an interlocutory posture because the court of appeals vacated petitioner's sentence and remanded for

resentencing. Pet. 1 n.1; Pet. App. 8. The interlocutory posture of a case ordinarily "alone furnishe[s] sufficient ground for the denial" of certiorari. Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916); see Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R., 389 U.S. 327, 328 (1967) (per curiam) (observing that a case remanded to the district court "is not yet ripe for review by this Court"); Abbott v. Veasey, 580 U.S. 1104, 1105 (2017) (statement of Roberts, C.J., respecting the denial of certiorari).

Consistent with that general rule, this Court routinely denies interlocutory petitions in criminal cases. See Stephen M. Shapiro et al., Supreme Court Practice 4-55 n.72 (11th ed. 2019). That practice promotes judicial efficiency because, among other things, it enables issues raised at different stages of lower court proceedings to be consolidated into a single petition. See Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 508 n.1 (2001) (per curiam) ("[W]e have authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals.") (citation omitted). Petitioner offers no reason to deviate from that practice here.

Second, any error in this factbound case was harmless. At trial, the evidence established that police officers watched petitioner place distribution-quantities of methamphetamine and heroin in his girlfriend's car. See pp. 2-3, supra. The evidence

also established that the bag in which the drugs were found also contained collectible coins, and that petitioner was a coin collector. C.A. E.R. 130-131, 403. In its closing, the government relied on that evidence about the circumstances of the charged offense to urge the jury to find petitioner guilty, referring only briefly to the challenged text messages. C.A. E.R. 436-442. There is no sound basis for supposing that without those messages, the jury would have acquitted petitioner.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

NICOLE M. ARGENTIERI
Principal Deputy Assistant
Attorney General

NATASHA K. HARNWELL-DAVIS
Attorney

DECEMBER 2024