NO. 19-5553

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

REPLY IN SUPPORT OF PETITION FOR
A WRIT OF CERTIORARI

Goodloe T. Lewis
CJA Appointed Federal Public Defender
Northern District of Mississippi
1305 Madison Avenue / P.O. Box 668
Oxford, Mississippi 38655
Telephone: (662) 234-4000
Facsimile: (662) 234-2000
glewis@hickmanlaw.com

Attorney for Petitioner-Defendant

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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Petitioner Angela Roy (hereinafter "Roy") submits the following Reply in Support of her Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

ARGUMENT

In response to Angela Roy's Petition for a Writ of Certiorari, the United States makes three short arguments:

1. "The lack of uniformity in the formulations applied by each circuit will rarely, if ever, affect the threshold admissibility of evidence." (Brief in Opposition, p. 10);
2. Courts still reach consistent results in admission of other acts evidence despite different formulations of the intrinsic evidence standard; (Brief in Opposition, pp. 10-11); and
3. Since Rule 404(b) determinations get a differential standard of review, the Court should assume that the district judge's ruling would have been upheld in this case. (Brief in Opposition, p. 11).

I. The United States has presented no support whatsoever for its assertions in points 1 and 2 above.

Roy will consider points 1 and 2 together because they make the same general, unsupported assertions. The United States does not dispute that there is a lack of uniformity in how the various circuits handle intrinsic evidence. The United States's work-around on this issue is to assert that this lack of uniformity "rarely, if ever" affects the threshold admissibility of evidence. The United States cites no support for this position other than *United States v. Green*, 617 F.3d 233, 249 (3rd Cir. 2010) for the

proposition that the Third Circuit did not think that its abolition of the intrinsic evidence doctrine in that case would have had much practical effect.

First, it is crucial to note that the evidence of Roy's involvement in the vehicle burglary the day before the crime at issue would never have been admissible under the 3rd Circuit's formulation of the intrinsic evidence doctrine. In *Green*, the Court held that intrinsic evidence was admissible in only two categories:

> First, the evidence is intrinsic if it "directly proves" the charged offense. . . . This gives effect to Rule 404(b)'s applicability only to evidence of "other crimes, wrongs, or acts." . . . . If uncharged misconduct directly proves the charged offense, it is not evidence of some "other" crime. Second, "uncharged acts performed contemporaneously with the charged crime may be turned intrinsic if they facilitate the commission of the charged crime."

Green, 617 F.3d at 248-49 (citations omitted). None of those circumstances were present here.

The United States makes this "no harm, no foul" argument in spite of the fact that Roy cited in her petition five scholarly articles and several cases which found just the opposite of the United States' assertion. *See* also, Andrew J. Morris, *Federal Rule of Evidence 404 (b): The Fictitious Ban on Character Reasoning from Other Crime Evidence*, 17 REV. LITIG. 181, 184 (1998) (stating "courts routinely admit bad acts evidence precisely for its relevance to defendant propensity"). There could be no more inconsistent application of the intrinsic evidence doctrine that its use in some circuits (e.g. 6th Circuit, *United States v. Gibbs*, 797 F.3d 416, 423 (6th Cir. 2015)) to admit propensity evidence. Propensity evidence is <u>categorically inadmissible</u> under F.R.E. 404(b)(1). In short, contrary to the United States' position, the weight of both scholarly and legal analysis is that application of the intrinsic evidence doctrine <u>certainly does</u> affect the threshold admissibility of evidence that would otherwise be inadmissible.

Similarly, in its second point, the United States contends that there really is not a problem with inconsistent results because the circuits "are thus likely to reach consistent results irrespective of the particular form of words that each employs." Again, this assertion is totally unsupported by any law or legal scholarship. Plus, this position is again completely refuted by the cases and law journal articles cited by Roy in her Petition for a Writ of Certiorari that state that courts <u>certainly do</u> reach inconsistent results in the application of this doctrine.

II. The Court cannot assume that this evidence was otherwise admissible under Rule 404(b).

The United States' final argument is the rather speculative contention that the district court's finding that this evidence was admissible under Rule 404(b) would have been upheld by the Fifth Circuit, anyway.

First, this Court cannot make that inference because the Fifth Circuit absolutely did not review the district court's Rule 404(b) ruling. And this was true despite Roy specifically requesting the Court do so. How can this Court speculate or infer now the Fifth Circuit would have reviewed the district court's Rule 404(b) decision?

Moreover, as discussed in the Petition for a Writ of Certiorari, the probative value of the purse theft evidence was essentially non-existent, and in no way furthered the prosecution's stated purpose of introducing the purse theft evidence which was to put Roy and Scott together in north Mississippi on the day before the post office robbery because they had other non-prejudicial evidence doing the same thing and closer in time to the robbery (namely the Walmart video). Thus, even under a *de novo* standard of review, the district court's admission of this evidence was clearly an abuse of discretion.

III. Conclusion.

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

Respectfully submitted,

/s/ Goodloe T. Lewis

GOODLOE T. LEWIS

CJA Appointed Federal Public Defender
P.O. Box 668
Oxford, Mississippi 38655
Telephone: (662) 234-4000
Facsimile: (662) 234-2000
glewis@hickmanlaw.com
Attorney for Petitioner-Defendant