No. _____

IN THE
Supreme Court of the United States

LUIS PAYANO-PEREZ,

Petitioner,

v.

UNITED STATES,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

ALISON BRILL
Assistant Federal Public Defender
Office of the Federal Public Defender, District of New Jersey
800 Cooper Street, Suite 350
Camden, New Jersey 08102
(609) 489-7457
alison_brill@fd.org

QUESTION PRESENTED

1. Whether a trial court, in admitting evidence under Federal Rule of Evidence 404(b), must explicitly articulate the "chain of inferences" it relied upon in concluding that the evidence was offered for a proper purpose and had no link to a forbidden propensity purpose?

PARTIES TO THE PROCEEDING

Petitioner is Luis Payano-Perez, an inmate at FCI Allenwood Low, a Federal Correctional Institution in Allenwood, Pennsylvnia.

Respondent is the United States of America.

RELATED PROCEEDINGS

United States v. Payano-Perez, Crim. No. 20-526 (D.N.J.)

United States v. Payano-Perez, Appeal No. 23-2874 (3d Cir.)

TABLE OF CONTENTS

QUESTION PRESENTED……i

PARTIES TO THE PROCEEDING……ii

RELATED PROCEEDINGS……ii

TABLE OF CONTENTS……iii

TABLE OF AUTHORITIES……iv

PETITION FOR A WRIT OF CERTIORARI……1

INTRODUCTION……1

OPINIONS BELOW……4

JURISDICTION……4

STATUTORY PROVISION INVOLVED……5

STATEMENT OF THE CASE……6

A. Trial Proceedings Below……6

B. Appeal of the 404(b) ruling and decision……8

REASONS FOR GRANTING THE PETITION

A. Decisional law varies and courts need clear instruction to protect defendants from wrongful convictions……9

B. This case is a good vehicle to prevent wrongful convictions……12

CONCLUSION……13

TABLE OF AUTHORITIES

Cases

Huddleston v. United States, 485 U.S. 681 (1988)……1-2, 9

Old Chief v. United States, 519 U.S. 172 (1997)……12

United States v. Baker, 655 F.3d 677 (7th Cir. 2011)……11

United States v. Bowie, 232 F.3d 923 (D.C. Cir. 2000)……11

United States v. Bradley, 5 F.3d 1317 (9th Cir. 1993)……12

United States v. Caldwell, 760 F.3d 267 (3d Cir. 2014)……2, 8-9, 11

United States v. Commanche, 577 F.3d 1261 (10th Cir. 2009)……3

United States v. Curtin, 489 F.3d 935 (9th Cir. 2007)……11

United States v. Davis, 726 F.3d 434 (3d Cir. 2013)……9

United States v. Hall, 858 F.3d 254 (4th Cir. 2017)……2

United States v. Matthews, 431 F.3d 1296 (11th Cir. 2005)……2-3

United States v. McElmurry, 776 F.3d 1061 (9th Cir. 2015)……2

United States v. Morgan, 929 F.3d 411 (7th Cir. 2019)……2, 9-10

United States v. Repak, 852 F.3d 230 (3d Cir. 2017)……2, 9

United States v. Sampson, 980 F.2d 883 (3d Cir. 1992)……3

United States v. Varoudakis, 233 F.3d 113 (1st Cir. 2000)……3

Statutes

21 U.S.C. § 841……6

28 U.S.C. § 1254(1)……4

Rules

Federal Rule of Evidence 403……6, 8

Federal Rule of Evidence 404(b)……*passim*

Supreme Court Rule 10……9

Miscellaneous

Hillel J. Bavli, *Correcting Federal Rule of Evidence 404 to Clarify the Inadmissibility of Character Evidence*, 92 Fordham L. Rev. 2441 (2024)……11

Daniel J. Capra & Liesa L. Richter, *Character Assassination: Amending Federal Rule Evidence 404(b) to Protect Criminal Defendants*, 118 Colum. L. Rev. 769 (2018)……1

Edward J. Imwinkelried, *The Second Coming of Res Gestae: A Procedural Approach to Untangling the "Inextricably Intertwined" Theory for Admitting Evidence of an Accused's Uncharged Misconduct*, 59 Cath. U. L. Rev. 719 (2010)……1

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 (1990)……10

Thomas J. Reed, *Admitting the Accused's Criminal History: The Trouble with Rule 404(b)*, 78 Temp. L. Rev. 201 (2005) ……10

Kevin A. Smith, Note, *Psychology, Factfinding, and Entrapment*, 103 Mich. L. Rev. 759 (2005)……12

PETITION FOR A WRIT OF CERTIORARI

Petitioner Luis Payano-Perez respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

INTRODUCTION

"Fundamental to the adversary system is the principle that a person should be convicted for what she has done and not for who she is." Daniel J. Capra & Liesa L. Richter, *Character Assassination: Amending Federal Rule Evidence 404(b) to Protect Criminal Defendants*, 118 Colum. L. Rev. 769, 776 (2018). In service of this principle, courts historically barred the introduction of evidence of previous misconduct at criminal trials. Edward J. Imwinkelried, *The Second Coming of Res Gestae: A Procedural Approach to Untangling the "Inextricably Intertwined" Theory for Admitting Evidence of an Accused's Uncharged Misconduct*, 59 Cath. U. L. Rev. 719, 720 (2010). That common law principle was codified at Federal Rule of Evidence 404(b). But courts have increasingly treated Rule 404(b) as a permissive rule, routinely admitting prior-bad-acts evidence with little meaningful scrutiny. The practice cries out for intervention by this Court.

Huddleston v. United States, 485 U.S. 681 (1988) has long been cited as setting forth a rigorous four-step analysis for when other acts evidence can be admitted for a non-character purpose, under Rule 404(b). But *Huddleston* was a case about the procedural requirements for admitting conditionally relevant evidence under Federal Rule of Evidence 104(b). To that end, this Court found that a district court need not "itself make a preliminary finding that the Government has proved the 'other act' by a preponderance of the evidence before it

submits the evidence to the jury." *Id.* at 683. *Huddleston* did not speak about the substantive requirement for admitting other acts evidence for a non-character purpose, and its four-part test to avoid trials by character, which has loomed so large for decades, was simply mentioned in dictum.

The second part of the four-part test, how the proposed evidence is relevant to the identified non-propensity purpose, is an issue that demands this Court's attention. In some cases, courts have articulated this relevance inquiry as requiring a proponent to *explain* how the evidence "fits into a chain of inferences–a chain that connects the evidence to a proper purpose," no link of which can be the inference that because the defendant committed the prior bad act, he is more likely to have committed this one. *United States v. Caldwell*, 760 F.3d 267, 277 (3d Cir. 2014).

The Third, Fourth, and Seventh Circuits require that proponents carefully articulate a propensity-free chain of inferences between what the government seeks to admit and what the government seeks to establish. *See United States v. Morgan*, 929 F.3d 411, 427-32 (7th Cir. 2019) (requiring proponent to explain how exactly the evidence is relevant to that purpose); *United States v. Hall*, 858 F.3d 254, 277 (4th Cir. 2017) (explaining "under Rule 404(b), evidence of a defendant's prior bad acts is generally inadmissible" unless the government can "present a propensity-free chain of inferences" in support of the purpose for which the evidence is offered); *see also United States v. Repak*, 852 F.3d 230, 244 (3d Cir. 2017). By contrast, the Ninth and Eleventh Circuits justify a permissive approach that is inconsistent with the Rule. *United States v. McElmurry*, 776 F.3d 1061, 1067 (9th Cir. 2015) (stating that "Rule 404(b)(2) functions as an exception to [Rule] 404(b)(1)"); *United States v. Matthews*,

431 F.3d 1296, 1311 (11th Cir. 2005) (confusingly interpreting Rule 404(b)(2)'s enumerated purposes as involving a list of purposes that are non-propensity by definition).

This requirement to articulate the chain of inferences was strengthened by a 2020 amendment to the Federal Rules of Evidence so that prosecutors now must "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. Crim. P. 404(b)(3)(B) (emphasis added).

However, despite alleged protections against over-use, the use of bad character evidence has become a staple, almost a given, in most criminal trials across this country. Judges are well aware of the government's improper urge to admit character evidence. *United States v. Sampson*, 980 F.2d 883, 886 (3d Cir. 1992) (suspecting government's motive "is often mixed between an urge to show some other consequential fact as well as to impugn the defendant's character"); *United States v. Commanche*, 577 F.3d 1261, 1269 (10th Cir. 2009) (explaining that prosecutors "actual intent" in urging admission of 404(b) evidence "is often to administer a powerful dose of "strong [other crimes] medicine" to the jury); *United States v. Varoudakis*, 233 F.3d 113, 125 (1st Cir. 2000) (describing how "the prosecution too often pushes the limits of admissibility of this evidence, knowing its propensity power . . .").

The permissive and routine manner in which Rule 404(b) evidence is often proffered and admitted flies in the face of the Rule against propensity evidence and invites an exercise of this Court's supervisory power to course correct. This case is a good vehicle to resolve the problems with courts' application of Rule 404(b) because the other acts evidence turned the case and was admitted despite the

Third Circuit's robust case law and recent complementary amendments to the Federal Rules.

OPINIONS BELOW

On March 18, 2025, the United States Court of Appeals for the Third Circuit denied a petition for rehearing. Appeal No. 23-2874. (Pet. App. 1a-2a). 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.). (Pet. App. 3a-10a).

JURISDICTION

The Court of Appeals entered its judgment on February 19, 2025, and denied rehearing on March 18, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Federal Rule of Evidence 404(b), last amended in 2020, provides:

> (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.
>
> (3) Notice in a Criminal Case. In a criminal case, the prosecutor must:
>
> (A) provide reasonable notice of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it;
>
> (B) articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and
>
> (C) do so in writing before trial--or in any form during trial if the court, for good cause, excuses lack of pretrial notice.

STATEMENT OF THE CASE

A. Trial Proceedings Below

Petitioner Luis Payano-Perez is currently an inmate at the Federal Correctional Institution at Allenwood, in Allenwood, Pennsylvania. In November 2018, he was arrested while delivering a single closed package to a confidential informant at a rest stop off a New Jersey highway. He was charged with possession with intent to distribute 100 or more grams of heroin, 21 U.S.C. §§ 841(a)(1), (b)(1)(B) and proceeded to trial.

In a cursory pre-trial notice of the evidence, the government moved to present evidence that Mr. Payano-Perez had allegedly engaged in prior drug transactions. The evidence included text message threads and proposed expert testimony to explain that the messages related to drug transactions. The government argued that the evidence was admissible to help establish Mr. Payano-Perez knew he was engaging in a drug transaction on November 8, 2018. Mr. Payano-Perez opposed the admission of this evidence under Federal Rules of Evidence 404(b) and 403. The District Court ruled that one text message thread from two weeks before the instant offense occurred was admissible under Federal Rule of Evidence 404(b) to show lack of mistake and intent.

The government's evidence at trial consisted of the seized 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 Rule 404(b) evidence. 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. Mr. Payano-Perez had no criminal history and had never been charged with any offense, so the government required 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, these coded messages indicated Mr. Payano-Perez engaged in small-scale narcotics sales in New York City two weeks before the instant offense. Interspersed in the expert's explanation about the uncharged conduct was expert testimony about the charged conduct.

The government could not prove Mr. Payano-Perez's knowledge without this testimony. But the purported evidence could only show knowledge 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 then overemphasized what the text message chain showed about these prior acts: instead of a small transaction suggesting knowledge of bigger things, the government analogized the prior small drug sales to bicycle parts and called Mr. Payano-Perez a "great cyclist" who then absurdly claimed two weeks later to know nothing of bicycle parts. This argument laid bare the government's improper purpose—it was now explicitly arguing propensity to the jury. Counsel objected to the pure propensity reasoning the government injected into the trial, and into that evidence. The District Court gave another curative instruction but denied a mistrial.

After extensive deliberation, during which time the jury asked to re-hear the expert's evaluation of the "drug talk

from the exhibits where Mr. Payano-Perez was speaking," the jury returned a guilty verdict.

B. Appeal of the 404(b) ruling and decision

On appeal, Mr. Payano-Perez argued, as he had below, that the District Court erred in admitting text messages of conversations to establish he had engaged in small-scale drug transactions to prove his knowledge of the instant offense, and that this error was not harmless. He argued that the District Court failed to require the government to articulate a chain of inferences without the forbidden propensity inference: once a drug dealer, always a drug dealer.

The panel (Bibas, Chung, and Roth, JJ.), in a non-precedential opinion authored by Judge Chung, determined that the District Court did not violate Federal Rules of Evidence 404(b) or 403 by admitting one text message thread reflecting prior uncharged conduct of small-scale narcotics trafficking. The panel wrote:

> Here, the Government "identifie[d] a non-propensity purpose that is 'at issue' in the case" and "explain[ed] how the evidence [wa]s relevant to that purpose," *Caldwell*, 760 F.3d at 276, by explaining in its motion that the evidence was relevant to negating Payano-Perez's defense that he did not know the package in his trunk contained heroin. App. 32. The Government then articulated the requisite "chain of inferences," id. at 277, for the evidence it proffered, noting that "[h]aving negotiated quantities of narcotics sales as reflected by the eleven text threads, Payano-Perez is certainly more likely to have had knowledge of the nature and quantity of the heroin in the bed of the Toyota SUV, not

> to mention the intent and plan to distribute that particular quantity of narcotic to [the confidential informant]." App. 33, 40. This chain "connect[ed] the evidence to a proper purpose, no link of which [wa]s a forbidden propensity inference." *Id*. (internal quotation omitted).

Pet. App. 7a-8a. Payano-Perez moved for rehearing and that application was denied. Pet. App. 1a-2a.

REASONS FOR GRANTING THE PETITION

A. Decisional law varies and courts need clear instruction to protect defendants from wrongful conviction

This case presents a question of exceptional importance, *see* Supreme Court Rule 10: whether character evidence should continue to be 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 some panels of 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, 243 (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, 427-32 (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 and poorly explained 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) ("In some jurisdictions, errors in the introduction of uncharged misconduct are the most frequent basis for reversal in criminal cases."); *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"). That 404(b) challenges dominate published opinions and are common grounds for appeal and reversal is significant and suggests review by the Court is due.

But the problem here is more than numerical: the improper admission of other acts evidence goes to the very heart of liberty and what is essential to a fair criminal trial.

The introduction of evidence of prior convictions or other past bad acts "causes the odds of conviction to skyrocket, almost guaranteeing conviction." Hillel J. Bavli, *Correcting Federal Rule of Evidence 404 to Clarify the Inadmissibility of Character Evidence*, 92 Fordham L. Rev. 2441, 2452 (2024) (citations omitted).

Decisional law is inconsistent, with some Circuits setting forth clear instructions to limit admission of other acts evidence and others setting a standard for maximum admissibility. Indeed, Circuit Courts cannot even agree whether Rule 404(b) is a rule of exclusion or inclusion. *Compare Caldwell*, 760 F.3d at 276 ("Rule 404(b) is a rule of general exclusion…"); *United States v. Baker*, 655 F.3d 677, 681 (7th Cir. 2011) ("Rule 404(b) is a rule of exclusion."), *with United States v. Curtin*, 489 F.3d 935, 944 (9th Cir. 2007) ("Rule 404(b) is a rule of inclusion—not exclusion …"); *United States v. Bowie*, 232 F.3d 923, 929 (D.C. Cir. 2000) ("Rule 404(b) is a rule of inclusion rather than exclusion."). Regardless of the Circuit, though, prosecutors often offer and courts often accept a two-link chain that does nothing to establish relevance: they offer the proffered non-propensity purpose and their ultimate conclusion. Indeed, the Third Circuit in this case affirmed the introduction of Rule 404(b) evidence without requiring the government to provide any reasoning that supported a non-propensity purpose for admitting the evidence.

The requirement that the government detail its reasoning before admitting prejudicial evidence is worth strengthening. Foremost, abiding by the admissibility requirements will constrain the government from straying into forbidden propensity territory, as it did here in its summation. Laying out the non-propensity *reasoning* is also important to provide the jury a roadmap to permissibly review the evidence, lest it fall back on the "fundamental attribution error" of overestimating

character and underestimating "situational factors." *See* Kevin A. Smith, Note, *Psychology, Factfinding, and Entrapment*, 103 Mich. L. Rev. 759, 766 (2005); *see also Old Chief v. United States*, 519 U.S. 172, 181 (1997) (explaining evidence of prior convictions might inspire the jury to dole out a "preventive conviction even if [the defendant] should happen to be innocent momentarily").

B. This case is a good vehicle to prevent wrongful convictions

The only issue in this case was whether Mr. Payano-Perez knew the package he delivered contained drugs. And the government could not establish his knowledge beyond a reasonable doubt without this other acts evidence. Because Mr. Payano-Perez had no prior convictions, the government's 404(b) case required an expert and significant analysis of the uncharged act: there could be no proof by a sanitized judgment of conviction. Other acts evidence that relies on allegations or innuendo required extensive testimony to give the jury context about the act, the witness, and the conclusions. Here, the expert reviewed a brief text exchange line-by-line and, in its final deliberation, the jury asked to re-hear Mr. Payano-Perez's words.

The dangers of wrongful conviction here are also heightened because Mr. Payano-Perez had no criminal record. Because his other acts were not the subject of a conviction, the jury might have determined he should be punished for that prior activity even if he was not guilty of the offense charged. *See United States v. Bradley*, 5 F.3d 1317, 1321 (9th Cir. 1993).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

s/Alison Brill

Assistant Federal Public Defender
OFFICE OF THE FEDERAL PUBLIC DEFENDER
800 Cooper Street, Suite # 350
Camden, New Jersey 08102
(609) 489-7457
alison_brill@fd.org