NO. _____

In the

Supreme Court of the United States

Angela Roy,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari
from the United States Court of Appeals
for the Fifth Circuit

Fifth Circuit Case No. 18-60261

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. Whether the widely criticized "inextricably intertwined" or "intrinsic evidence" family of exceptions to Federal Rule of Evidence 404(b) lack meaningful standards or limits and therefore improperly and unfairly permit introduction of otherwise inadmissible character evidence, particularly when three (3) circuits have rejected the exceptions.

PARTIES TO THE PROCEEDING

The parties to the proceeding are named in the caption. Angela Roy was the defendant in the district court, appellant in the Fifth Circuit, and is the Petitioner here. The United States was the plaintiff in the district court, the appellee in the court below, and is the Respondent here.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Angela Roy asks this Court to issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

On April 18, 2019, the Fifth Circuit entered a *per curiam* opinion affirming Roy's conviction for (1) aiding and abetting assault with intent to rob a United States Post Office in violation of 18 U.S.C. § 2114(a); and (2) aiding and abetting the discharge of a firearm during a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A)(iii). *United States v. Angela Roy*, 765 Fed. Appx. 85 (5th Cir. 2019). (Pet. App.). Roy's Petition for Rehearing was denied by an unpublished order on May 20, 2019. (Pet. App. 4). The Mandate was issued on May 28, 2019. (Pet. App. 5).

JURISDICTION

The Fifth Circuit affirmed Roy's conviction of federal crimes on April 18, 2019. (Pet. App. 1). The court denied Roy's timely petition for rehearing on May 20, 2019. (Pet. App. 4). This Court has jurisdiction to review the judgment under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case Federal Rule of Evidence 404(b) and certain common law exceptions thereto. These provisions are reprinted in the Appendix. (Pet. App. 6).

STATEMENT OF THE CASE

I. The underlying conviction.

On October 25, 2017, Roy was convicted by a jury in the Northern District of Mississippi as follows: Count One - aiding and abetting assault with intent to rob the post office in Randolph, Mississippi in violation of 18 U.S.C. § 2114(a); and Count Two - aiding and abetting the discharge of a firearm during a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A)(iii). The conviction arose out of a robbery and shooting that occurred at the Randolph, Mississippi United States Post Office on September 23, 2016 where Richard Thomas Scott (hereinafter "Scott") entered the post office, fired his weapon three times (which caused a minor abrasion to Post Master Relief Virginia Duff's (hereinafter "Duff") left arm), stole her purse and left in a gold Pontiac G6 with no hubcaps. Duff stated that she saw a female with a yellow bandana over her face standing by the car after the robbery.

II. Evidence of the uncharged burglary of a vehicle the day before the underlying crimes were committed.

The government filed a Motion in Limine seeking to admit evidence of other wrongs pursuant to F.R.E. 404(b), specifically evidence that Roy allegedly participated in the burglary of a purse from a vehicle owned by Sylvia Massey (hereinafter "Massey") in another town on September 22, 2016 (the day before the post office robbery). The trial court granted this motion and pursuant to F.R.E. 404(b) permitted introduction of this evidence on the basis that, though it was prejudicial, it was probative and admissible. *See United States v. Roy*, 2017 WL 4701318 *2 (N.D. Miss. October 19, 2017).

III. Trial.

The trial was four days in total with the government calling 19 witnesses and the defendant calling four. The only evidence placing Roy at the crime scene was the testimony of Scott, who had pled guilty to the crime before trial. Roy presented alibi witness testimony that she was in fact several hundred miles away in the Mobile, Alabama area at the time the crime was committed.

Massey was called as a witness and testified that certain jewelry found in Roy's car at the time of Roy's arrest belonged to Massey, and that it had been stolen out of Massey's car on September 22, 2016 in another town in North Mississippi. She also testified that a person appearing to be Roy in a security video from the Walmart in Amory, Mississippi was wearing her shirt that was stolen out of her car. This video was taken on the evening of September 22, 2016, the day before the post office robbery.

IV. Appeal.

Both the government and the Roy extensively briefed the F.R.E. 404(b) issue on appeal. However, the Fifth Circuit did not decide the issue under a Rule 404(b) analysis, instead surprisingly finding that the evidence was admissible on a basis not decided by the district court or briefed by the parties:

> [T]he challenged evidence was intrinsic and admissible to complete the story of the crime because the vehicle burglary and the charged offenses were part of a single criminal episode perpetrated by Roy and the co-participant over approximately 18 hours in Northern Mississippi.

Roy, 765 Fed. Appx. 85, 86 (5th Cir. 2019) (citing *United States v. Rice*, 607 F.3d 133, 141 (5th Cir. 2010)).

ARGUMENT

I. Introduction.

At its heart, this case implicates the use of character evidence of other, uncharged conduct to prove the alleged illegal conduct at issue. Inconsistent, unfair and at times abusive admission of this kind of evidence outside of Rule 404(b) has been a hallmark of criminal prosecutions in recent years.

Historically, character evidence was been prohibited under American common law,[1] and F.R.E. 404(b) codified this principle in stating: "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." However, Rule 404(b) provides an avenue for admission of other wrongs if such evidence is legitimately relevant to something other than character, stating: "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."

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[1] *See* 1 George E. Dix et al., *McCormick on Evidence* 4, ¶¶ 186-95 (Kenneth S. Broun ed., 2006) (discussing historical use of character evidence). The basis for the common law prohibition of character evidence was to avoid the danger that the trier of fact would decide the case on an improper basis: that the accused had committed other crimes and was therefore guilty of committing the crime at issue. Edward J. Imwinkelreid, *The Second Coming of* Res Gestae*: A Procedural Approach to Untangling the "Inextricably Intertwined" Theory for Admitting Evidence of An Accused's Uncharged Misconduct*, 59 Cath. U. L. Rev. 719, 720 (2010). This Court has noted:

> Courts . . . almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. . . . The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to do so over persuade them as to prejudge one with a bad general record and deny him a fair opportunity to defendant against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of the issues, unfair surprise and undue prejudice.

Michelson v. United States, 335 U.S. 469, 475-76, 69 S. Ct. 213, 93 L.Ed. 168 (1948).

Despite ostensibly clear rules-based standards for the admissibility of character evidence, courts have developed all kinds of exceptions, short cuts and back doors permitting introduction of such evidence; not the least of which is the "inextricably intertwined" doctrine where evidence of the uncharged crime is admissible because it is part of a "single criminal episode" or "a necessary preliminary to the crime charged." *United States v. Sumlin*, 489 F.3d 683, 689 (5th Cir. 2007) (citations omitted). This doctrine uses the term "intrinsic evidence," and the Fifth Circuit has held that intrinsic evidence is "admissible to complete the story of the crime by proving the immediate context of events in time and place."[2] *United States v. Coleman*, 78 F.3d 154, 156 (5th Cir. 1996) (emphasis added).

Due to their indisputably prejudicial impact on the defendant, prosecutors like to introduce evidence of other crimes, and as a result, character and other uncharged crime evidence are involved in more reported decisions than any other federal rule. 2 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence* ¶¶ 404[08], 404[07] (1997) (discussing prevalence of character evidence cases); *see* Kenneth S. Broun et al., *McCormick on Evidence* § 558 no. 8 (Edward W. Cleary ed, 3d, 1984) (stating "published opinions on character evidence are as numerous 'as the sands of the sea.'").

II. The intrinsic evidence doctrine has come under scholarly criticism.

The general theme of scholarly criticism of the doctrine is that it is too loose and facilitates the otherwise inadmissible introduction of character evidence. *See e.g.* 1 Michael H. Graham, *Handbook of Federal Evidence* § 404:5, at 70513 n.22 (6th ed. 2006); 1 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 4:33, at 808-09, 818

[2] Due to the varying terminology used in cases and elsewhere, Roy will use the terms "inextricably intertwined," "complete the story," "necessary preliminary" and "intrinsic evidence" doctrine in this petition to mean the same thing.

(3d ed. 2007 & Supp. 2009); Thomas M. DiBiagio, *Intrinsic and Extrinsic Evidence in Federal Criminal Trials: Is the Admission of Collateral Other-Crimes Evidence Disconnected to the Fundamental Right to a Fair Trial?*, 47 Syracuse L. Rev. 1229, 1230 (1997); Stephen A. Saltzburg, *Trial Tactics: Inextricably Intertwined? Maybe Not*, 16 Crim. Just. 60, 60 (2001); Jason M. Brauser, *Comment, Intrinsic or Extrinsic?: The Confusing Distinction between Inextricably Intertwined Evidence and Other Crimes Evidence under Rule 404(b)*, 88 Nw. U. L. Rev. 1582, 1583-84 (1994).

Commentators argue that the intrinsic evidence doctrine is the modern equivalent of the old discredited *res gestae* doctrine which was used for the admission of hearsay and uncharged misconduct.[3] The issues with the intrinsic evidence doctrine has succinctly been described as follows:

> "Inextricably intertwined" is the "modern de-Latinized" equivalent of *res gestae*, and it has been savaged by a similar critique. The standard has been described as "lack[ing] clarity" and "obscure," because it does not embody a clear substantive principle. Thus, the doctrine functions largely as a "shibboleth" or "talisman" to be incanted. The looseness of the doctrine allows the courts to engage in "result-oriented" decision-making. A court can purport to justify the admission of testimony about uncharged misconduct "by the simple expedient of describing [the conduct] as 'inextricably intertwined'" with the charged offense. The vacuous nature of the test's wording gives courts license to employ sloppy analysis and allows them quickly to slip from a conclusory analysis to a desired conclusion. Simply stated, the indefinite phrasing of the doctrine is a virtual invitation for abuse.

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[3] *See* 6 John Henry Wigmore, *Evidence in Trials at Common Law* § 1767, at 253, 255 (1976) (describing the *res gestae* principle as "entirely useless and positively harmful"); 1 Mueller & Kirkpatrick, supra, § 4:33, at 809 (describing the *res gestae* principle as "mind-numbing"). Many courts have altogether rejected the *res gestae* concept. *See United States v. Krezdorn*, 639 F. 2d 1327, 1332 (5th Cir. 1981); *Stephens v. Miller*, 13 F.3d 998, 1003 (7th Cir. 1994) (finding that the Federal Rules of Evidence rendered *res gestae* obsolete); *State v. Fetelee*, 117 Haw. 53, 55, 175 P.3d 709, 711 (2008) ("*res gestae* should be abandoned in the wake of Hawaii's well-developed and long-standing rules of evidence."); *State v. Gunby*, 282 Kan. 39, 63, 144 P.3d 647, 663 (2006) ("The concept of *res gestae* is dead as an independent basis of admissibility. . . ."); *State v. Rose*, 206 N.J. 141, 182, 19 A.3d 985, 1011 (2011) (ending practice of invoking *res gestae* in circumvention of the New Jersey Rules of Evidence).

> The doctrine's second criticism is that, worse still, abuse has in fact occurred. Commentators have noted that courts have frequently applied the doctrine in an overbroad manner. In the view of one treatise author, some courts have "lost [their] way." In applying the doctrine, a number of courts have turned a blind eye to the danger of admitting prejudicial uncharged-misconduct evidence. Rather than "meticulous[ly]" attempting to determine whether the testimony about the charged and uncharged crimes could realistically be severed, the judicial tendency has been to apply the doctrine in a lax fashion. In case after case, the courts have invoked the doctrine even though, on careful scrutiny, the testimony about the charged and uncharged offenses could readily have been separated. In these cases, testimony concerning the different crimes was "anything but inseparable."

Imwinkelried, *The Second Coming of Res Gestae*, 59 Cath. U. L. Rev. at 729–30.

III. The intrinsic evidence doctrine has come under judicial criticism.

The Third Circuit has rejected the intrinsic evidence doctrine due to its use by prosecutors to circumvent Rule 404(b). *United States v. Green*, 617 F. 3d 233, 248-49 (3d Cir. 2010). The Third Circuit identified three specific problems with the doctrine. First, it "creates confusion because, quite simply, no one knows what it means;" that it was applied in varying ways, leading to inconsistent outcomes. *Green*, 617 F. 3d at 246. Second, the doctrine "exempts evidence of wrongful acts that explain the circumstances of the crime from the rigors of Rule 404(b)." *Id.* at 247. Third, the Third Circuit noted that the doctrine was applied overly broadly so that virtually any bad act was intrinsic, nullifying F.R.E. 404(b). *Id.*

Similarly, the D.C. Circuit has abolished the distinction between intrinsic and extrinsic evidence on the basis that the intrinsic evidence doctrine creates "a danger that finding evidence 'inextricably intertwined' may too easily slip from analysis to mere conclusion." *United States v. Bowie*, 232 F. 3d 923, 929 (D.C. Cir. 2000). It has also

limited the doctrine to reject "completes the story" formulations on the basis that it "threatens to override Rule 404(b)." *Id.* The court held that "some uncharged acts performed contemporaneously with the charged crime may be termed intrinsic if they facilitate the commission of the charged crime." *Id.*

The Seventh Circuit has held that the "inextricable intertwinement doctrine has since become overused, vague and quite unhelpful." *United States v. Gorman*, 613 F.3d 711, 719 (7th Cir. 2010). The court stated:

> We again reiterate our doubts about the usefulness of the inextricable intertwinement doctrine, and again emphasize that direct evidence need not be admitted under this doctrine. If evidence is not direct evidence of the crime itself, it is usually propensity evidence simply disguised as inextricable intertwinement evidence, and is therefore improper, at least if not admitted under the constraints of Rule 404(b).

Gorman, 613 F.3d at 718.

IV. The intrinsic evidence doctrine is inconsistently applied (or not applied at all) in various circuits.

As will be discussed in detail below, some circuits liberally allow the intrinsic evidence doctrine to be applied and some have eliminated it altogether, resulting in inconsistent application of the character evidence rule across the circuits.

A. The Fifth Circuit.

The Fifth Circuit has held that evidence of an act is intrinsic when (1) "it and evidence of the crime charged are inextricably intertwined," (2) "both acts are part of a single criminal episode," or (3) "it was a necessary preliminary to the crime charged." *United States v. Sumlin*, 489 F.3d 683, 689 (5th Cir. 2007) (citations omitted). Intrinsic evidence is "admissible to complete the story of the crime by proving the immediate context of events in time and place." *United States v. Coleman*, 78 F.3d 154, 156 (5th Cir.

1996) (emphasis added). In cases where the other acts are "distinct and distinguishable events" and did not constitute "a necessary preliminary" for the crime charged, the other acts are not intrinsic. *United States v. Williams*, 900 F.2d 823, 825 (5th Cir. 1990). Notably, intrinsic evidence does not implicate Rule 404(b), and consideration of admissibility pursuant to that rule is unnecessary. *United States v. Garcia*, 27 F.3d 1009, 1014 (5th Cir. 1994).

In multiple cases, the Court has held that typical intrinsic acts occur at least the same day if not within a few hours of the underlying offense. *See Coleman*, 78 F.3d at 156 (two attempted car-jackings earlier in the day before the carjacking at issue); *United States v. Rice*, 607 F.3d at 141 (four unsuccessful robbery attempts occurred "within a few hours" of the carjacking at issue).

B. Other circuits that accept the doctrine.

The intrinsic evidence exception is recognized in the following circuits. *United States v. Monteiro*, 871 F.3d 99, 110 (1st Cir. 2017) (similar to Fifth Circuit approach); *United States v. Fama*, 636 F. App'x 45, 47-48 (2d Cir. 2016) (similar to Fifth Circuit approach); *United States v. Logan*, 593 F. App'x 179, 183 (4th Cir. 2014) (using a variety characterizations such as "completes the story," "context," and "necessary preliminaries" essentially similar to Fifth Circuit approach); *United States v. English*, 785 F. 3d 1052, 1059 (6th Cir. 2015);[4] *United States v. Cunningham*, 702 F. App'x 489, 492 (8th Cir. 2017) (similar to Fifth Circuit approach); *United States v. Cuenca*, 692 F. App'x 857, 858 (9th Cir.

[4] The Sixth Circuit has been described as "one of the more egregious employers of the 'intrinsic evidence exception' heuristic [i.e. short cut]." Dora W. Klein, *The (Mis)application of Rule 404(b) Heuristics*, 72 U. Miami L. Rev. 706, 736 (2018). In the Sixth Circuit, intrinsic evidence is admissible not only as "other-acts" evidence, but also as propensity evidence (i.e. evidence that since the defendant had engaged in bad acts previously, the defendant has a propensity to engage in other bad acts in the future). *United States v. Gibbs*, 797 F. 3d 416, 423 (6th Cir. 2015).

2017);[5] *United States v. Kupfer*, 797 F.3d 1233, 1238 (10th Cir. 2015) (using an expansive concept of "intertwined" similar to the Sixth Circuit); *United States v. Louissaint*, 407 F. App'x 378, 379 (11th Cir. 2011) (similar to Fifth Circuit approach).

C. Circuits that reject the doctrine.

As discussed above, the Third Circuit, Seventh Circuit and DC Circuits have specifically rejected the intrinsic evidence doctrine. *See Green*, 617 F.3d 233, 248 (3d Cir. 2010) (stating "the inextricably intertwined test is vague, overbroad, and prone to abuse, and we cannot ignore the danger it poses to the vitality of Rule 404(b)."); *Gorman*, 613 F.3d at 718 (stating "resort to inextricable intertwinement is unavailable when determining a theory of admissibility."); *Bowie*, 232 F. 3d at 929.

V. The use of the intrinsic evidence doctrine in this case was grossly prejudicial to Roy.

The district court admitted the evidence of the vehicle burglary from the day before the accident under a Rule 404(b) analysis, finding that the prejudicial effect was outweighed by the probative value. On appeal however, perhaps in recognition of the likely error of the district court, the Fifth Circuit did not address Rule 404(b), instead finding that the evidence was intrinsic and completed the story of the post office robbery.

First, the over breadth of the doctrine allowed evidence that was otherwise inadmissible to come in. The prosecution introduced evidence of the vehicle burglary in another town 18 hours before the robbery and shooting in question for the singular reason of putting Roy and her alleged accomplice, Scott, together on September 22, 2016. However, the government introduced surveillance video from Walmart in Amory, Mississippi from September 22, 2016 which clearly showed Roy and Scott together in the

[5] The Ninth Circuit has been described as "misus[ing] the 'intrinsic evidence heuristic' in several ways." Klein, *The (Mis)application of Rule 404(b) Heuristics*, 72 U. Miami L. Rev. at 743.

store at that time. Further, Roy's own witness, Victoria Roy, testified that Roy called her from a Walmart that night to ask what size underwear she wore. So though probably minimally relevant, the probative value of the evidence of the burglary of Massey's car was so minimal as to be grossly outweighed by the prejudicial effect of telling the jury that Roy and/or Scott burgled a car the day before the robbery.[6] This is particularly true in light of the fact that the prosecution presented completely non-prejudicial evidence in the form of video from Walmart. In other words, the government gained little or no substantive benefit from the evidence, but gained a substantial prejudicial benefit.

Second, in a legal sense, the vehicle burglary in no way "completed the story" of the underlying post office robbery nor was it in any way "immediate" to it. It was not a necessary preliminary to the post office robbery because no implements used in that robbery were taken in the vehicle burglary. They were not in the same town, and they were not at the same time. The incidents were clearly distinct and distinguishable and not inextricably intertwined.

Finally, the fact that the Fifth Circuit did not even discuss F.R.E. 404(b) and instead defaulted to the intrinsic evidence analysis is telling. In light of the minimal probative value of the evidence, and the significant prejudicial effect (especially since the prosecution had non-prejudicial evidence accomplishing what it wanted to do without admitting evidence of the vehicle burglary), it is likely that the admission of this evidence would have been overturned under the 404(b) analysis. Thus, in districts that have abolished the intrinsic evidence doctrine, this highly prejudicial evidence would not have

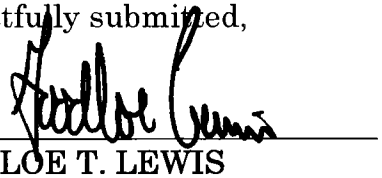
[6] Furthermore, the fact that a purse was stolen from Massey's car was particularly prejudicial because the only item stolen from the post office was Duff's purse. However, Roy was not prosecuted for aiding and abetting the theft of Duff's purse, instead she was prosecuted for attempted theft of the property of the post office. Thus, the prosecution was able to suggest to the jury that Roy and Scott were on some kind of purse stealing spree which is irrelevant to the underlying offense and extremely prejudicial.

come in at all – meaning that there are inconsistent applications of federal evidentiary rules from circuit to circuit.

VI. Conclusion.

Petitioner respectfully asks that this Court grant certiorari and set the case for a decision on the merits.

Respectfully submitted,



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