No. 19-5550

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

JACKIE DUNCAN — PETITIONER
(Your Name)

vs.

UNITED STATES — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

10th CIRCUIT OF APPEAL
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

JACKIE DUNCAN
(Your Name)

P.O. BOX 26030
(Address)

BEAUMONT, TX 77720
(City, State, Zip Code)

NONE
(Phone Number)

QUESTION(S) PRESENTED

1. WHETHER THE 10TH CIRCUIT ERRED IN RULING THE WESTERN DISTRICT OF OKLAHOMA DIDN'T ABUSE THEIR DISCRETION?

2. WHETHER ANTHONY JOHNSON TESTIMONY OUT WEIGH IT'S PROBATIVE VALUE UNDER THE 403 BALANCE TEST?

3. WHETHER 404(B) IS UNCONSTITUTIONAL VAGUE?

LIST OF PARTIES

[✓] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

CASES: PAGE NO.

STATUTE AND RULES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[✓] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[✓] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was 3-12-2019.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[✓] An extension of time to file the petition for a writ of certiorari was granted to and including May 30, 2019 (date) on August 9, 2019 (date) in Application No. 18A1234.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

1. 5th Amendment Violation "DUE PROCESS"

STATEMENT OF CASE

This case arises from the robbery of two drug dealers in Lawton, Oklahoma and the possession of a firearm during the course of the robbery. Despite the instruction from the Court, in its opening statement the government said that the evidence was Mr. Duncan aided in Mr. Johnson being shot and that Mr. Johnson will take the stand and say Mr. Duncan shot him. ROA V. III., page 286.

pertinent to this appeal is evidence regarding an event the evening of February 27, 2014 wherein police responded to shots being fired and a person being shot in "The View" area of Lawton. ROA V. III., page 128. Law enforcement officer Lindsey Adamson and her trainee PPO Raymond Scott responded to the area. ROA V. III., page 289-290. They discovered Anthony Johnson, who said he had been shot, had blood on his jacket and a bullet in his back. ROA V. III., page 290. Mr. Johnson had an unusual demeanor for someone who had just been shot. Id. Following the arrival of assistance for Mr. Johnson, officer Adamson and PPO Scott began to investigate the crime scene. ROA V. III., page 294. They entered the alleyway approximately one block away and discovered shell casings, 4 casings from a .40 caliber and 7 casings from a 9mm. ROA V. III., page 300.

In the report of the incident, there were no suspects listed. ROA V. III., page 319. However, Officer Adamson testified that Mr. Johson had given the name of J-Reezy, a nickname for the Appellant,

as the person who shot him. ROA V. III., page 321.

Anthony Johnson was the next witness. He tesitified that he was homeless and lived in parks in Lawton. ROA V., page 325. He was a member of 24K Crips gang in Oklahoma City, but had achieved "OG" or retirement status and no longer had to "gangbang" or participate in the selling of dope or drive bys. ROA V. III., page 328-330. He was enrolled in special education in school and is unable to read or write. ROA V. III., page 128.

Anthony Johnson testified that February 27, 2014 was the day he was shot. ROA V. III., page 331. He stated that as a result he was in a "whole bunch of pain," that he hurt in places "I aint never hurt before," and that he hurt now. ROA V. III., page 335. He describe that he came to the area to purchase drugs. ROA V. III., page 128. At that joint J-Reezy (the Appellant) and his girlfriend Queen came to the front of the house from the back of the house and shot him. ROA V. III., page 341. He also describes an individual named "7-shot" firing at him. ROA V. III., page 342, but indicated that Mr. Duncan shot him first. ROA V. III., page 344. Johnson testified that 7-shot and J-Reezy then got into a Cadillac and drove off. ROA V. III., page 347.

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the district court erred when it allowed testimony and evidence of the uncharged shooting of Anthony Johnson by Mr. Duncan on February 27, 2014 and the fact that the firearm allegedly possessed by Mr. Duncan was discharged on that date. The evidence was not inextricably interwined and was not necessary to explain or further tell the story of the charged against Mr. Duncan, as it was only necessary to show that appellant possessed the firearm, not that he discharged the weapon, or that Mr. Johnson was shot and injured.

It was also alleged by the government that the dischargee of the firearm and the injury of Mr. Johnson was a vital piece of the puzzle regarding the conspiracy with other members of the 107 Hoover Gang in Lawton. However, the story could be sufficiently told by Mr. Johnson, sufficient to demonstrate the involvement of the 107 Hoovers without mention of the discharge, shooting or his injuries.

This evidence was 404(b) evidence of a separate wrong or act, which was offered only to show comfority by Mr. Duncan and inflame the jury against him. The evidence was offered only for the purpose of establishing prior bad acts by the Appellant and attempting to demonstrate that he is generally a bad person of bad character. It was irrelevant to establish possession of the firearm on that date or conspiracy to commit robbery and the prejudicial effect of the evidence highly outweighed the probative value.

Finally, the evidence was prejudicial to Mr. Duncan, whether considered intrinsic or as 404(b), considering the entirely of the charges and other potential evidence, that it outweighed any probative value of that evidence.

ARGUMENT

The District Court erred in admitting testimony and evidence that on February 27, 2014 Mr. Anthony Johnson was allegedly shot and injured by Appelloant.

A district court's decision to admit evidence is reviewed for an abuse of discretion. **United States v. Mcphilomy, 270 F.3d 1302, 1312 (10th Cir. 2001).**

The court allowed testimony and evidence from two witnesses regarding an incident between Mr. Duncan and Mr. Anthony Johnson on February 27, 2014. As described above, Mr. Johnson went to a home in Lawton, while there he encountered Mr. Duncan, gunfire happened and Mr. Johnson was allegedly shot by Mr. Duncan. Officers were called to the scene and interviewed Mr. Johnson, arranged for his medical treatment and discovered spent casing that matched a firearm attributed to Mr. Duncan. No charged were brought against Mr. Duncan for the events on that date.

Appellant objected to evidence of this incident, specifically the fact that the gun was used by Mr. Duncan to shoot Mr. Johnson as inadmissible pursuant to 404(b), not inextricably interwined and unduly prejudicial.

Appellant argued below that the government could introduce evidence of possession of the weapon and gang activity without reference to the firing of the gun and the shooting and injury of Mr. Johnson. See generally, ROA Vol. I., page 135.

The government argued that evidence that Mr. Johnson was shot was not extrinsic to the charged crime of posssession of the fire-arm and therefore Rule 404(b) should not apply. **ROA** Vol. I., page 147. It argued that the evidence should be allowed because it was "inextrinsic interwined" with counts two (possession of a firearm) and one (conspiracy to commit robbery). The court allowed the evidence.

Evidence of the shooting of Mr. Johnson and the discharge of the weapon was extrinsic to the case against Mr. Duncan and was evidence of a prior bad act used to show conformity therewith.

> Rule 404(b) only applies to evidence of acts extrinsic to the charged crime. United States v. Orr, 864 F.2d 1505, 1510 (10th Cir.1988). An uncharged act may not be extrinsic if it was part of the scheme for which a defendant is being prosecuted, see Orr, 864 F.2d at 1510, or if it was "inextricably interwined" with the charged crime such that a witnesss's testimony "would have been confusing and incomplete without mention of the prior act." United States v. Richardson, 764 F.2d 1514, 1521-22 (11th Cir.) cert. denied, 474 U.S. 952, 106 S.Ct. 320, 88 L.Ed.2d 303 (1985).

United States v. Record, 873 F.2d 1363, 1372 n. 5(10th Cir.1989).

> [I]ntrinsic evidence is that which is "directly connected to the factual circumstances of the crime and provides contextual or background information to the jury. Extrinsic evidence, on the other hand, is extraneous and is not intimately connected or blended with the factual circumstances of the charged offense. Thus, "evidence essential to the context of the crime" is intrinsic and "does not fall under the other crimes's limitation of Rule 404(b)."

United States v. Irving, 665 F.3d 1184, 1212 (10th Cir.2011)

The shooting and the injury to Mr. Johnson was not inextricably interwined with the possession of the firearm nor the conspiracy and therefore is 404(b) evidence. First, the fact that the firearm injured a person was not necessary to demonstrate Mr. Duncan's Possession of the firearm. Nor is it a fact of Mr. Duncan alleged gang membership that is vital to support the complete story of Mr. Duncan's alleged conspiracy with other 107 Hoover members to commit robbery.

This evidence did not form an "integral and natural part of the witness[es]' accounts of the circumstances surrounding the offense for which the defendant was indicted." **Irving, 665 F.3d 1184 at 1213.** It was not "entirely germane background information, which is "directly connected to the factual circumstances of the crime." id. Thus the evidence that Mr. Johnson was shot is extrinsic to the crime at issue.

Additionally, the Government had evidence sufficient to demonstrate Mr. Duncan's involvement in a conspiracy involving the 107 Hoovers absent testimony regarding Mr. Johnson's shooting. There was sufficient evidence from Mr. Johnson for the government to attempt to establish conspiracy such as: Mr. Johnson had seen Mr. Duncan with the firearm (ROA V. III., page 354), Mr. Johnson own gang activity as an "O.G." with the 24K Crips(R.O.A. V. III page 314, 328), Mr. Johnson's prior purchases of controlled

substances from the Appellant (ROA V. III page 314, 328), Mr. Johnson's testimony that he saw another member of the 107 Hoovers present (ROA V. III page 342) as well as Mr. Duncan's girlfriend, (ROA V. III page 341), Mr. Johnson's testimony regarding his prior dealings with Mr. Duncan and that Mr. Duncan gave him a "bad vibe" (ROA V. III page 347 and 341-42), Mr. Johnson's testimony that the 107 Hoovers wanted revenge for something he did 10-15 years ago (ROA V. III page 337, 339). The officer's testimony confirming Mr. Johnson had given the name of the appellant as present at the scene (ROA V. III page 321), Officer's testimony regarding the recovery of spent shell casings which matched the 9mm the Appellant was charged with possessing (ROA V. III page 295, 300). This listing is only the unobjectable testimony gained from Mr. Johnson and Officer Adamson. The Government provided numerous other witnesses who testified to Mr. Duncan's alleged gang involvment and possession of the firearm alleged in count 2.

Evidence of the shooting and injury to Mr. Johnson was not necessary to demonstrate Mr. Duncan's involvment with the 107 Hoovers attempt to commit robbery. There was no evidence that Mr. Duncan or Mr. Johnson were present on February 27th for the purposes of robbery.

AA The evidence was unfairly prejudicial.

Even if the court determines that the evidence of the shooting of Mr. Johnson is inextricably interwined, it still must meet the requirements of Rule 403. **United States v. Lambert, 995 F.2d 1006,**

1007 (10th Cir. 1993).

In this instant, the evidence of the shooting and injury of Mr. Johnson was unfairly prejudicial.

> Virtually all relevant evidence is prejudicial to one side or the other. Evidence becomes unfairly prejudicial, however, when it makes a conviction more likely because it provokes an emotional response in the jury or otherwise tends to affect adversely the jury's attitude towards the defendant wholly apart from its judgment as to his guilt or innocence of the crime charged. But even where unfair prejudice is found, it must substantially outweigh the probative value of the evidence in order to be excluded under Rule 403.

United States v. Archuleta, 737 F3d 1287, 1293 (10th Cir. 2013) (internal quotations and citations omitted).

The term "unfair prejudice," as to a criminal defendant speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged. "Unfair prejudice" within its context means an undue tendency to suggest decision on an improper basis commonly, though not necessarily, an emotional one.
Old Chief v. U.S. 172, 180 (1997).

Such "improper grounds" include "generalizing a defendant's earlier bad act into bad character and taking that as raising the odds that he did the later bad act now charged." Id. Evidence that on February 27, 2014 a gun was discharged by Mr. Duncan acted in

conformity with the charge of discharge or brandishing a firearm on different dates and under entirely different circumstances as alleged in counts 6 and 10. It is improper and unfairly prejudicial to generalize the bad character and alleged bad acts of Mr. Duncan.

Further, the evidence was highly emotional. Mr. Johnson was shot in the back. ROA V. III., page 293. He was still in pain at the time of trial more than two years foollowing the event. ROA V. III., page 334. At the time of the shooting, he hurt in places "I aint never hurt before." Furhter the United States attorney described him as a "tragic" person, unable to read and write, a special education student and living on the streets. ROA V. II., page 324-330.
So sympathetic in fact, that the Government relocated him and provided him a temporary home in exchange for his testimony.
Mr. Johnson testified that the Government provided him with $60 and something to eat and put him up in a hotel room for 30 days because "they want me to be a witness." ROA V. III., page 377-378.

All this evidence was certainly provided to provoke an emotional, sympathetic response in the jury and swing the jury's attitude against the defendant. Especially in light of the fact that it is really not clear who shot Mr. Johnson. While Mr. Johnson testified that it was Mr. Duncan who shot him, he also testified that "7-shot" was also firing at him. ROA V. III., page 342.
There were also casings from a 40. caliber found along with the 9mm. ROA V. III., page 300. The bullet was not recovered from Mr. Johnson (ROA V. III., page 355), so there is no connection that the

weapon allegedly possessed by Mr. Duncan was the weapon that injured Mr. Johnson.

B. The evidence was improper under 404(b)

if the court determines that the evidence was extrinsic, then it must conduct an analysis under 404(b). The standard of review for a district court's admission of evidence pursuant to Fed.R.Evid. 404(b) is for abuse of discretion. **United States v. Grisson, 44 F.3d 1507, 1513 (10th Cir. 1995).** It is presumed that a defendant is protected from undue prejudice if the following four requirements are met:

(1) The government offered the evidence for a proper purpose;

(2) The evidence was relevant;

(3) The trial court made a Fed.R.Evid. 403 determination that the probative value of the evidence is not substantially outweighed by its potential for unfair prejudice; and

(4) The district court submitted a limiting instruction.

United States v. Wacker, 72 F.3d 1453, 1468-69 (10th Cir. 1995).

The admission of evidence pursuant to Fed.R.Evid 403 is reviewed for an abuse of discretion. id. at 1469. This court, "applies a reasonableness standard and examines the facts and circumstances of each case." Id. (quoting **United States v. Cuch, 842 F.2d 1173, 1176 (10th Cir. 1988).**

i. The evidence was not offered for a proper purpose:

The evidence of the shooting of Mr. Johnson and his injury was offered not for the purpose of showing Mr. Duncan's Possession

of the firearm on February 27, 2014, nor for the purpose of showing Mr. Duncan's alleged conspiracy to commit robbery with members of the 107 Hoovers.

Rule 404(b) provides in pertinent part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistakes or accident....

Fed.R.Evid. 404(b).

The list of proper purposes is illustrative, not exhaustive, and Rule, admitting all evidence of other crimes or acts except that which tends to prove only criminal disposition.

United States v. Tan, 254 F3d 1204, 1208 (10th Cir. 2001)(Citations omitted).

This evidence of the shooting was only offered to prove the criminaldisposition of Mr. Duncan. The Government had evidence that Mr. Duncan possessed the firearm on February 27, 2014 sufficient to meet its burden on count two without relying upon testimony that Mr. Johnson had been shot. The court could have limited Mr. Johnson's testimony to evidence that he saw Mr. Duncan with a firearm on that date without violating 404(b) and without unfairly prejudicing the jury. The investigating officer, Linsey Adamson, corroborated that Mr. Johnson had provided information that Mr. Duncan was present. Officer Adamson also testified that she found seven 9mm shell casings in the alleyway near the shooting.

ROA VIII., page 295.

Further, there was sufficient evidence to demonstrate any alleged conspiracy without evidence of the shooting. Mr. Johnson testified about his gang membership. ROA VOL III., page 328. He testified about his knowledge of Mr. Duncan's involvement in the 107 Hoovers. ROA VOL. III., page 337, 339, 368. Mr. Johnson testified that "7-Shot" was also present at the time . ROA Vol. III., page 342.

The only logical reason for admitting evidence of Mr. Johnson's injuries and shooting was to inflame and prejudice the jury into believing Mr. Duncan acted in conformity with the allegations that he brandished and discharged a firearm in connection with a crime of violence as alleged in count 6 and 10. Additionally, presenting the "tragic" figure of Mr. Johnson was used to garner sympathy and an emotional reaction from the jury.

ii The evidence was not relevant

Even if the court finds that the evidence was admitted for a proper purpose, it must be relevant. "[E]vidence is admissible under Rule 404(b) only if it is relevant for a permissible purpose and that relevance does not depend on a defendant likely acting in conformity with an alleged character trait." **United States v. Commanche, 577 F.3d 1261, 1267 (10th Cir. 2009).** Here, if the evidence was properly admitted to show possession of the weapon, the relevance of evidence of the shooting, as opposed to Mr. Johnson's confirmation that Duncan possessed the firearm,

depends solely on Duncan using that weapon in a violent way.

The elements of felon in possession require the government to prove beyond a reasonable doubt that: First) the defendant knowingly possessed a firearm; Second) the defendant was convicted of a felony, that is a crime punishable by imprisonment for a term exceeding one year, before he possessed the firearm, and; Third) before the defendant possessed the firearm, the firearm has moved at some time from one state to another. Tenth Circuit Pattern Jury Instructions (2011) § 2.44.

The evidence that Mr. Johnson was shot was also not relevant to the charge of the conspiracy to commit robbery or that he was a gang member.The relevance of this in connection with the crimes charged is solely based upon the allegation that he acted in conformity with the activities on February 27, 2014.

iii The evidence was prejudicial.

as argued above the evidence of the fact that Mr. Johnson was shot and injured was unfairly prejudicial.

iv. Limiting instruction

No limiting instruction was given prior to the testimony of Officer Adamson Nor Anthony Johnson. The jury was instructed to consider only the crime charged. ROA Vol., I, page 229.
It was also instructed that the indictment, which contained the statement that the Appellant was in the presence of other 107 Hoovers.

III. WHETHER 404(B) RULE IS UNCONSTITUTIONAL VAGUE.

Several Circuits' agree that 404(B) is unconstitutional vague and the intrinsic and extrinsic dichotomy is confusing, prejudice, and a waste of time. Such words are being used to describe the intrinsic and extrinsic dichotomy of the 404(B) Federal Rule Evidence. 404(B) is too broad and the intrinsic / extrinsic dichotomy is flagrantly unclear and can lead to substituting conclusion. See. Dictionary to define confusion, prejudice, and unclear.

CONFUSION: A state of being confused mentally: Lack of certainty, orderly thought or power to distinguish, choose, or act decisively.

PREJUDICE: A prejudgment, or bias which interferes with a person's sense of judgment: [a]n opinion formed without due knowledge and examination.

UNCLEAR: Difficult to grasp or understand: Confused or uncertain in statement or understanding.

When using these type of words to explain a federal court rule, it can only mean that the district and circuit courts are having a hard time understanding the 404(B) Rule and its intrinsic and extrinsic dichotomy, the inextricably - interwinement is too broad and has become over used, [vague] and very unhelpful. UNITED STATES V. GREEN, 617, F.3d, 233, 248 (3rd Cir.2010). Other circuits have written in great lengths regarding the problems associated with the intricably -interwinement to the charge part of 404(b) Rule. UNITED STATES V. GORMAN,613 F.3d 711, 719 (7th Cir).

abandoning the inextricably and intertwinement [t]est because its too vague, overbroad, and prone to abuse. UNITED STATES V. BOWIE, 232 F.3d. 923, 927, 344, U.S. App.D.C. 34 (D.C. Cir.2000), ("[i]t is hard to see what function the [Intrinsic/Extrinsic] interpretation of 404(B) perform.") See. Generally saltzburg Martin and Capra. Federal Rules of Evidence Manual Paragraph 404.2 [12] (10th. Cir. 2012) discussing issues at length and concluding, "the inextricably intertwinement exception substitues a careful analysis with boilerplate Jargon."

404(B) Rule is unconstitutional vague in violation of defendant's "due process" allowing the courts' to bring in any prior bad acts as evidence. No matter the prejudice it is putting a dark cloud over 403 balance test rule and allowing the government too broad of a range when introducing prior bad acts into court even if it's outweighing its probative value the government can easily say that the prior bad act was intrinsic to the crime. Therefore, it does [not] fall under the 404(B) Rule and dismissing an argument without the proper analysis under the 403 balance test causes a prejudicial error in violation of defendant's "due process."

Some Court's might not be conscious of the fact that even though the "crime does not fall under the 404(B) Rule it still must undergo the 403 balance test to ensure that the evidence does not outweigh its probative value. Clearly, 404(B) has become a dark cloud over

the 403 balance test, making it hard for the court to distinguish what could be allowed and should [not] be allowed in such court proceedings. When there's a confusion between 404(B) Rules and 403 Balance test, then the government has no clue on how to use the 404(B) because its texts is too ["broad"] and ["vauge"], and prone to abuse, Therefore, 404(B) is unconstitutionally vague in violation of defendant's due process and should not be used in the Court of law.

CONCLUSION.

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded for further proceedings in light of the unconstitutionally vagueness in 404(B) Rule, which single handedly violates this country citizens "Due process rights."