No. 16-160

In the Supreme Court of the United States

FRANK HARPER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

IAN HEATH GERSHENGORN
Acting Solicitor General
Counsel of Record
LESLIE R. CALDWELL
Assistant Attorney General
JOHN P. TADDEI
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether, in a prosecution for conspiracy to commit multiple armed carjackings and related firearms offenses, the district court abused its discretion by admitting evidence that, during the course of the carjacking conspiracy, petitioner committed a drive-by shooting using the same gun and the same carjacked vehicle as used in other charged carjackings, on the grounds that such evidence was intrinsic to the charged offenses or otherwise admissible under Federal Rule of Evidence 404(b).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 815 F.3d 1032. The opinion of the district court is not published in the Federal Supplement but is available at 2014 WL 4978663.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 2016. A petition for rehearing was denied on May 4, 2016 (Pet. App. 26a-27a). The petition for a writ of certiorari was filed on August 2, 2016. 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 Michigan, petitioner was convicted of conspiracy to commit carjacking, in violation of 18 U.S.C. 371; three counts of carjacking,

in violation of 18 U.S.C. 2119(1) and 2; and three counts of using and carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) and 2. Judgment 1-2. He was sentenced to 757 months of imprisonment, to be followed by three years of supervised release. Judgment 3-4. The court of appeals affirmed. Pet. App. 1a-25a.

1. a. From January 2009 through March 2012, petitioner conspired with his brother Phillip Harper, Stratford Newton, Justin Bowman, and others to carjack luxury cars in Detroit and sell them. Third Superseding Indictment 1-2; Pet. App. 2a-7a; Gov't C.A. Br. 7-11, 51-54. In a typical case, one of the conspirators would threaten a parking lot attendant with a gun while the others would steal the keys for high-end cars and drive them away. Pet. App. 2a-7a; Gov't C.A. Br. 7-11. The carjackers delivered the vehicles to intermediaries, who took them to a chop shop. Pet. App. 3a; Gov't C.A. Br. 7-8. In all, petitioner and his co-conspirators engaged in five carjackings and one attempted carjacking involving 12 stolen vehicles. Pet. App. 3a. In January and February 2011, petitioner directly participated in three of the armed carjackings. *Id.* at 5a-6a.

b. A federal grand jury returned a 23-count indictment against petitioner and his co-conspirators. Third Superseding Indictment 1-18. The indictment charged petitioner with seven offenses: conspiracy to commit carjacking and related offenses, in violation of 18 U.S.C. 371 (Count 1); three counts of carjacking, in violation of 18 U.S.C. 2119(1) and 2 (Counts 6, 8, and 10); and three counts of using and carrying a firearm during and in relation to a crime of violence, in viola-

tion of 18 U.S.C. 924(c) and 2 (Counts 7, 9, and 11). *Ibid.*

Before trial, the government notified petitioner that it intended to introduce evidence of several prior shootings, including of one incident, on December 31, 2010, in which petitioner shot at another vehicle while riding as the passenger of a carjacked vehicle that was driven by a co-conspirator. D. Ct. Doc. 116-2, at 1 (Aug. 7, 2013). The government stated that it sought to admit that evidence pursuant to Federal Rule of Evidence 404(b) or, alternatively, as "part of a continuing pattern of illegal activity in the third superseding indictment." D. Ct. Doc. 116-2, at 1. Petitioner moved to exclude the evidence. D. Ct. Doc. 116, at 1-5 (Aug. 7, 2013).

The district court agreed with petitioner that evidence of two prior shootings should be excluded, but ruled that the evidence of the December 31, 2010, shooting was admissible. Pet. App. 53a. The court found that the December 31, 2010, shooting was "intertwine[d] with the conspiracy" and was "essentially res gestae evidence that would circumstantially tend to demonstrate that" petitioner "was in possession of the same gun and car that was used to commit some of the other carjackings that were named in the indictment in the midst of the period involved in this charged conduct." *Id.* at 50a. The court added that the evidence "demonstrate[d] a pattern and demonstrate[d] relationships in connection among the co-conspirators." *Ibid.* As such, the court held that it was of "compelling probative value on its face" and "clearly admissible" "whether it is admitted as intrinsic evidence or * * * as 404(b) evidence." *Id.* at 50a-51a.

c. At trial, co-conspirator Newton testified about the carjacking conspiracy generally and he also specifically addressed the December 31, 2010, shooting. Gov't C.A. Br. 35-36. Newton stated that he, Bowman, and Phillip Harper kept two recently stolen Jeep Cherokees to use during the commission of other vehicle thefts and carjackings and that he was driving one of the stolen Jeep Cherokees on December 31, 2010, when he spotted a man that he believed had previously shot petitioner. *Ibid.* Newton informed petitioner, picked petitioner up in the stolen Jeep Cherokee, and followed the man's vehicle. *Id.* at 36. While stopped at a red light, petitioner tried to shoot the man, but his gun jammed, so Newton tossed petitioner his Glock, and petitioner used it to fire into the other car, which sped away. *Ibid.* The same Jeep Cherokee and Newton's Glock were used during various carjackings throughout the conspiracy, including in a carjacking by petitioner's co-conspirators later that same day. Pet. App. 17a-19a; see 09/03/13 Trial Tr. (Tr.) 92. Petitioner's co-conspirators also engaged in carjackings on both the day preceding and the day following the December 31, 2010, shooting. Pet. App. 18a-19a; see Tr. 95.

2. The court of appeals affirmed petitioner's convictions. Pet. App. 1a-25a.

The court of appeals rejected petitioner's contention that the district court abused its discretion in admitting Newton's testimony about the December 31, 2010, shooting. The court of appeals noted that a district court may admit "uncharged background evidence as long as it is 'inextricably intertwined' with the underlying offense" and found that "[a]lthough the shooting did not arise in the context of a carjacking, it still

had a causal, temporal or spatial connection with the charged offenses." Pet. App. 18a (citation, brackets, and internal quotation marks omitted). The court observed that petitioner "was riding in a vehicle that had itself recently been carjacked and was used in the commission of a carjacking." *Ibid.* Furthermore, petitioner "fired a weapon that a co-conspirator would use later that day to carjack a vehicle, and the incident occurred the day after one carjacking and the day before another." *Id.* at 18a-19a. Petitioner had been charged, the court also noted, with a carjacking conspiracy that began in January 2009 and was ongoing during the December 31, 2010, shooting. *Id.* at 19a. Thus, the court concluded that the "shooting was a prelude to, directly probative of, and developed the story of the carjacking conspiracy" and that it "established the relationship between [petitioner] and [co-conspirator] Newton," "tied [petitioner] to the weapon used to commit a number of carjackings," and showed petitioner's "involvement with carjacked cars." *Ibid.* The court also held that the evidence was not "unduly prejudicial" because Newton's "testimony covered just four pages of the trial transcript in an eleven day trial and the jury already had heard considerable unchallenged evidence about [petitioner]'s involvement in other violent incidents, including the carjackings themselves." *Ibid.*

ARGUMENT

Petitioner renews his contention (Pet. 10-26) that the district court abused its discretion in admitting evidence of his involvement in the December 31, 2010, shooting and argues that the court of appeals' holding conflicts with decisions of several courts of appeals. The court of appeals correctly upheld the admission of

that evidence as intrinsic to the charged carjacking conspiracy. Even though a narrow disagreement exists among the circuits over the standard for determining whether particular evidence is intrinsic to the crime charged or covered by Federal Rule of Evidence 404(b), that conflict, which would not affect the admissibility of the challenged evidence in this case, does not warrant this Court's review. The petition for a writ of certiorari should be denied.[1]

1. a. Rule 404(b) addresses the use at trial of "[e]vidence of a crime, wrong, or other act." Fed. R. Evid. 404(b). Such evidence 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," but "may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." *Ibid.* When the prosecution seeks to introduce such evidence, a defendant is entitled, on request, to advance notice that the prosecution will introduce it, and to a jury instruction describing the purposes for which it may be considered. *Ibid.*

Because Rule 404(b) addresses only evidence of *other* crimes, wrongs, or acts, it does not apply to evidence intrinsic to the charged crime. See Fed. R. Evid. 404(b) advisory committee's note (1991) (citing with approval case that recognized a "distinction between 404(b) evidence and intrinsic offense evidence").

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[1] A similar question is presented in *Holden* v. *United States*, petition for cert. pending, No. 16-5259 (filed July 6, 2016). This Court has previously denied petitions for a writ of certiorari in cases presenting this issue. See *Villanueva* v. *United States*, 132 S. Ct. 497 (2011) (No. 10-1535); *Siegel* v. *United States*, 562 U.S. 1141 (2011) (No. 10-5836). The same result is warranted here.

The prosecution is therefore free to introduce such intrinsic evidence without notice and without a limiting instruction.

b. The court of appeals correctly found no abuse of discretion in the district court's decision to admit evidence of the December 31, 2010, shooting as intrinsic evidence of the carjacking conspiracy. Contrary to petitioner's claim (Pet. 7) that the shooting "had nothing to do with the charged carjacking conspiracy or its objectives," the courts below found that the incident occurred not only during the course of the carjacking conspiracy but also in the midst of a three day spree in which petitioner's co-conspirators used the same gun and carjacked car to commit three other armed carjackings. Pet. App. 18a-19a. The court of appeals thus concluded that the events on December 31, 2010, provided direct proof of the relationship between the co-conspirators, "tied [petitioner] to the weapon used to commit a number of carjackings," and demonstrated petitioner's "involvement with carjacked cars." *Id.* at 19a. It was therefore not an abuse of discretion to admit as intrinsic evidence, without a Rule 404(b) limiting instruction, testimony that recounted events bearing such a close "causal, temporal or spatial connection with the charged offense[s]." *Id.* at 18a (citation omitted; brackets in original).

Petitioner is also incorrect (Pet. 24) that the government advanced "an unapologetic propensity argument" to justify admission of the December 31, 2010, shooting testimony. Nor did the government use the December 31, 2010, shooting to show "[p]etitioner's tendency to use guns and his 'willingness to shoot people in cars,'" as petitioner suggests. Pet. 7 (citation omitted). Rather, the government presented to the

district court a range of proper purposes for the challenged evidence, including that the shooting would "demonstrate the relationships and connections among the coconspirators" because that incident involved petitioner's use of the "same gun and car that were used to commit some of the carjackings named in the indictment, is the same type of violent activity that is charged, and took place in the middle of those carjackings."[2] D. Ct. Doc. 123, at 7 (Aug. 18, 2013). Indeed, the court of appeals rejected petitioner's characterization of the government's reasons for seeking admission of the evidence of the shooting. Pet. App. 19a ("Nor is it fair to say that the evidence was admitted for prohibited 'propensity' reasons."). And, in any event, petitioner does not point to any improper reliance on the challenged evidence at trial to show propensity or bad character.

2. Petitioner correctly points out (Pet. 12-18) that different courts of appeals have used different linguistic formulations to describe what evidence qualifies as intrinsic evidence. Some courts have stated that evidence is intrinsic if it is "inextricably intertwined" with or "completes the story of" the charged crime. See Pet. 12-15 & nn.4-5 (citing cases); see also, *e.g.*, *United States* v. *Kaiser*, 609 F.3d 556, 570 (2d Cir. 2010); *United States* v. *Basham*, 561 F.3d 302, 326 (4th Cir. 2009), cert. denied, 560 U.S. 938 (2010); *United States* v. *Sumlin*, 489 F.3d 683, 689 (5th Cir. 2007); *United States* v. *Hardy*, 228 F.3d 745, 748 (6th Cir.

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[2] The government also argued that the December 31, 2010, shooting was admissible under Rule 404(b) to show specific intent to use violence in the carjackings, plan, identity (given the use of the same gun and vehicle), knowledge, and absence of mistake. See D. Ct. Doc. 123, at 8, 12-14 (Aug. 18, 2013).

2000); *United States* v. *Hall*, 604 F.3d 539, 543 (8th Cir. 2010); *United States* v. *DeGeorge*, 380 F.3d 1203, 1220 (9th Cir. 2004), cert. denied, 549 U.S. 1083 (2006); *United States* v. *Irving*, 665 F.3d 1184, 1212 (10th Cir. 2011), cert. denied, 132 S. Ct. 1873 (2012); *United States* v. *Wright*, 392 F.3d 1269, 1276 (11th Cir. 2004), cert. denied, 544 U.S. 968 (2005). The Third and D.C. Circuits have described intrinsic evidence as evidence that "directly proves" the charged offense or relates to "uncharged acts performed contemporaneously with the charged crime" that "facilitate the commission of the charged crime." *United States* v. *Green*, 617 F.3d 233, 248-249 (3d Cir.) (citations and internal quotation marks omitted), cert. denied, 562 U.S. 942 (2010); *United States* v. *Bowie*, 232 F.3d 923, 927, 929 & n.3 (D.C. Cir. 2000) (similar). The Seventh Circuit has similarly indicated that a court should focus on whether evidence is "direct evidence of a charged crime" in determining whether it is intrinsic. *United States* v. *Gorman*, 613 F.3d 711, 719 (2010).

Petitioner urges (Pet. 26) this court to "abolish[]" the intrinsic-evidence doctrine "entirely in favor of the global application of Federal Rules of Evidence 404(b)." That contention does not warrant the Court's review. First, petitioner's sought-after relief would directly contravene the intent of the drafters of the Federal Rules of Evidence, who have advised that the limitations created by Rule 404(b) "do[] not extend to evidence of acts which are 'intrinsic' to the charged offense." Fed. R. Evid. 404(b) advisory committee's note (1991). Second, abolishing the intrinsic-evidence theory of admissibility would be unprecedented. As discussed, every court of appeals to address the relationship between evidence intrinsic to a crime and Rule 404(b)

has acknowledged the validity of both theories of admissibility, although some apply different standards.

Petitioner contends that the Seventh Circuit has gone "one step further" than the Third and D.C. Circuits by "reject[ing] * * * altogether" "the intrinsic evidence doctrine." Pet. 16, 20 (citing *Gorman*, 613 F.3d at 719). Petitioner's characterization of *Gorman* and the Seventh Circuit's position are inaccurate. The Seventh Circuit in *Gorman* refused to categorize evidence as falling under the "inextricable intertwinement doctrine," because the court found that only a "fine distinction" exists between that doctrine and the Seventh Circuit's view of intrinsic evidence. 613 F.3d at 719. Although *Gorman* relabeled such evidence, it did not substantively narrow the scope of admissible evidence and it retained an approach that is generally in line with the Third and D.C. Circuits.[3] See *United States* v. *Vargas*, 689 F.3d 867, 874 (7th Cir.) ("*Gorman* does not stand for the proposition that 'foundation' or 'contextual' evidence is always inadmissible."), cert. denied, 133 S. Ct. 804 (2012); see also *Green*, 617 F.3d at 248-249 (intrinsic evidence "directly proves" the charged offense or relates to "uncharged acts performed contemporaneously with the charged crime" that "facilitate the commission of the charged crime") (citations omitted); *Bowie*, 232 F.3d at 929 (postulating a "narrow range of circumstances" where "the evidence is of an act that is part of the charged of-

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[3] In *Gorman*, the Seventh Circuit found that evidence that the defendant stole a vehicle constituted admissible direct evidence of the charged perjury offense because the evidence "completed the story" and "explained to the jury [the defendant's] motivation to lie" about the presence of the stolen vehicle in the defendant's garage. 613 F.3d at 619.

fense" and is therefore "properly considered intrinsic").

Petitioner further claims (Pet. 20) that the lack of a standardized distinction among the courts of appeals between intrinsic evidence and evidence subject to Rule 404(b) "invites confusion and creates abuse." Contrary to petitioner's argument, the lack of uniformity will rarely, if ever, affect the threshold admissibility of evidence. See *Green*, 617 F.3d at 249 ("As a practical matter, it is unlikely that our holding will exclude much, if any, evidence that is currently admissible as background or 'completes the story' evidence under the inextricably intertwined test."). So long as the evidence is not being introduced *solely* for the purpose of proving a defendant's propensity to commit the charged offense—which is highly unlikely to be the case for evidence that a court would consider intrinsic to the offense under any definition of that term—the question whether Rule 404(b) applies merely determines the procedures under which the evidence is admitted.

Second, it is unclear how often the precise definition of intrinsic evidence actually matters in practice. As the Seventh Circuit observed with respect to its own precedent, the distinctions between different formulations are "subtle," and "the inextricable intertwinement doctrine often serves as the basis for admission even when it is unnecessary." *Gorman*, 613 F.3d at 719. Courts therefore likely reach generally consistent conclusions about the application of Rule 404(b) in a high percentage of cases regardless of the particular linguistic formulation they use for the intrinsic-evidence test.

Third, a district court's determination of whether or not evidence falls within Rule 404(b) is highly fact-specific and is reviewed under a deferential abuse-of-discretion standard. See, *e.g.*, *Sprint/United Mgmt. Co.* v. *Mendelsohn*, 552 U.S. 379, 384 (2008) ("In deference to a district court's familiarity with the details of the case and its greater experience in evidentiary matters, courts of appeals afford broad discretion to a district court's evidentiary rulings."). Factual differences between cases are, in practice, likely to be far more significant than any "fine distinctions," *Gorman*, 613 F.3d at 719, between different linguistic formulations of the definition of intrinsic evidence.

In support of his contention (Pet. 19-20) that the precise definition of intrinsic evidence has significant practical consequences, petitioner solely relies on the Third Circuit's hypothetical discussion in *Green*, *supra*, of whether the challenged evidence at issue in that case would be treated as intrinsic evidence under the tests employed by other courts of appeals. See 617 F.3d at 146. Petitioner, however, does not identify any cases in which courts of appeals have actually reached divergent conclusions on similar facts. Nor does petitioner cite any out-of-circuit cases that clearly indicate that the evidence presented here would be inadmissible. In the absence of a clearer indication that the question presented is outcome-determinative in a significant number of cases, this Court's intervention is not warranted.

3. In any event, this case would not be an appropriate vehicle to clarify the scope of Rule 404(b) because the district court committed no reversible error even under the narrower formulations of the intrinsic evidence doctrines adopted by the Third, Seventh, and

D.C. Circuits or under Rule 404(b) itself. See, *e.g.*, *United States* v. *Miller*, 673 F.3d 688, 695 (7th Cir. 2012) (upholding admission of evidence of defendant's "recent possession of the same gun" as "directly relevant evidence of the charged crime, not propensity evidence" even though the evidence was admitted under the "inextricable intertwinement" doctrine, rather than under Rule 404(b) (citation omitted)); *United States* v. *Mahdi*, 598 F.3d 883, 891 (D.C. Cir.) (evidence that the defendant twice used a knife to threaten or assault members of conspiracy were "intrinsic acts" used to show "the kind of organizational control" he exerted over the narcotics organization) (citations omitted), cert. denied, 562 U.S. 971 (2010). Thus, any ruling by this Court concerning the intrinsic evidence doctrine would have no effect on the outcome of petitioner's case.

Petitioner nonetheless suggests (Pet. 17) that the district court's failure to apply Rule 404(b) "strip[ped] away" the Rule's "important procedural safeguards" including its notice and limiting instruction requirements. But petitioner did receive advance notice of the government's intent to admit evidence of the December 31, 2010, shooting, see D. Ct. Doc. 116-2, at 1, and petitioner failed to request a limiting instruction under Rule 404(b) at trial, see Pet. 8. The district court's failure to give a Rule 404(b) limiting instruction would therefore be reviewed, at most, for plain error.[4] See Fed. R. Evid. 105 (limiting instructions

[4] Petitioner contends (Pet. 8-9) that defense counsel made a strategic choice to forgo a limiting instruction for the December 31, 2010, shooting evidence in favor of an unsuccessful attempt to refute that evidence by calling an exculpatory witness. Defense counsel's reasons for failing to request a limiting instruction under

must be given "on timely request"); Fed. R. Crim. P. 52(b); see also *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977) ("It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court."). Petitioner therefore could not establish reversible plain error even if Rule 404(b) applied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

IAN HEATH GERSHENGORN
Acting Solicitor General
LESLIE R. CALDWELL
Assistant Attorney General
JOHN P. TADDEI
Attorney

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Rule 404(b) do not, however, relieve petitioner of the burden of demonstrating plain error. See *United States* v. *Rodriguez*, 759 F.3d 113, 121 (1st Cir.) ("[I]t would be most unusual for us to find that a district court erred in failing to give a limiting instruction that was never requested * * * because [t]he district court is not required to act sua sponte to override seemingly plausible strategic choices on the part of counseled defendants.") (citations, emphasis, and internal quotation marks omitted; second set of brackets in original), cert. denied, 135 S. Ct. 421 (2014); *United States* v. *Delgado*, 672 F.3d 320, 343 (5th Cir.) (holding that defendant "could not come close to demonstrating reversible plain error" where he did not "offer a particular instruction" or "rely on the theory of defense embodied in that instruction at trial"), cert. denied 133 S. Ct. 525 (2012).