No. 05-1355

In the Supreme Court of the United States

TERRANCE MATTHEWS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion by admitting evidence of petitioner's prior drug-trafficking arrest to demonstrate petitioner's intent to commit the charged conspiracy to distribute drugs.

2. Whether the Eleventh Circuit abused its discretion by declining to consider petitioner's claim of error under *United States* v. *Booker*, 543 U.S. 220 (2005), which petitioner attempted to raise for the first time in a motion to file a supplemental brief.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-55a) is reported at 431 F.3d 1296. An earlier opinion of the court of appeals (Pet. App. 60a-106a) is reported at 411 F.3d 1210.

JURISDICTION

The judgment of the court of appeals was entered on December 6, 2005. A petition for rehearing was denied on January 24, 2006 (Pet. App. 111a-112a). The petition for a writ of certiorari was filed on April 24, 2006. 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 Middle District of Florida, petitioner was

convicted of conspiring to distribute five or more kilograms of cocaine, in violation of 21 U.S.C. 846, and two counts of obstructing justice, in violation of 18 U.S.C. 1512(b)(1). He was sentenced to 292 months of imprisonment, to be followed by ten years of supervised release. Pet. App. 2a-3a. The court of appeals initially reversed petitioner's convictions, *id.* at 60a-106a, but the court subsequently granted rehearing and affirmed the convictions, *id.* at 1a-55a.

1. Petitioner was a member of a conspiracy that distributed multi-kilogram quantities of cocaine in Jacksonville and Miami, Florida. Drug dealers in Miami supplied cocaine to the Jacksonville distributors, who pooled their money to purchase the drugs and used couriers to transport drugs and money between the two cities. Petitioner sold cocaine to the Miami dealers when their primary source was unable to fill their orders. Pet. App. 4a; Gov't C.A. Br. 4, 6-7, 10.

2. Before trial, the government provided notice to petitioner that it intended to introduce evidence, pursuant to Federal Rule of Evidence 404(b), of petitioner's 1991 arrest for drug dealing. Petitioner filed a motion in limine to exclude that evidence, which the district court denied. Gov't C.A. Br. 2-3, 24.

At trial, the government relied principally on the testimony of seven co-conspirators, who testified pursuant to cooperation agreements that included the possibility of sentence reductions for their substantial assistance. The government also introduced two tape recordings obtained through a wiretap on a co-conspirator's telephone. In addition, two officers with the Miami-Dade Police Department testified about petitioner's 1991 arrest for selling cocaine. The first officer testified that petitioner had been arrested after the officer had

observed petitioner make three drug sales from the trunk of his car. Pursuant to a search of petitioner's person and car, the police recovered 251 grams of cocaine, some marijuana, about $3500, and three guns. The second officer testified that petitioner had admitted that he was a low-level drug dealer. Pet. App. 4a-20a.

Following the admission of the evidence of petitioner's prior arrest, and on two subsequent occasions, the district court issued the following limiting instruction to the jury:

> You may consider [the Rule 404(b)] evidence not to prove that the defendant did the acts charged in the indictment, but only to prove the defendant's state of mind, that is, that the defendant acted with the necessary intent or willfulness and not through acts of mistake. Therefore, if you find, first, that the government has proved beyond a reasonable doubt that the defendant did, in fact, commit the acts charged in the indictment, and that the defendant also committed similar acts at other times, then you may consider those other similar acts in deciding whether the defendant committed the acts charged here willfully and intentionally and not through an accident or mistake.

Pet. App. 21a.

The government referred to the 1991 arrest in its closing argument:

> The intent in 1991 that the defendant had was to distribute cocaine. He had those little baggies of cocaine in the trunk of his car and he was out there distributing it back in 1991. And by the time of this charged conspiracy in 1999 through June of 2001, the defendant had that same intent. He had the same

> intent to distribute cocaine, only now he was a bigger dealer. He's dealing in kilograms of cocaine, not little baggies of cocaine any longer.

Pet. App. 21a-22a. In response to petitioner's contention that the government had introduced the evidence of the prior arrest because its witnesses were not credible, the government, in rebuttal, again contended that the evidence was "important" and "relevant" to the issue of intent. *Id.* at 22a. The jury found petitioner guilty on all counts, and the district court sentenced him to 292 months of imprisonment. *Id.* at 2a-3a.

3. a. On appeal, petitioner contended, *inter alia*, that the evidence of his prior arrest had been improperly admitted. Petitioner did not challenge his sentence. Pet. App. 3a-4a & n.1, 62a-63a & n.12. On June 24, 2004, after briefing in the court of appeals was completed, this Court issued its decision in *Blakely* v. *Washington*, 542 U.S. 296. Petitioner subsequently filed a motion for leave to file a supplemental brief in light of *Blakely*. On August 20, 2004, the court of appeals denied that motion, citing prior Eleventh Circuit decisions holding that a party may not raise issues—including *Blakely* claims—for the first time in a supplemental brief. Pet. App. 107a-108a.

On January 12, 2005, while petitioner's appeal was pending before the Eleventh Circuit, this Court issued its decision in *United States* v. *Booker*, 543 U.S. 220. The Court held that the federal sentencing scheme enacted by Congress, under which the sentencing court rather than the jury finds facts that establish a mandatory Guidelines range, is inconsistent with this Court's decisions in *Blakely* and in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). *Booker*, 543 U.S. at 230-244. The Court further held that the constitutional infirmity was most

appropriately eliminated by severing the statutory provisions that mandate sentences within the applicable Guidelines range, leaving a sentencing scheme in which the Guidelines range is advisory and federal sentences are reviewable for unreasonableness. *Id.* at 244-268. On April 1, 2005, the court of appeals granted petitioner's renewed motion for leave to file a supplemental brief in light of *Booker*. Pet. App. 109a-110a.

b. On June 8, 2005, the court of appeals reversed petitioner's convictions. Pet. App. 60a-106a. The court held that the district court had erred in admitting evidence of petitioner's 1991 arrest because that evidence was unnecessary to prove and irrelevant to proving petitioner's intent, and thus served no purpose other than to prove petitioner's character. *Id.* at 90a-101a. The court further held that the error was not harmless as to either the conspiracy or the obstruction charges. *Id.* at 102a-105a.

c. On August 10, 2005, the court of appeals denied the government's petition for rehearing. Pet. App. 58a-59a. On December 6, 2005, however, the court vacated its order denying rehearing, see *id.* at 56a-57a, and issued a new opinion vacating the prior opinion and affirming petitioner's convictions, *id.* at 1a-55a.

i. Relying on the Fifth Circuit's decision in *United States* v. *Roberts*, 619 F.2d 379 (1980), which serves as precedent in the Eleventh Circuit, the court of appeals stated that, "in every conspiracy case, a not guilty plea renders the defendant's intent a material issue. Evidence of such extrinsic evidence as may be probative of a defendant's state of mind is admissible unless the defendant affirmatively takes the issue of intent out of the case." Pet. App. 33a (brackets, ellipses, internal quotation marks, and citations omitted). The court further

explained that "[t]he jury was entitled to believe as much or as little of the witnesses' testimony as it found credible," and that "the jury may have concluded that [petitioner] engaged in all of the substantive drug offenses about which the witnesses testified without believing that [petitioner] intended to join a conspiracy." *Id.* at 36a. Noting that "this precise difficulty of proving intent in conspiracies is what creates the presumption that intent is always at issue," *ibid.*, the court concluded that "the district court was well within its discretion in finding that the Government's need for additional evidence relevant to intent * * * was not substantially outweighed by undue prejudice," *id.* at 36a-37a.

ii. Judge Tjoflat filed a separate concurring opinion. Pet. App. 38a-55a. While agreeing that the court of appeals' disposition of the case reflected a correct application of circuit precedent, Judge Tjoflat expressed the view that the circuit's prior decisions were erroneous. See *id.* at 38a-40a, 53a-55a.

iii. The court of appeals' opinion affirming petitioners' convictions did not address petitioner's challenge, raised in his supplemental brief, to the sentence imposed by the district court. Petitioner subsequently filed a petition for rehearing and rehearing en banc. That petition sought rehearing with respect to the district court's admission of evidence about petitioner's 1991 arrest; the petition did not include any challenge to petitioner's sentence. On January 24, 2006, the court of appeals denied rehearing and rehearing en banc. Pet. App. 111a-112a.

ARGUMENT

1. Petitioner contends (Pet. 8-15) that evidence of his 1991 arrest was improperly admitted at trial, and that the Eleventh Circuit's decision upholding the admission

of that evidence conflicts with rulings of other circuits. The decision of the court of appeals is correct and does not conflict with more recent decisions of other courts of appeals. Further review is not warranted.

a. Federal Rule of Evidence 404(b) states that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Rule 404(b) further provides, however, that such evidence "may * * * be admissible for other purposes, such as proof of * * * intent." The courts of appeals have consistently recognized that evidence of a defendant's prior drug dealing and other drug activity may be introduced to prove the defendant's intent to participate in a drug conspiracy. See, *e.g.*, *United States* v. *Johnson*, 439 F.3d 947, 952-954 (8th Cir. 2006); *United States* v. *Ruiz*, 178 F.3d 877, 880-881 (7th Cir.), cert. denied, 528 U.S. 897 (1999); *United States* v. *Hardwell*, 80 F.3d 1471, 1489-1490 (10th Cir. 1996); *United States* v. *Cardenas*, 895 F.2d 1338, 1341-1343 (11th Cir. 1990); *United States* v. *Scelzo*, 810 F.2d 2, 4-5 (1st Cir. 1987). The Eleventh Circuit's decision in this case is consistent with those authorities.

Petitioner contends (Pet. 9, 13-15) that intent was not at issue in this case because his theory of defense was that the co-conspirators' testimony was not credible. That argument fails for several reasons. First, although petitioner argued that the testifying witnesses had falsely implicated him in hopes of reducing their sentences, he did not unequivocally remove the question of intent from the case. For example, in response to evidence of petitioner's drug-related conversation with a co-conspirator, which the government intercepted in a wiretap, petitioner argued that the discussion had an innocent explanation. See 7/11/03 Tr. 36-37. That claim

alone justified the introduction of the evidence at issue here. See 2 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 404.22[1][a] at 404-76 to 404-77 (Joseph M. McLaughlin ed., 2d ed. 2006) ("[E]vidence of another crime that tends to undermine defendant's innocent explanation for his or her act will usually be admitted.").

As the court of appeals observed, moreover, "the jury [could] have concluded that [petitioner] engaged in all of the substantive drug offenses about which the witnesses testified without believing that [petitioner] intended to join a conspiracy." Pet. App. 36a. Although petitioner's primary line of defense was that the co-conspirators had lied about his involvement in the individual transactions, the jury's rejection of that theory therefore did not eliminate all possible controversy about petitioner's intent. And even if petitioner did not directly place his intent in issue by asserting an innocent explanation for his conduct, the government was still required to prove beyond a reasonable doubt that petitioner intended to enter into the conspiracy. See, *e.g.*, *Estelle* v. *McGuire*, 502 U.S. 62, 69-70 (1991) ("[T]he prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense."). Thus, if evidence of petitioner's 1991 arrest was otherwise relevant to the question whether petitioner intended to join the conspiracy, petitioner's failure actively to contest that element of the charge would not render the evidence inadmissible.

b. Petitioner contends (Pet. 11-13) that a circuit conflict exists on the question whether evidence of prior acts is admissible when a defendant claims that he did not participate in the charged offense. That claim is incorrect. Three of the cases on which petitioner relies

did not involve conspiracy charges. See *United States* v. *Sumner*, 119 F.3d 658, 660 (8th Cir. 1997); *United States* v. *Ortiz*, 857 F.2d 900, 901 (2d Cir. 1988), cert. denied, 489 U.S. 1070 (1989); *United States* v. *Schaffner*, 771 F.2d 149, 150 (6th Cir. 1985). Because the Eleventh Circuit's analysis in this case focuses on the admission of prior-acts evidence in conspiracy cases, those precedents are inapposite. In the fourth case cited by petitioner, *United States* v. *Zelinka*, 862 F.2d 92 (6th Cir. 1988), the court found that the prior-acts evidence was inadmissible because the government had not articulated "any theory of admissibility." *Id.* at 99. Here, by contrast, the government argued, and the court of appeals agreed, that the evidence of petitioner's prior arrest was relevant to the question whether he intended to join the charged conspiracy.

In addition, all but one of the decisions on which petitioner relies were issued before this Court's ruling in *Old Chief* v. *United States*, 519 U.S. 172 (1997).[1] In *Old Chief*, the Court emphasized "the accepted rule that the prosecution is entitled to prove its case free from any defendant's option to stipulate the evidence away." *Id.* at 189. The Court made clear that the prosecution in a criminal case has broad latitude "to prove its case by evidence of its own choice," even with respect to elements of the charged offense that the defendant chooses not to contest. *Id.* at 186; see *id.* at 186-189. As the courts of appeals have recognized, "*Old Chief* has overruled, or at least substantially limited," earlier appellate

[1] Although the Eighth Circuit issued its ruling in *Sumner* approximately six months after this Court decided *Old Chief*, the court in *Sumner* did not cite *Old Chief*, and *Sumner*'s analysis has effectively been repudiated in subsequent Eighth Circuit decisions. See *Johnson*, 439 F.3d at 952 (citing cases); pp. 9-10, *infra*.

decisions that had precluded the admission of prior-acts evidence to show intent when the defendant denied involvement in the charged conduct. *United States* v. *Hill*, 249 F.3d 707, 712 (8th Cir. 2001); see *United States* v. *Williams*, 238 F.3d 871, 875-876 (7th Cir.), cert. denied, 532 U.S. 1073 (2001); *United States* v. *Bilderbeck*, 163 F.3d 971, 977-978 (6th Cir.), cert. denied, 528 U.S. 844 (1999); *United States* v. *Crowder*, 141 F.3d 1202, 1209 (D.C. Cir. 1998) (en banc) (*Crowder II*), cert. denied, 525 U.S. 1149 (1999)[2]; *United States* v. *Queen*, 132 F.3d 991, 997 (4th Cir. 1997), cert. denied, 523 U.S. 1101 (1998).[3]

2. Petitioner contends (Pet. 15-17) that the Eleventh Circuit's practice of treating as abandoned *Booker* and

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[2] In *United States* v. *Crowder*, 87 F.3d 1405, 1410 (D.C. Cir. 1996) (en banc) (*Crowder I*), the court of appeals held that "a defendant's offer to concede knowledge and intent" precludes the admission of prior-acts evidence to prove the defendant's intent. This Court granted the government's petition for a writ of certiorari and remanded the case for further consideration in light of *Old Chief*. *United States* v. *Crowder*, 519 U.S. 1087 (1997). On remand, the court of appeals held, "upon reconsideration of [its] earlier decision in light of *Old Chief*," that "a defendant's offer to stipulate to an element of an offense does not render the government's other crimes evidence inadmissible under Rule 404(b) to prove that element, even if the defendant's proposed stipulation is unequivocal." *Crowder II*, 141 F.3d at 1209.

[3] The rationale of *Old Chief* applies to cases, such as this one, in which the defendant does not offer to stipulate to intent but nonetheless does not contest it. See *Bilderbeck*, 163 F.3d at 977 ("We believe that allowing the introduction of evidence under 404(b) to prove specific intent despite the defense's failure to contest intent is little different from allowing such evidence where the defendant stipulates to an element of the crime. The raising of a defense that makes one element of a crime a non-issue and the stipulation of an element to make it a non-issue are simply different means to accomplish the same end: the exclusion of the government's otherwise-admissible evidence.").

Blakely claims that are not raised in a party's initial brief is inconsistent with the principle announced in *Griffith* v. *Kentucky*, 479 U.S. 314, 328 (1987), that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases * * * pending on direct review or not yet final." Petitioner further argues (Pet. 17-19) that the Eleventh Circuit's approach conflicts with decisions of other courts of appeals that permit supplemental briefing in like circumstances. For the reasons set forth at greater length in the government's briefs in opposition in other cases challenging the Eleventh Circuit's application of its procedural default rule, see, *e.g.*, U.S. Br. in Opp. at 4-18, *Claritt* v. *United States*, cert. denied, 126 S. Ct. 417 (2005) (No. 04-9926); U.S. Br. in Opp. at 4-19, *Tytler* v. *United States*, cert. denied, 126 S. Ct. 417 (2005) (No. 04-9409); U.S. Br. in Opp. at 5-17, *Tugman* v. *United States*, 126 S. Ct. 410 (2005) (No. 04-1387), the court's application of that rule is consonant with established retroactivity principles, and there is no conflict among the circuits that warrants this Court's review.[4]

a. In *Griffith*, this Court held that retroactive application of new rules on direct appeal is necessary both because of "the nature of judicial review" and in order to "treat[] similarly situated defendants the same." 479

[4] Although the court granted petitioner's motion for leave to file a supplemental brief challenging his sentence under *Booker*, see Pet. App. 109a-110a, the court ultimately did not rule on the claim. Because the Eleventh Circuit confirmed in *United States* v. *Dockery*, 401 F.3d 1261 (per curiam), cert. denied, 126 S. Ct. 442 (2005), that a remand for further consideration in light of *Booker* does not alter the court of appeals' application of its longstanding rule that issues not raised in an appellant's opening brief are deemed abandoned, there is no reason for the Court to remand this case for further consideration by the court of appeals.

U.S. at 323. That rationale is in no way inconsistent with the application of procedural-default rules to bar consideration of claims that have not been adequately preserved. Defendants who have not preserved claims of error are not "similarly situated" (*ibid.*) to those who have. Cf. *Shea* v. *Louisiana*, 470 U.S. 51, 60 (1985) (holding that it is not inequitable to draw a distinction between a defendant who raises a claim on collateral attack and one who raises it on direct review because "[t]he one litigant already has taken his case through the primary system," while "[t]he other has not").

In *Booker* itself, the Court stated that it "expect[ed] reviewing courts to apply ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the 'plain-error' test." 543 U.S. at 268. The Court's reference to "ordinary prudential doctrines" is naturally read to encompass the established rule that claims not raised in an appellant's opening brief will generally be deemed abandoned. Indeed, this Court recently declined to vacate a sentence for further consideration in light of *Blakely* when the request was made for the first time in the petitioners' merits brief and "[p]etitioners did not raise [the] claim before the Court of Appeals or in their petition for certiorari." *Pasquantino* v. *United States*, 544 U.S. 349, 372 n.14 (2005). "It seems relatively obvious that if [this] Court may apply its prudential rules to foreclose a defendant's untimely *Blakely*, now *Booker*, claim, there is no reason why [the Eleventh Circuit] should be powerless to apply its prudential rule to foreclose [a] defendant['s] * * * untimely *Blakely*, now *Booker*, claim." *United States* v. *Levy*, 416 F.3d 1273, 1277 (11th Cir.) (per curiam), cert. denied, 126 S. Ct. 643 (2005).

b. This Court has denied review in a number of cases in which the Eleventh Circuit declined to entertain a claim under the intervening decision in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), solely because it was not raised in the petitioner's opening brief. See, *e.g.*, *Ardley* v. *United States*, 535 U.S. 979 (2002) (No. 01-8714); *Nealy* v. *United States*, 534 U.S. 1023 (2001) (No. 01-5152); *Padilla-Reyes* v. *United States*, 534 U.S. 913 (2001) (No. 01-5284). Several of those petitions specifically challenged the court of appeals' application of its procedural-bar rule. See, *e.g.*, *Phillips* v. *United States*, 536 U.S. 961 (2002) (No. 01-5718) (denying petition for a writ of certiorari when petitioner challenged application of rule to bar consideration of *Apprendi* claim); *Garcia* v. *United States*, 534 U.S. 823 (2001) (No. 00-1866) (denying petition for a writ of certiorari when Eleventh Circuit declined, on remand from this Court for reconsideration in light of *Apprendi*, to consider claim because it was not raised in initial brief); see also *Thompson* v. *United States*, 535 U.S. 1114 (2002) (No. 01-8603) (denying petition that challenged application of procedural-bar rule to preclude consideration of Ex Post Facto Clause challenge). There is no reason for a different result in this case.

c. The application of the Eleventh Circuit's procedural-default rule to *Blakely* and *Booker* claims presents a transitional issue of limited continuing importance. The issue arises most frequently in cases currently on appeal in which sentence was imposed befoe this Court's decision in *Blakely*, when sentencing courts treated the Guidelines as mandatory and defendants did not routinely raise Sixth Amendment challenges to judicial factfinding under the Guidelines. As this case demonstrates, the Court's decision in *Blakely* put many defen-

dants and courts on notice of the potential for error. After *Blakely*, most defendants who wished to raise Sixth Amendment challenges to sentencing on appeal did so in a timely manner in their opening briefs. This issue should rarely arise in appeals briefed after *Booker* because defense counsel are now well aware that the Guidelines are not binding under that decision.

This Court recently denied review in *Rodriguez* v. *United States*, 125 S. Ct. 2935 (2005) (No. 04-1148), which involved the application of the plain-error rule, Federal Rule of Criminal Procedure 52(b), to *Booker* error, although that issue implicated a "multi-circuit conflict" that was "deep and real," U.S. Br. at 7, *Rodriguez*, *supra*, and implicated potentially thousands of federal sentences. The Court's denial of the petition for a writ of certiorari in *Rodriguez* is consistent with the fact that *Rodriguez*, like this case, presented a "transitional issue * * * [of] limited continuing importance once the cases in which sentences were imposed before *Booker* have become final." *Ibid.* The same conclusion is warranted here.[5]

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[5] By letter dated April 28, 2006, petitioner has requested that this Court grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand the case for further consideration in light of *Bell* v. *Thompson*, 125 S. Ct. 2825 (2005). Petitioner contends in his letter that, in light of *Bell*, "the Eleventh Circuit committed error in withholding the mandate in * * * [this] case for four months after denying the Government's petition for rehearing and ultimately rendering a superseding opinion that vacated its prior decision." Petitioner did not raise that claim either in his petition for rehearing and rehearing en banc in the Eleventh Circuit, or in his petition for a writ of certiorari, even though *Bell* was decided several months before the first of those documents was filed. This Court should accordingly decline to address the claim. See, *e.g.*, *Pasquantino*, 544 U.S. at 372 n.14 (declining to consider *Blakely* claim raised for the first time in

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 2006

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brief on the merits); *Lopez* v. *Davis*, 531 U.S. 230, 244 n.6 (2001) (declining to address an issue that was "not raised or decided below, or presented in the petition for certiorari").