No. 24-5519

IN THE

Supreme Court of the United States

MATTHEW PEDDICORD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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The question presented is whether evidence of prior bad acts is admissible under Rule 404(b) where its relevance to a proper purpose, such as knowledge or intent, depends on propensity reasoning. Pet. i. As the petition explained at length, that question has deeply divided the courts of appeals. *See* Pet. 11–23 (describing 3–5–3 circuit conflict). Tellingly, the government does not dispute that square and well-developed conflict. Nor does the government dispute that the question is exceptionally important, recurring with enormous frequency and driving the outcome in numerous federal criminal cases. And the government does not defend the rule adopted by the Eleventh Circuit and four other courts of appeals, giving prosecutors free rein to rely on propensity reasoning to establish knowledge or intent from prior bad acts.

Instead, the government rests its opposition entirely on the claim that this case does not "implicate" the use of propensity reasoning. BIO 9, 12–13. But that claim is impossible to reconcile with the Eleventh Circuit's decision, the record at trial, and even the government's own arguments below. The Eleventh Circuit repeatedly used the following propensity reasoning to uphold the admission of petitioner's 23-year old armed-robbery conviction: "the fact that a defendant knowingly possessed a firearm on a previous occasion makes it more likely that he *knowingly* did so this time as well." Pet. App. 7a (quoting *United States v. Jernigan*, 341 F.3d 1273, 1281–82 (11th Cir. 2003)) (brackets, ellipsis, and quotation mark omitted); *see id.* at 8a, 9a. The government never acknowledges—let alone explains away—that core reasoning. Nor does it acknowledge that the government *itself* repeatedly used that same propensity

reasoning at trial and on appeal. The government specifically relied on *Jernigan* and other circuit precedents making it perfectly acceptable to reason that, because petitioner knowingly and unlawfully possessed a gun in Washington state in 1999, it was more likely that he did so knowingly and unlawfully again in Miami in 2022.

Having successfully invoked that propensity reasoning below, the government now ignores it in an effort to evade review. But petitioner's prior conviction had no relevance without propensity reasoning. Indeed, the non-propensity theory that the government now offers contradicts the record and defies common sense. For that reason, petitioner's conviction would not stand in the three circuits that correctly preclude the use of propensity reasoning under Rule 404(b). Accordingly, the Court should grant this petition for a writ of certiorari and reverse the judgment below.

In any event, even if the government could identify some bare non-propensity relevance of petitioner's prior conviction, this case would *still* squarely implicate the question presented. The Eleventh Circuit employed propensity reasoning to find that the prior conviction had "probative value," weighing in favor of admission. But three other circuits would have placed that propensity reasoning on the "prejudice" side of the scale, weighing against admission. So if petitioner were to prevail on the question presented, it would be necessary (at a minimum) to vacate the decision below and remand for the Eleventh Circuit to reassess the admissibility of the prior conviction under the correct legal standard—one that does not permit propensity reasoning.

In short, the Court should grant review to resolve this deep and entrenched circuit conflict on an issue of exceptional importance to the administration of justice.

I. The government does not dispute the basic criteria for review.

The government does not dispute that the question presented has deeply divided the circuits. It does not dispute that the question is frequently recurring and exceptionally important. And it makes no attempt to defend the legality of using propensity reasoning to establish relevance to a proper purpose under Rule 404(b).

A. The government does not dispute that the circuits are divided.

The petition thoroughly documented the deep circuit conflict that exists on the question presented. Specifically, it explained that the Third, Fourth, and Seventh Circuits strictly prohibit the use of propensity reasoning to establish knowledge or intent. *See* Pet. 11–15. The Fifth, Sixth, Eighth, Eleventh, and D.C. Circuits, in contrast, allow prosecutors to rely on propensity reasoning to justify putting prior bad acts evidence before the jury. *See* Pet. 15–19. (And the First, Ninth, and Tenth Circuits inconsistently do both. *See* Pet. 19–22). The government disputes none of that. Indeed, it expressly "assum[es]" that the Third, Fourth, and Seventh Circuits prohibit propensity reasoning. BIO 12. But there is no need to assume; that's the law.

The government's only other response is a puzzling footnote suggesting that any disagreement is limited to firearm cases involving actual rather than constructive possession. BIO 13 n.3. There is a reason why the government relegates this point to a footnote: it has nothing to do with the use of propensity reasoning at all. Rather, it refers to an entirely separate question about when knowledge is "at issue" in the first place, as some circuits have held that knowledge is not at issue where the government proceeds under a theory of actual possession. *See, e.g.*, Pet. 18

n.1 (noting Fifth Circuit precedent); *United States v. Caldwell*, 760 F.3d 267, 278–81 (3d Cir. 2010). Here, though, all agree that the government proceeded under a theory of constructive possession, and that petitioner's knowledge was therefore very much "at issue" in this trial. The question is simply whether the prosecution could seek to persuade the jury of petitioner's knowledge through the use of propensity reasoning.

B. The government does not dispute that the question is important.

That question has not only deeply divided the circuits, but it is also "the single most important issue in contemporary criminal evidence law." Pet. 23 (quoting Professor Imwinkelried, one of this country's top evidence scholars). As the petition explained: Rule 404(b) is the most contested and litigated Rule of Evidence; the propensity issue lies at the heart of Rule 404(b)'s operation and recurs with enormous frequency in criminal cases; and that issue has a monumental practical impact, dictating whether prosecutors can put before juries intensely prejudicial evidence about defendants' past encounters with the criminal justice system. *See* Pet. 23–27.

Again, the government has no response. As with the circuit conflict, there is no denying that the question presented warrants this Court's attention. The government notes that the Court has previously denied review in cases raising related issues. BIO 9 n.2. But that simply confirms that Rule 404(b) issues recur frequently. And while the previous petitions cited by the government presented "related questions" about applying Rule 404(b), they did not directly or carefully set out the conflict on the use of propensity reasoning. Here, in contrast, the conflict has been plainly set out and implicitly acknowledged by the government. It can no longer be overlooked.

The government also asserts that no "further guidance from this Court is necessary." BIO 14. But, as explained, this Court has not provided *any* guidance about the use of propensity reasoning under Rule 404(b), even though this is a bread-and-butter question of criminal evidence law. *See* Pet. 27–28. The Court should provide a uniform answer to that question rather than allow the admissibility of prior bad acts to depend arbitrarily on the particular circuit in which a defendant is tried.

C. The government does not defend propensity reasoning.

On the merits, the petition argued in some detail that the text, structure, and history of Rule 404(b) prohibit the use of propensity reasoning to establish a proper purpose. *See* Pet. 33–38. As Judge Tjoflat has previously explained, the Eleventh Circuit's contrary approach "has turned Rule 404(b) on its head." *United States v. Matthews*, 431 F.3d 1296, 1319 (11th Cir. 2005) (Tjoflat, J., specially concurring).

Once again, the government has no response. Instead, it defends the decision below on the sole ground that there was no abuse of discretion on the "specific facts of this case." BIO 11. But that does not respond to petitioner's argument here. His argument is that the Rule 404(b) analysis below was infected by legal error—the use of propensity reasoning. The government mischaracterizes the question presented as a "fact-specific" one of application. *See* BIO 10. But this petition instead presents a question of law: in determining whether prior bad acts are relevant to a proper purpose, such as knowledge, may courts use propensity reasoning? Petitioner is asking the Court to resolve that pure question of law, not to "provide a dispositive general taxonomy" on how to apply Rule 404(b) to various factual scenarios. BIO 13.

II. This case squarely implicates the question presented.

As with the standard criteria for review above, the government also does not dispute that petitioner fully preserved his argument below. *See* Pet. 28–30; BIO 4–5, 7 n.1. Nor does it argue that any error in admitting the prior conviction was harmless. *See* Pet. 10, 31. Instead, it attempts to evade review by contending that the question presented is not implicated here. But that contention cannot be squared with the Eleventh Circuit's decision, the record at trial, or the government's own arguments below. The government put petitioner behind bars and then secured the affirmance of his conviction by relying on propensity reasoning—reasoning that the Eleventh Circuit permits but the Third, Fourth, and Seventh Circuits forbid. Thus, this case provides an ideal vehicle for this Court to determine which side of that split is correct.

A. The decision below expressly used propensity reasoning.

To start, the Eleventh Circuit's decision plainly rests on propensity reasoning. The government can maintain otherwise only by ignoring central parts of the opinion.

In holding that petitioner's 1999 conviction was properly admitted, the court of appeals emphasized that, under circuit precedent, the "fact that a defendant knowingly possessed a firearm . . . on a previous occasion makes it more likely that he knowingly did so this time as well." Pet. App. 7a (quoting *United States v. Jernigan*, 341 F.3d 1273, 1281–82 (11th Cir. 2003)) (brackets and emphasis omitted). The court also cited its decision in *United States v. Taylor*, 471 F.3d 1176, 1182 (11th Cir. 2005), for the same proposition. *Id*. And to drive home the centrality of the point, it reiterated this reasoning twice more, relying on the same precedents. *See* Pet.

App. 8a ("[T]he prior conviction and the felon-in-possession conviction both involve the knowing use of a firearm. As already discussed, our prior precedent has concluded that such evidence is probative to show a defendant's knowledge.") (citing *Jernigan* and *Taylor*); *id.* at 9a ("His knowing possession was the central question in this case, so the conviction was probative to addressing that question.") (citing *Jernigan*).

That is quintessential propensity reasoning. According to the Eleventh Circuit, petitioner's prior conviction was admissible because his knowing possession of a firearm in the past made it more likely that he knowingly possessed the firearm in the present. But as the Third Circuit has recognized, that sort of reasoning—namely, that "[i]f [the defendant] knowingly possessed firearms in the past, he was more likely to have knowingly possessed the firearm this time"—"is precisely the propensity-based inferential logic that Rule 404(b) forbids." *Caldwell*, 760 F.3d at 282.

Remarkably, the government completely ignores that aspect of the decision below. At no point, either in its factual recitation or in its argument, does the government's brief ever acknowledge that the Eleventh Circuit invoked propensity reasoning and its propensity precedents—not just once but repeatedly—to uphold the admission of the prior conviction. The government acts like that central aspect of the decision below does not exist. This inexplicable omission is fatal to the government's opposition. After all, the government's entire argument is that "the propriety of propensity reasoning is not implicated in this case." BIO 9. That is demonstrably wrong: propensity reasoning was at the very core of the Eleventh Circuit's decision.

B. The government itself expressly used propensity reasoning.

The government's refusal to acknowledge the Eleventh Circuit's invocation of propensity reasoning is particularly egregious because the government itself relied heavily on such reasoning to secure the conviction and then to preserve it on appeal.

1. In its Eleventh Circuit brief, the very first sentence of the government's "summary of the argument" read as follows: "This Court has repeatedly upheld the admission of a prior firearm conviction, under Rule 404(b), to prove a defendant's knowledge that he possessed a firearm again." U.S. C.A. Br. 10 (citing *Jernigan* and *Taylor*). The government reiterated the same point and precedent in the argument section, quoting the key propensity passage from *Jernigan*, citing *Taylor* as well, and emphasizing that, "[t]hough Peddicord disagrees with this precedent, it is binding." *Id.* at 12; *see id.* at 14 ("As noted, this Court has repeatedly held that a defendant's prior conviction for an offense involving the knowing possession of a firearm is probative of his knowledge that he possessed a firearm on another occasion") (citing *Jernigan* and *Taylor*). Having argued repeatedly to the Eleventh Circuit that this "binding" propensity precedent required upholding the admission of petitioner's prior firearm conviction, *id.* at 12, the government cannot now credibly maintain that "the propriety of propensity reasoning is not implicated in this case," BIO 9.

2. The government's submissions to the district court contained more of the same. In its Rule 404(b) notice, the government: quoted the propensity passage from *Jernigan*; cited *Jernigan*, *Taylor*, and other Eleventh Circuit cases to show that "[t]he Eleventh Circuit has reiterated this holding multiple times"; and explained

that "[d]istrict courts regularly admit prior convictions involving knowing possession of firearms in subsequent firearm-related prosecutions—and appellate courts regularly affirm such decisions." Dist. Ct. ECF No. 32 at 5–6, 8. It is no wonder that the district court overruled petitioner's objection and admitted the prior conviction based solely on the precedent cited by the government. Dist. Ct. ECF No. 74 at 233–34 ("given the 11th Circuit authority . . . I am going to overrule your objection").

3. Finally, the prosecution repeatedly employed propensity reasoning in closing argument. It told the jury that it did not "just have to rely on" the fact that petitioner got into his girlfriend's car "to conclude what [petitioner's] intent was. Why? Because we know that he has previously been convicted of armed robbery with the use of a firearm. And the Judge will instruct you that that evidence is something that you can use to determine the defendant's intent in this case." Dist. Ct. ECF No. 75 at 133–34. A few moments later, it again emphasized for the jury that petitioner is "a man, who in the past has not only possessed a firearm, but has used one." *Id.* at 141. And finally, the prosecution made its theme as clear as could be: "[D]oes it make sense that the defendant, a man who we know has previously used a gun in the past . . . didn't know that that gun was in the car?" *Id*. at 147. As with the government's arguments to the court of appeals and the district court, the government's presentation to the jury makes it impossible for the government to now credibly claim that "propensity reasoning is not implicated in this case." BIO 9.

C. The government's non-propensity theory defies common sense.

There is a straightforward reason why the government, the district court, and the Eleventh Circuit all invoked propensity reasoning: petitioner's prior firearm conviction was not otherwise relevant to his knowledge of the firearm in this case.

Ignoring its heavy use of propensity reasoning below, the government now asserts that the prior conviction was relevant "simply to show petitioner's familiarity with guns" and how they "look" and "feel." BIO 12. While the government alluded to this theory below, it invariably did so alongside its propensity theory, not as an independent theory of relevance of the sort the government now offers. And for good reason: absent propensity, that theory simply is not plausible (and, in any event, would be substantially outweighed by the risk of unfair prejudice from informing the jury that petitioner was convicted of armed robbery with a firearm 23 years earlier).

The only dispute at trial was whether petitioner knew about the firearm ultimately found on the driver's seat. The government now claims that it introduced petitioner's armed-robbery conviction "simply to show petitioner's familiarity with guns"—and thus that he would have known what object he was sitting on. BIO 12; *see* BIO 11–12. But that claim cannot be made with a straight face. The fact that petitioner held a firearm back in 1999 does not make it any more likely that he knew, in 2022, that he was sitting on a firearm as opposed to some other object. And the government, for its part, has never tried to explain how using a firearm to commit a robbery 23 years earlier enabled petitioner to sense a firearm with his backside.

In any event, petitioner pre-emptively took this implausible theory off the table before trial even began. In response to the government's Rule 404(b) notice, he expressly disclaimed any lack of familiarity with firearms. He assured the government and the district court that he "will not argue that he is unfamiliar with firearms." Dist. Ct. ECF No. 35 at 6. Although the petition highlighted this disclaimer (at 7, 32), the government revealingly ignores it. But this disclaimer shows that the prosecution knew before trial that petitioner would not claim that he mistook the firearm for some other object. And, in fact, he did not. Rather, he argued only that he did not know there was any object there at all. Why? Because the object was wedged in the crevice of the seat. *See* Pet. C.A. Initial Br. 40–41 (recounting supportive body camera footage). That petitioner was "familiar" with guns had absolutely no bearing on whether the gun was wedged in the crevice and whether he could feel it at all.

That explains why the government, the district court, and the Eleventh Circuit were all forced to employ propensity reasoning to justify the admission of the prior conviction. After all, if the "familiarity theory" of relevance were sufficient, there would have been no reason to resort to propensity reasoning. The Eleventh Circuit could have simply accepted the familiarity theory without mentioning *Jernigan* or its other propensity precedent. But, instead, the court expressly and repeatedly invoked that precedent to hold that petitioner's 1999 conviction was properly admitted here.

D. Even if the prior conviction had some probative value without propensity, that would still not be a basis to deny review.

In any event, the government's familiarity theory is not even relevant at this stage. Contrary to the government's main assumption, that theory has no bearing on

whether this case implicates the question presented. Rather, it affects (at most) the ultimate disposition if the Court were to grant review and rule in petitioner's favor.

Even if the government's familiarity theory somehow had some probative value independent of propensity, the key fact would remain: the Eleventh Circuit expressly and repeatedly employed propensity reasoning to uphold the admission of the prior conviction. Pet. App. 7a, 8a, 9a. As explained, that reasoning formed an indispensable basis of the decision below. As a result, this case tees up the question presented and squarely implicates the circuit conflict. Again, at least three circuits strictly prohibit the very propensity reasoning that the Eleventh Circuit used to affirm the conviction.

The viability of the government's non-propensity theory is relevant, at most, only to whether the Court would vacate and remand rather than reverse outright in the event it ruled in petitioner's favor on the question presented. That is because, even where a court determines that Rule 404(b) evidence has legitimate probative value, it still must "determine whether the probative value of the . . . evidence is substantially outweighed by its potential for unfair prejudice." *Huddleston v. United States*, 485 U.S. 681, 691 (1988) (citing Fed. R. Evid. 404(b), adv. cmte. notes (1972)).

In this case, the Eleventh Circuit's erroneous view about the question presented infected its balancing analysis. Rather than placing propensity-based reasoning on the "prejudice" side of the scale—as the Third, Fourth, and Seventh Circuits would have done—the Eleventh Circuit instead placed it on the "probative value" side of the scale. *See* Pet. App. 8a (explaining that, where "the prior conviction and the felon-in-possession conviction both involve the knowing use of a firearm . . . ,

our prior precedent has concluded that such evidence is probative to show a defendant's knowledge") (citing *Jernigan* and *Taylor*); *id*. at 9a (repeating same).

As a result, were the Court to grant review and hold that propensity reasoning is impermissible, it would be necessary (at the very least) to vacate the judgment below and remand for the court of appeals to conduct any requisite balancing based on a correct understanding of the law. But the proper merits disposition in this Court has no bearing on whether this case implicates the question presented in the first place. As explained, it does. And, as explained, the government does not dispute that this question otherwise satisfies the standard criteria bearing on this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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