No. 19-5553

IN THE SUPREME COURT OF THE UNITED STATES

ANGELA ROY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

ANN O'CONNELL ADAMS
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether, in a prosecution for assault of a postal employee with intent to commit robbery, in violation of 18 U.S.C. 2114(a) and 2; the district court abused its discretion by admitting evidence under Federal Rule of Evidence 404(b) that petitioner had burglarized a car in a town near the post office the night before the robbery.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Miss.):

United States v. Scott et al., No. 16-cr-110 (April 4, 2018)

United States Court of Appeals (5th Cir.):

United States v. Roy, No. 18-60261 (April 18, 2019)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1, at 1-2) is at 765 Fed. Appx. 85. The order of the district court partially granting the motion in limine (Pet App. 3, at 1-2) is not published in the Federal Supplement but is available at 2017 WL 4701318.

JURISDICTION

The judgment of the court of appeals was entered on April 18, 2019. A petition for rehearing was denied on May 20, 2019 (Pet. App. 4, at 1-2). The petition for a writ of certiorari was filed on August 7, 2019. 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 Northern District of Mississippi, petitioner was convicted on one count of assault of a postal employee with intent to commit robbery, in violation of 18 U.S.C. 2114(a) and 2; and one count of discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) (2012). Judgment 1. The district court sentenced petitioner to 270 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1, at 1-2.

1. On September 23, 2016 at 10:28 a.m., petitioner called the U.S. Post Office in Randolph, Mississippi, and asked when the post office would open. Gov't C.A. Br. 4. The postmaster advised petitioner that the post office would open at 10:30 a.m. Ibid. Shortly thereafter, as petitioner waited outside, Richard Scott entered the post office and asked the postmaster about renting a post office box. Ibid. When the postmaster turned around to show Scott the various box sizes, Scott shot at her three times with a handgun, hitting her one time in the arm. Ibid.

When the postmaster ran away, Scott jumped over the counter and took the postmaster's keys and purse, then fled with petitioner. Gov't C.A. Br. 4-5. As petitioner and Scott drove away, petitioner urged Scott to shoot the postmaster, who was standing at the door of a neighboring house. Id. at 5. The gun,

however, was jammed. Ibid. The postmaster eventually was able to contact law enforcement from a nearby convenience store. Ibid.

As the postmaster had run out of the post office, she had seen a woman in the post office parking lot wearing a yellow bandana over her face and standing next to a gold Pontiac G6. Gov't C.A. Br. 5. Postal inspectors connected the phone number used to call the post office on the morning of the robbery to Scott, and they identified petitioner as an associate of Scott who drove a Pontiac G6. Id. at 5-8. A deputy U.S. Marshal entered petitioner's license plate number into the Mississippi, Alabama, and Louisiana tag reader systems, which caused an alert when petitioner's Pontiac G6 crossed into Louisiana. Id. at 8. Louisiana police officers located the car at an apartment complex, arrested Scott as he approached the vehicle, and later arrested petitioner. Ibid. They obtained a warrant to search the car. Ibid.

During the investigation, postal inspectors learned of a car burglary that had occurred in nearby Pontotoc, Mississippi on September 22, 2016 -- the night before the post office robbery. Gov't C.A. Br. 8. The victim, Sylvia Massey, had left her car outside a gym, and when she returned she found her window broken, and her gym bag containing clothes, purse, and jewelry had been stolen. Id. at 8-9. Later that night, petitioner was captured on surveillance video at a Walmart in Amory, Mississippi, wearing clothing that was stolen from Massey's car. Ibid. Checks that

were stolen from Massey's purse were used to purchase supplies at that Walmart. C.A. App. 490-491. And the jewelry that was taken from Massey's car was recovered from petitioner's car when she and Scott were arrested in Louisiana. Gov't C.A. Br. 9.

2. A federal grand jury in the Northern District of Mississippi returned an indictment charging petitioner and Scott with one count of assault of a postal employee with intent to commit robbery, in violation of 18 U.S.C. 2114(a) and 2; and one count of discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) (2012). Indictment 1-2. Scott pleaded guilty, but petitioner proceeded to trial. Gov't C.A. Br. 9.

Before trial, the government filed a motion in limine to admit evidence of other crimes, wrongs, or acts pursuant to Federal Rule of Evidence 404(b). D. Ct. Doc. 58 (Sept. 1, 2017). The government informed the district court that it planned to introduce at trial testimony from Massey describing items that were stolen from her car on September 22, 2016, confirming that a woman in the Walmart surveillance video was wearing clothing stolen from Massey's car, and identifying jewelry recovered from petitioner's car as jewelry that had been stolen from Massey's car. Id. at 5. The government also planned to introduce testimony from Scott confirming that petitioner is the woman in the Walmart video, and that petitioner had burglarized Massey's car. Ibid. The government explained that because petitioner and Scott reside near Mobile, Alabama, all

of this testimony would be probative to identify petitioner as the woman standing outside of a north Mississippi post office on the morning after the car burglary. Id. at 5-6.

The government argued that this evidence was "intrinsic to the instant offense" because petitioner's possession of items stolen from a car in north Mississippi the night before the robbery and "use of stolen checks during the burglary to purchase needed items at Walmart" was "part of the events immediately prior to and leading up to the robbery." D. Ct. Doc. 58, at 6. The government additionally contended that even if the evidence was not intrinsic to the offense, it was admissible under Rule 404(b) "to show identity, intent, planning, and opportunity." Ibid. The district court granted the motion in limine with respect to the testimony of Scott and Massey about the car burglary, finding that it was admissible under Rule 404(b) and would be "extremely probative" as to petitioner's presence at the crime scene. D. Ct. Doc. 64, at 2-3 (Oct. 19, 2017). The court also found that the probative value of the testimony outweighed any prejudice. Id. at 3.

At trial, Scott testified that he and petitioner had burglarized a car in Pontotoc the day before the post office robbery, and that they had gone into a Walmart after they burglarized the car. Gov't C.A. Br. 24. Massey identified the jewelry found in petitioner's car as jewelry stolen from Massey's car. Id. at 9, 24. Massey also identified a shirt, stolen from her car the day before the robbery, in a Walmart surveillance video

from September 22, 2016. Ibid. That evidence placed petitioner in north Mississippi the night before the post office robbery. Id. at 9, 25.

Through testimony of her daughter, petitioner attempted to create an alibi that she was in Mobile, Alabama at 9:00 a.m. on the morning of the robbery. Gov't C.A. Br. 6-7; C.A. App. 629. The jury found petitioner guilty on both counts of the indictment. Judgment 1. The district court sentenced her to 270 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3.

3. The court of appeals affirmed in a per curiam opinion. Pet. App. 1, at 1-2. As relevant here, the court determined that the district court did not abuse its discretion in admitting the evidence relating to petitioner's involvement in the car burglary. Id. at 1. The court explained that the 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 [petitioner and Scott] over approximately 18 hours in Northern Mississippi." Ibid.

ARGUMENT

Petitioner contends (Pet. 4-12) that the district court abused its discretion in admitting evidence of petitioner's participation in a car burglary in Pontotoc, Mississippi the night before the post office robbery. The court of appeals correctly upheld the admission of that evidence. Although 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 disagreement does not warrant this Court's review. And even if it did, this case would be an unsuitable vehicle for addressing it because it would not affect the admissibility of the challenged evidence in this case. Further review is therefore unwarranted.

1. Federal Rule of Evidence 404(b) addresses the use at trial of "[e]vidence of a crime, wrong, or other act." Fed. R. Evid. 404(b)(1). 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." Fed. R. Evid. 404(b)(1) and (2). When the prosecution seeks to introduce such evidence, a defendant is entitled, on request, to advance notice that the prosecution will introduce it. Fed. R. Evid. 404(b)(2).

Because Rule 404(b) addresses only evidence of <u>other</u> 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 amendment) (28 U.S.C. App. at 1019)(citing with approval a case that recognized a "distinction between 404(b) evidence and intrinsic offense evidence"). The prosecution is therefore free

to introduce such intrinsic evidence without first providing notice.

The court of appeals correctly determined that the district court did not abuse its discretion in admitting evidence of the car burglary on the night before the post office robbery. The evidence showed that petitioner and Scott were together in northern Mississippi around the time of the robbery, and it completed the story of the direct relationship between petitioner and Scott and how they came to be at a post office in nearby Randolph the next morning. See United States v. Rice, 607 F.3d 133, 141 (5th Cir.) (evidence that is intrinsic to the crime charged is admissible to "complete the story of the crime by proving the immediate context of events in time and place") (citation omitted), cert. denied 562 U.S. 941 (2010).

2. As petitioner notes (Pet. 7-10), 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 "complete[s] the story of" the charged crime. Pet. 8 (citations omitted); see Pet. 7-10 (citing cases); see also, e.g., United States v. Robles-Alvarez, 874 F.3d 46, 50-51 (1st Cir. 2017); United States v. Robinson, 702 F.3d 22, 37 (2d Cir. 2012), cert. denied, 568 U.S. 1203 (2013); 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. 2000); United States v. Guzman, 926 F.3d 991, 999-1000 (8th Cir. 2019); United States v. Anderson, 741 F.3d 938, 949 (9th Cir. 2013), cert. denied, 572 U.S. 1025 (2014); United States v. Watson, 766 F.3d 1219, 1235 (10th Cir.), cert. denied, 135 S. Ct. 735 (2014); United States v. Dixon, 901 F.3d 1322, 1344-1345 (11th Cir. 2018), cert. denied, 139 S. Ct. 854 and 139 S. Ct. 1392 (2019). 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 omitted), cert. denied, 562 U.S. 942 (2010); see 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).

Contrary to petitioner's assertion (Pet. 7-8, 10), however, no court of appeals has rejected the distinction between intrinsic and extrinsic evidence altogether. And the differences in the courts' formulations of what constitutes intrinsic evidence falling beyond the reach of Rule 404(b) do not warrant this Court's review. This Court has repeatedly denied certiorari to petitions for writs of certiorari raising that issue. See Harper v. United

States, 137 S. Ct. 619 (2017) (No. 16-160); Holden v. United States, 137 S. Ct. 567 (2016) (No. 16-5259); Villanueva v. United States, 565 U.S. 976 (2011) (No. 10-1535). It should follow the same course here.

First, the lack of uniformity in the formulations applied by each circuit 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 -- it will be admissible under Rule 404(b). And the question of whether the evidence is intrinsic will thus affect only whether Rule 404(b)'s procedural requirements are applicable.

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," because another formulation would likewise classify the evidence as intrinsic.

Gorman, 613 F.3d at 719. Courts are thus likely to reach consistent results irrespective of the particular form of words that each employs. Third, a district court's determination of whether or not evidence falls within Rule 404(b) is highly fact-specific and 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."). Accordingly, 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.

3. In any event, even if it were necessary to articulate a singular form of words to describe whether evidence is intrinsic to the charged crime or must instead be admitted under Rule 404(b), this case is not an appropriate vehicle in which to address that issue. The government complied with the notice requirements of Rule 404(b) with respect to Massey's testimony, see D. Ct. Doc. 58 (motion in limine), and the district court admitted the evidence on that basis -- not as intrinsic evidence, see D. Ct. Doc. 64, at 2-3 (determining that the testimony of Scott and Massey about the car burglary would be probative of petitioner's identification at the crime scene).

Petitioner asserts (Pet. 10) that because the court of appeals did not address Rule 404(b), it must have believed the evidence was inadmissible under that rule. That inference is unwarranted. No question exists that the evidence, if not intrinsic to the crime, was admissible under Rule 404(b). Petitioner does not suggest that the evidence lacks probative value with respect to her identity as the woman seen standing next to a Pontiac G6 in the post office parking lot by the postmaster and to undermining petitioner's claim to have been hundreds of miles away near Mobile, Alabama when the post office was robbed. See Pet. 3; Gov't C.A. Br. 6-7. Instead, petitioner's argument is, at bottom, a fact-bound contention that evidence of the car burglary should not have been admitted under a Rule 403 balancing test because the government already had the Walmart surveillance video to prove that petitioner, together with Scott, was present in northern Mississippi on the evening before the post office robbery in Randolph. See Pet. 10-11 (acknowledging that evidence of the car burglary was relevant). That fact-bound contention does not merit review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

ANN O'CONNELL ADAMS
Attorney

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