NO. ___

IN THE

SUPREME COURT OF THE UNITED STATES

HAROLD ARTHUR HENTHORN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the doctrine of chances, which purportedly differs from character evidence because it is based on the objective improbability that similalr incidents coincidentally repeat themselves, can logically support the inference that all of the incidents were the product of design.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Harold Arthur Henthorn respectfully requests the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

DECISION BELOW

The decision of the United States Court of Appeals for the Tenth Circuit is published at 864 F.3d 1241 (10th Cir. 2017), and is reproduced at Pet. App. 1a.

JURISDICTION

The Tenth Circuit entered judgment on July 19, 2016. *See* Pet. App. 1a. Justice Sotomayor extended the time in which to file this petition until December 26, 2017. Pet. App. 13a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

FEDERAL RULE INVOLVED

Federal Rule of Evidence 404(b). Character Evidence; Crimes or Other Acts

. . . .

(b) Crimes, Wrongs, or Other Acts.

(1) Prohibited Uses. Evidence of a crime, wrong, or other 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; Notice in a Criminal Case. 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. On request by a defendant in a criminal case, the prosecutor must:

(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

(B) do so before trial--or during trial if the court, for good cause, excuses lack of pretrial notice.

STATEMENT OF THE CASE

In September 2012, Toni Henthorn fell to her death from a cliff in Rocky Mountain National Park, near Estes Park, Colorado. The only witness was her husband, Harold Henthorn, the defendant in this case. The government charged Mr. Henthorn with first-degree murder, claiming that he pushed Ms. Henthorn off the cliff in order to collect life insurance proceeds. Vol. 1, pt. 1, at 8.[1] Mr. Henthorn insisted that she fell and went to trial on the charge.

I. The Government's Circumstantial Case that Mr. Henthorn Killed Toni Henthorn.

The Henthorns had gone to Estes Park for their wedding anniversary. Vol. 7 at 228-29. The trip was a surprise for Ms. Henthorn: Mr. Henthorn had arranged to pick her up early from work and had hired a babysitter to look after their seven-year-old daughter. *Id.* at 217, 707-08, 840. They spent Friday night at the Stanley Hotel in Estes Park, and on Saturday afternoon, they set out for a hike. *Id.* at 228-29. They chose the Deer Mountain Trail, a popular trail of moderate difficulty. *Id.* at 230, 307. After hiking about a mile and a half and gaining the summit ridge, the pair left the trail and hiked north through the woods and down a rocky slope to an overlook with spectacular views. *Id.* at 312-21, 404. They ate lunch there, at about 3:30 p.m., and took photographs of each other. *Id.* at 232. After lunch, they continued down the

[1] Record citations are to the record filed in the Tenth Circuit.

slope to a cliff below, where they took more photographs of each other. *Id.* at 232-34. It was from that cliff that Ms. Henthorn fell to her death. *Id.* at 235.

Mr. Henthorn called 911 a little before 6:00 p.m. *Id.* at 170. Distraught, he reported that Ms. Henthorn had fallen, and he repeatedly asked that a rescue helicopter be deployed. *Id.* at 157-58. He was told a ranger was on the way, and he called back several times, expressing concern that the rangers were not getting there fast enough. *Id.* at 158. By the time the first ranger arrived, a little after 8:00 p.m., Ms. Henthorn was dead. *Id.* at 213-17.

The rangers decided to wait until the morning to remove Ms. Henthorn's body from the fall site. *Id.* at 218-20. Mr. Henthorn wanted to stay with her, but the rangers would not allow it, and one of them escorted him back to the trailhead. *Id.*

Mr. Henthorn, the only witness to the fall, adamantly denied that he pushed Ms. Henthorn off the cliff. The government had no physical evidence indicating that he had. The medical examiner who conducted the autopsy concluded that Ms. Henthorn died from wounds she suffered as a result of the fall, but he testified that there was no way to determine whether she fell or was pushed. *Id.* at 516, 525. The government's case against Mr. Henthorn was therefore circumstantial.

Mr. Henthorn's own statements made up part of the government's case. Mr. Henthorn spoke to many people about Ms. Henthorn's death, and though he consistently maintained that her death was an accident, his accounts diverged in other

respects. For example, he sometimes said they left the trail because it was too crowded and then followed wildlife down the rocky slope in the hopes of getting a good photograph. *Id.* at 217, 449. Other times he said they were looking for a romantic spot. *Id.* at 232-33. He told a ranger that he had made one earlier scouting trip to the park, but phone records indicated that he had gone to the park nine times in the month or so prior to his trip with Ms. Henthorn. *Id.* at 230, 749-50. He told some people that he was looking at a text message on his phone about their daughter's soccer game when Ms. Henthorn, trying to get the perfect photograph, slipped and fell over the edge. *Id.* at 120, 235, 453. He told other people that he was looking in his backpack when she fell. *Id.* at 578. A police officer agreed that people often get details "mashed up after trauma." *Id.* at 1349.

The rangers found a map of the park in Mr. Henthorn's car. The Deer Mountain Trail had been highlighted, and an "X" had been drawn in the general area of the cliff. *Id.* at 556. Another trail in the park had also been highlighted and was one the Henthorns had thought about visiting. *Id.* at 253, 560. There was also highlighting on the map in an area near Grand Lake, where the Henthorns had a cabin. *Id.* at 253. When he was first shown the map, Mr. Henthorn said the map was from a different trip. *Id.* at 242. He later said he made the map for a young man he considered a nephew, for whom he had made maps before. *Id.* at 620-21, 630, 922, 979, 984.

The government also sought to show that the area where Ms. Henthorn fell was an odd place for her to venture. The hike required the Henthorns to descend a steep slope of loose rock. *Id.* at 314-31. Ms. Henthorn, who was 50 years old, had undergone knee surgery and could no longer ski. *Id.* at 616, 994, 1007. The rangers did not peg her as an avid hiker. *Id.* at 415. But Ms. Henthorn was not a novice: a family friend testified that he had hiked and snowshoed with Ms. Henthorn in the park and near Grand Lake. *Id.* at 1508-10. A ranger testified that park visitors are free to explore off the established trails. *Id.* at 394.

The government maintained that Mr. Henthorn killed Ms. Henthorn in order to collect insurance on her life. Mr. Henthorn told some people that Ms. Henthorn's life was insured for about $1 million, with their daughter as the beneficiary. *Id.* at 245, 624. But in three separate policies and an annuity, Ms. Henthorn's life was actually insured for a total of $4.7 million, and the beneficiary was either Mr. Henthorn or a trust he controlled. *Id.* at 1850-51, 1861. While $4.7 million is undoubtedly a lot of money, an insurance agent testified that "family protection" warranted insuring an earner's life for ten times that person's annual income. *Id.* at 896. Ms. Henthorn was an ophthalmologist who had recently become a partner at her practice. *Id.* at 839. And her parents were wealthy and generous to their children. *Id.* at 105. Ms. Henthorn earned significant income from mines and oil leases that her parents owned, and her parents gifted her about $250,000 each year. *Id.* at 1040-41.

Ms. Henthorn stood to inherit many millions more when her parents passed away. *Id.* at 1042. Mr. Henthorn had allowed the policy on his own life to lapse, but although he told people that he was a fundraiser for churches, he had not actually been employed since 1992. *Id.* at 105, 135, 784, 1599, 1839-40.

II. The District Court's Ruling Allowing the Government to Introduce, Under the Doctrine of Chances, Evidence Concerning the Death of Mr. Henthorn's First Wife and an Earlier Injury to Toni Henthorn.

Prior to trial, the government notified Mr. Henthorn that it intended to introduce evidence of two prior incidents for which Mr. Henthorn was not on trial. Vol. 1, pt. 1, at 16. The first concerned the death of Mr. Henthorn's first wife, Lynn Henthorn. She died in 1995 when she was crushed by a car while she and Mr. Henthorn were changing a tire on the side of the road. *Id.* at 22-23. Law enforcement investigated the incident at the time and determined it was an accident. *Id.* at 82. The government now believed, however, that Mr. Henthorn had killed Lynn Henthorn to collect life insurance proceeds. *Id.* at 28-32. In the second incident, Mr. Henthorn dropped a piece of wood on Toni Henthorn from the deck of their cabin near Grand Lake, Colorado. *Id.* at 18-20. This incident occurred about a year before Toni Henthorn's death. *Id.* She suffered a neck injury, and medical personnel deemed the incident an accident, but the government now believed Mr. Henthorn was trying to kill her. *Id.* at 35; Vol. 7 at 1149.

The government pointed to shared similarities among the two uncharged incidents and Toni Henthorn's death, including that they all involved unusual accidents in remote locations where Mr. Henthorn was the only witness. Vol. 1, pt. 1, at 26-27, 195-96. The government argued that evidence of the prior incidents was admissible under Federal Rule of Evidence 404(b) to rebut Mr. Henthorn's claim that Ms. Henthorn's death was accidental and also to prove intent and planning. *Id.* at 27, 35.

The government invoked the doctrine of chances in support of that argument. *Id.* at 25-26. According to the government, the doctrine of chances provided a theory of logical relevance that did not depend on a negative inference about Mr. Henthorn's character. *Id.* Instead, it was "a theory resting on the objective or statistical improbability of extraordinary coincidence." *Id.* at 185. Under that theory, according to the government, the objective improbability that all three incidents were accidents allowed the jury to infer that all of them were likely the product of design. *Id.*

Critically, this inference did not require a preliminary finding that the earlier incident was actually a bad act perpetrated by Mr. Henthorn. Instead, according to the government, the jury could infer Mr. Henthorn's guilt solely because the incidents were "highly unusual" and "occurred under similar circumstances." Vol. 1 pt. 1 at 187. In this sense, the government's "doctrine of chances" theory differed from

ordinary Rule 404(b) evidence, which involves the jury inferring something based on the defendant's commission of a past crime.

Mr. Henthorn moved in limine to exclude the evidence. *Id.* at 77, 153, 211. The district court denied the motion, ruling that evidence of the two incidents was admissible to rebut Mr. Henthorn's claim of accident and to show that Mr. Henthorn intended and planned to kill Toni Henthorn. Vol. 1, pt. 1, at 231, 237. The court agreed with the government that the evidence was logically relevant under the doctrine of chances and that the doctrine did not require an impermissible character-based inference. *Id.* at 228-37. The court ruled, as the government had argued, that the jury could use the evidence to infer that *all* of the incidents – the two uncharged incidents and Toni Henthorn's death – were intentionally caused by Mr. Henthorn. *Id.* at 228, 237.

The evidence concerning Lynn Henthorn's death made up a significant portion of the government's case. The government's entire evidentiary presentation took about six days and spans about 1,600 transcript pages. Vol. 7 at 102-1674, 1795-1862. About two of those days – amounting to just over 400 pages of transcript, or a quarter of the government's case – were devoted to Lynn Henthorn's death. Vol. 7 at 959-963, 1050-1131, 1156-1378, 1380, 1387-1475, 1526-47. Nine government witnesses testified exclusively about her death, and three others testified about it in addition to other matters. *Id.*

The jury deliberated for several hours over two days. Vol. 7 at 1782-86. It ultimately returned a guilty verdict. *Id.* at 1788. The district court sentenced Mr. Henthorn to a mandatory term of life in prison. Vol. 6 at 396.

III. The Tenth Circuit's Affirmance of the District Court's Ruling.

On appeal, Mr. Henthorn challenged the district court's admission of the evidence concerning the death of his first wife and Toni Henthorn's injury at the cabin. The Tenth Circuit affirmed. It acknowledged (obliquely) that the doctrine of chances formed the basis of the district court's ruling. Pet. App. 11a n.8. And it appeared to endorse the doctrine as it was applied by the district court. *Id.* But the court did not acknowledge the distinction between the doctrine of chances and ordinary 404(b) evidence—namely, that it does not depend on a preliminary finding that the prior incident involved a bad act perpetrated by the defendant. Indeed, the court expressly conflated the two, stating that the doctrine formed the basis of its own precedent concerning the use of a prior crime to prove criminal intent. *Id.* (quoting *United States v. Cherry*, 433 F.3d 698, 701-02 (10th Cir. 2005). Thus, the court analyzed Mr. Henthorn's claim using the traditional framework that applies to review of Rule 404(b) evidence. Pet. 3a-8a (analyzing claim under *Huddleston v. United States*, 485 U.S. 681 (1988)). Applying that frameowkr, the court held that the district court had not abused its discretion. Pet. App. 1a.

REASONS FOR GRANTING THE WRIT

The Court Should Grant Certiorari to Clarify the Proper Scope and Evidentiary Utility of the Doctrine of Chances.

This Court should grant review in this case to provide guidance on how to apply the doctrine of chances, an issue that has confounded, and will continue to confound, the lower courts. Properly understood, the doctrine of chances allows only the limited inference that one or some, but not all, of the incidents – charged and uncharged – were intentional. And critically, the doctrine is incapable of discerning which of the incidents were intentional and which were not. Thus, the doctrine cannot single out the charged incident as non-accidental, which makes evidence admitted under the doctrine irrelevant to whether the charged incident was intentional and therefore a crime. The lower courts, however, including the Tenth Circuit, construe the doctrine far more broadly, allowing the inference that *all* of the incidents were intentional. As explained below, the doctrine does not support that inference. In fact, making that inference requires a rejection of the probabilities on which the doctrine of chances is based in favor of a different inference, one that is impermissible: that the defendant is acting in conformity with his character.

The Tenth Circuit's first mistake was failing to discern that the doctrine of chances differs from ordinary Rule 404(b) evidence in that its logical underpinnings do not require a preliminary finding that the prior incident involved a bad act on the defendant's part. Pet. App. 11a n.8. Under the doctrine of chances, the question is

what can be inferred from the fact that the defendant repeatedly became enmeshed in similar, unusual circumstances, not what can be inferred from his prior commission of a crime. As the district court put it, the doctrine of chances rests on the notion that "a string of improbable incidents is unlikely to be the result of chance." Vol. 1 pt. 1 at 228. The question is simply what can be inferred from the fact that the defendant has more than once become "enmeshed in suspicious circumstances." Edward J. Imwinkelried, *An Evidentiary Paradox: Defending the Character Evidence Prohibition by Upholding a Non-character Theory of Logical Relevance, the Doctrine of Chances*, 40 U. Rich. L. Rev. 419, 439 (2006).

This mistake, in turn, led the court to affirm the district court's conclusion that the doctrine of chances allowed for the inference that *all* of the similar events – charged and uncharged—were the product of design, not accident. Other courts have reached similar conclusions. For example, the Fourth Circuit has held that, under the doctrine of chances, "where prior acts of apparent coincidence are similar, the repeated reoccurrence of such an act takes on increasing relevance to support the proposition that there is an absence of accident." *Westfield Ins. Co. v. Harris*, 134 F.3d 608, 615 (4th Cir. 1998). Under this rationale, the Fourth Circuit understands the doctrine of chances to support the inference that the charged incident in particular was non-accidental. *Id.* The Seventh Circuit also invokes the doctrine of chances to support the inference that each and every incident in a string of similar incidents

"were the product of design rather than the vagiaries of chance." *United States v. York*, 933 F.2d 1343 (7th Cir. 1991).

This reasoning is unfounded and rests on a misunderstanding of the probabilities on which the doctrine of chances is supposedly based. The underpinning of the doctrine of chances is "the improbability of multiple coincidences." Kenneth J. Melilli, *The Character Evidence Rule Revisited*, 1998 B.Y.U. L. Rev. 1547, 1564. According to the doctrine's proponents, the doctrine does not require a "subjective assessment" of the accused's character; instead, it rests solely on the "objective" unlikelihood that similar and unusual accidents would repeatedly befall the same person. *York*, 933 F.2d at 1350.

Since it is the doctrine's focus on objective probabilities that distinguishes it from character evidence, it is essential that the doctrine be limited to what the probabilities actually show. And the probabilities allow only a "very limited" inference: that "one or some of the incidents were probably" the product of design. Edward J. Imwinkelried, *An Evidentiary Paradox*, 40 U. Rich. L. Rev. at 437-38. It does not permit the inference that all of the incidents were intentional.

The problem is that to conclude that all of the incidents were the product of design requires the inference that the incidents are connected to, or dependent on, each other. After all, if the incidents are independent, the odds that any one of them had a particular cause are the same each time the incident occurs. For example, with

each flip of a coin, there is a 50% chance the coin will land on heads. This is so even if the coin flip was preceded by ten others that all landed on heads. Each and every time, the chance that the coin lands on heads is exactly the same.

Of course, the odds that a coin would land on heads in 11 consecutive flips is exceedingly small. Faced with such a situation, it would be natural to surmise that there is more than chance involved. But it is precisely the attraction of that conclusion that makes the doctrine of chances so dangerous. To avoid lapsing into a subjective judgment of the defendant's character, it is essential to keep the focus on the objective probabilities. After all, the doctrine's objective character is what supposedly distinguishes it from character evidence. See *York*, 933 F.2d at 1350. And the probabilities do not support the inference that the district court here concluded the jury could draw: that all of the incidents, charged and uncharged, were the product of design.

A good explanation appears in the literature. Andrew J. Morris, *Federal Rule of Evidence 404(b): The Fictitious Ban on Character Reasoning From Other Crimes Evidence*, 17 Rev. Litig. 181 (Spring 1998). Morris explains that as the incidents accumulate, the chance that at least one of them was intentional grows, but so too does the chance that at least one of them was accidental. Thus, to infer that all of the the incidents were intentional actually cuts against the objective probabilities and necessarily requires "the assumption that character is constant." *Id.* at 201.

Morris provides the following example. Say the probability that a given incident was accidental is 5%, and the chance it was intentional is 95%. As the incidents add up, the chance that all of them were accidental decreases significantly (.05 x .05 x .05 = .000125). But the chance that all of them were intentional also decreases, to about 86% (.95 x .95 x .95 = .8574). *Id.* at 202. In other words, as the incidents increase in number, the objective probability that they share a common cause actually decreases. With each additional incident, the odds go up that the sum total is a mixed set – some combination of accident and intentional conduct.

Thus, to infer that each of the incidents was intentional actually cuts against the objective probabilities that the doctrine of chances supposedly rests on. Instead, it derives from the intuition that there is a connection between the incidents, and that connection is of course the defendant. In other words, since the objective likelihood that each of the incidents was intentional is on the downslope, the conclusion that they were all intentional rests on an inference about the defendant himself: "he did it once, so he probably did it again." But that inference violates Rule 404(b)'s prohibition on propensity reasoning. A "jury which infers from evidence of repeated acta rea that the charged actus reus was no accident unavoidably uses a defendant's history to make inferences about character." *Id.* at 200.

Other commentators have reached the same conclusion. For example, Professor Paul Rothstein has found it "inescapable" that the doctrine of chances

invites an impermissible character inference. Paul F. Rothstein, *Intellectual Coherence in an Evidence Code*, 28 Loy. L.A. L. Rev. 1259, 1261 (1998); accord Melilli, *The Character Evidence Rule Revisited*, 1998 B.Y.U. L. Rev. at 1567 (concluding that "the flaw in the doctrine of chances is that it collapses the slim barrier separating character and noncharacter evidence"); Lisa Marshall, Note, *The Character of Discrimination Law: the Incompatibility of Rule 404 and Employment Discrimination Suits*, 114 Yale L.J. 1063, 1081 (2005) (concluding that prior incidents are relevant under the doctrine of chances "only insofar as they shed light on some consistency in the defendant's character").

Professor Imwinkelried is perhaps the doctrine of chances' most ardent defender. But even he admits that the doctrine does not permit the conclusion that the district court here ruled the jury could draw: "that all the incidents were the product of an actus reus or mens rea." Imwinkelried, *An Evidentiary Paradox*, 40 U. Rich. L. Rev. at 437 (emphasis added). Instead, the doctrine allows only for the inference that "one or some of the incidents were not accidents." Id. Indeed, according to Professor Imwinkerlried, the "doctrine posits that some incidents can and, in the normal course of events, do occur accidentally." *Id.*

Critically, "there is nothing about the internal logic of the doctrine which singles out the charged incident as the product of" design. *Id.* This point is essential. Because the objective likelihood of accident is the same for each incident, there is no way, using the doctrine of chances, to discern which incident was an accident and

which was intentional. Although the likelihood that one or some, but not all, of the incidents was intentional increases as the incidents continue to occur, the doctrine is of no help in discerning which was intentional and which was not. *Id.*

For this reason, under a proper application of the doctrine of chances, other acts evidence is basically irrelevant. Because the doctrine suggests only that one or some, but not all, of the incidents were intentional, and because it is incapable of singling out any particular incident as intentional, it leaves the jury to speculate about which was intentional and which was not. Although the doctrine allows the jury to infer that at least one of the incidents was intentional, it did nothing as an objective matter to increase the odds that the charged incident in particular was intentional. Thus, under the doctrine, the other acts evidence does not make it "more . . . probable than it would be without the evidence" that Mr. Henthorn killed Toni Henthorn. Fed. R. Evid. 401.

Because the lower courts are not properly applying the doctrine of chances, this Court's review is warranted.

CONCLUSION

Mr. Henthorn respectfully requests that this Court issue a writ of certiorari.

Respectfully submitted,

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