No. 25A____

In the Supreme Court of the United States

LUIS PAYANO-PEREZ, *PETITIONER*,

v.

UNITED STATES OF AMERICA, *RESPONDENT*

APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable Samuel A. Alito, Jr., Associate Justice of the Supreme Court of the United States and Circuit Justice for the Third Circuit:

Petitioner-Applicant Luis Payano-Perez respectfully requests a 30-day extension of time to file his petition for a writ of certiorari in this Court to and including July 16, 2025.

1. Timeliness and Jurisdiction

On March 18, 2025, the United States Court of Appeals for the Third Circuit denied a petition for rehearing. Appeal No. 23-2874. Appx. A. On February 19, 2025, a panel of the Third

Circuit, in a non-precedential opinion, had affirmed Mr. Payano-Perez's conviction from Crim. No. 20-526 (D.N.J.). Appx. B.

Mr. Payano-Perez's petition for a writ of certiorari is due on June 16, 2025. *See* 28 U.S.C. § 2101(c); Sup. Ct. R. 13.5. This application is being filed at least ten days before that date. *See* Sup. Ct. R. 13.5, 30.2. This Court's jurisdiction will be invoked under 28 U.S.C. § 1254(1).

2. Opinion Below

The Third Circuit's February 19, 2025, opinion, authored by Judge Chung and joined by Judges Bibas and Roth, is attached as Appendix B. It is not reported in the federal reporter.

3. Reasons for Granting the Extension

This case presents a question of exceptional importance: whether character evidence is routinely admitted against criminal defendants at trial to establish their guilt in violation of Federal Rule of Evidence 404(b). This Court, in *Huddleston v. United States*, 485 U.S. 681 (1988), stated but did not expound upon the proposition that evidence can only be admitted if its relevance is not offered for a propensity purpose. Various circuit courts of appeals, including the Third Circuit, have been clear that the relevance requirement in Rule 404(b) and *Huddleston*

must be applied with "careful precision," *United States v. Caldwell*, 760 F.3d 267, 273 (3d Cir. 2014), that the proponent of 404(b) evidence must explain "how [it] should work in the mind of a juror to establish the fact the [proponent] claims to be trying to prove," *United States v. Repak*, 852 F.3d 230, 244 (3d Cir. 2017), and that "the reasoning should be detailed and on the record," *United States v. Davis*, 726 F.3d 434, 442 (3d Cir. 2013); *accord United States v. Morgan*, 929 F.3d 411, 427-432 (7th Cir. 2019) (requiring proponent to explain how exactly the 404(b) evidence is relevant to that proffered purpose). The detailed reasoning requirement should have been strengthened by the 2020 Amendment to the Federal Rules of Evidence, which now commands prosecutors to "articulate in the [pre-trial] notice the permitted purpose for which the prosecutor intends to offer the evidence *and the reasoning that supports the purpose."* Fed. R. Evid. 404(b)(3)(B) (emphasis added).

Despite strong case law and an improved evidence rule, courts still permissively and routinely admit weakly proffered evidence of uncharged acts that serves to convict criminal defendants based on their character, in violation of Rule 404(b).

The district and circuit courts would benefit from this Court's full attention to the admissibility of uncharged misconduct evidence, which has long been described 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); *see also* Thomas J. Reed, *Admitting the Accused's Criminal History: The Trouble with Rule 404(b)*, 78 Temp. L. Rev. 201, 211 (2005) (offering statistics to show that "[n]o other evidentiary rule comes close to this rule as a breeder of issues for appeals").

This case is also an ideal vehicle to address the issue because the wrongful admission of prior uncharged acts caused Mr. Payano-Perez's wrongful conviction. For delivering a single, closed package at a rest stop in New Jersey in November 2018, Mr. Payano-Perez was convicted of possessing with intent to distribute less than one kilogram of heroin. The only dispute was whether he knew that he was delivering a package containing drugs. The government's evidence at trial consisted of the

physical drugs, law enforcement observation, telephonic recordings, text messages, the testimony from a career confidential informant, and an expert on drug trafficking. But none of the evidence directly showed Mr. Payano-Perez's knowledge. Moreover, the recorded calls and text messages were vague, and the government's main witness was not credible.

To fill the gaps, the government relied on evidence of uncharged acts. It introduced the testimony of a law enforcement expert who, *inter alia*, analyzed a series of text messages between Mr. Payano-Perez and a person unrelated to the instant case. The government used an expert to testify about methods, manners, and means of drug trafficking, and the use of cellular phones in drug trafficking, including drug codes and terminology. According to that expert, Mr. Payano-Perez used coded messages to engage in small-scale narcotics sales in New York City two weeks before the instant offense. Without this expert testimony, the government could not prove beyond a reasonable doubt that Mr. Payano-Perez knew that the package he delivered contained drugs. But the past text messages evidence could only show knowledge about the contents of the package if the jury accepted

several obvious propensity inferences. That is, the government argued if Mr. Payano-Perez engaged in drug dealing before, he was more likely to have had knowledge of the nature and quantity of the package of heroin he was delivering, and also the intent and plan to distribute it. In its closing argument, the government made explicit its propensity reasoning- it called Mr. Payano-Perez "a great cyclist" (which even the government admits was an exaggeration, *see* Gov't Resp. Br. at 32 n.5) who, two weeks later, did not know his bicycle parts.

Over pre-trial and mid-trial objections, including to the closing argument, the evidence was improperly admitted, improperly argued, and then these errors were affirmed on appeal. These consistent challenges have clearly preserved the issue for further review by this Court. *See* Appx. B.

Undersigned counsel is an Assistant Federal Public Defender who represented Mr. Payano-Perez on direct appeal under the Criminal Justice Act, 18 U.S.C. § 3006A et. seq. Counsel respectfully requests a 30-day extension of the certiorari deadline because of other upcoming district court and appellate deadlines including: (1) an opening brief in *Michael Romano v. Warden,*

FCI Fairton, Appeal No. 25-1876 (3d Cir.), due June 23, 2025, which will require expedited briefing if granted; and (2) motions for sentence reduction under 18 U.S.C. § 3582(c)(1)(A), including in *United States v. Malik Lowery*, Crim. No. 12-289 (D.N.J.), currently due June 30, 2025; *United States v. Quiana Welch*, Crim. No. 19-471 (D.N.J.), currently briefing on an expedited basis; and *United States v. Arthur Seale*, Crim. No. 92-372 (D.N.J.), currently drafting.

In addition, in the last 90 days, counsel completed substantial work in the District Court, Third Circuit, and before this Court, including: (1) a motion and reply brief in support of bail, in *United States v. Marquis Smalls*, Appeal No. 25-1383 (3d Cir.), filed March 14 and April 28, 2025; (2) a reply in support of certiorari in *Seale v. United States*, S. Ct. Nos. 23-1089 and 24-594, filed April 23, 2025; (3) planning every aspect of the District of New Jersey's Federal Criminal Law Symposium, which was held on May 8, 2025, including preparing sample materials and a sample sentencing memorandum; (4) writing substantial parts of sentencing memoranda in *United States v. Victoria Crosby*, Crim. No. 23-941 (D.N.J.), filed April 24, 2025; and *United States v.*

Luquay Zahir, Crim. No. 25-018 (D.N.J.), filed on May 13, 2025; (5) filing a consent motion for sentence reduction in *United States v. Tacques Hall*, Crim. No. 19-471 (D.N.J.), filed May 16, 2025; and (6) filing a motion and reply in support of a modification of supervision in *United States v. Jeramie Harris*, Crim. No. 19-470 (D.N.J.), filed on April 8 and April 23, 2025.

Counsel accordingly believes there is good cause for the requested extension, as required by Supreme Court Rule 13.5.

For these reasons, Petitioner-Applicant Luis Payano-Perez respectfully requests that an order be entered extending his time to petition for certiorari in the above-captioned case to and including July 16, 2025.

Respectfully submitted,

s/ Alison Brill

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