NUMBER _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2019

MICHAEL BLANKENSHIP, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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I. QUESTIONS PRESENTED FOR REVIEW

1. Whether in a prosecution for illegally dumping waste into a creek, where a major part of the Government's case was based on eyewitness testimony about the smell of the creek when the defendant was allegedly dumping, a chart showing a consistently high level of fecal coliform in the creek was relevant to show there were other potential sources of the odors to which witnesses testified.

2. Whether allowing the Government to present testimony from multiple witnesses about the defendant's admissions to dumping on days outside the dates charged in the indictment violated Rule 404(b) of the Rules of Evidence.

II. TABLE OF CONTENTS

III. TABLE OF AUTHORITIES

Cases

Statutes

Rules

IV. LIST OF ALL DIRECTLY RELATED PROCEEDINGS

- *United States v. Blankenship*, No. 5:17-cr-00200-1, U.S. District Court for the Southern District of West Virginia. Judgment entered January 17, 2019.
- *United States v. Blankenship*, No. 19-4072, U.S. Court of Appeals for the Fourth Circuit. Judgment entered on October 1, 2019.

V. OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit in *United States v. Blankenship*, ___ F. App'x ___, 2019 WL 4805766 (4th Cir. 2019), is an unpublished opinion and is attached to this Petition as Appendix A. The basis of the first issue presented in this Petition was ruled upon by the district court in a written order prior to trial and is attached to this Petition as Appendix B. The basis of the second issue presented in this Petition was also ruled upon by the district court in a written order prior to trial and is attached to this Petition as Appendix C. The final judgment order of the district court is unreported and is attached to this Petition as Appendix D.

VI. JURISDICTION

This Petition seeks review of a judgment of the United States Court of Appeals for the Fourth Circuit entered on October 1, 2019. This Petition is filed within ninety days of the date the court's judgment. No petition for rehearing was filed. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254 and Rules 13.1 and 13.3 of this Court.

VII. STATUTES AND REGULATIONS INVOLVED

The first issue in this Petition requires interpretation and application of Rule 401 of the Rules of Evidence, which provides:

> Evidence is relevant if:
>
> **(a)** it has any tendency to make a fact more or less probable than it would be without the evidence; and
>
> **(b)** the fact is of consequence in determining the action.

The second issue in this Petition requires interpretation and application of Rule 404 of the Rules of Evidence, which provides, in pertinent part:

> **(b) Crimes, Wrongs, or Other Acts.**
>
> **(1) Prohibited Uses.** 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.
>
> **(2) Permitted Uses; Notice in a Criminal Case.** 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.

VIII. STATEMENT OF THE CASE

A. Federal Jurisdiction

This Petition arises from the final judgment and sentence imposed upon Michael Blankenship following his conviction on two counts of an eleven-count indictment for illegally dumping waste into a creek. On November 16, 2017, an indictment was filed in the Southern District of West Virginia charging Blankenship with eleven counts of discharging pollutants into a water of the United

States, in violation of 33 U.S.C. §§ 1311(a) and 1319(c)(2)(A). J.A. 10-12. Because that charge constitutes an offense against the United States, the district court had original jurisdiction pursuant to 18 U.S.C. § 3231. This is an appeal from the final judgment and sentence imposed after Blankenship was convicted by a jury of Counts Four and Nine of the indictment. J.A. 554-555. A judgment order was entered on January 17, 2019. J.A. 556-562. Blankenship timely filed a notice of appeal on January 30, 2019. J.A. 563. The United States Court of Appeals for the Fourth Circuit had jurisdiction to review this matter pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1291.

B. Facts Pertinent to the Issue Presented

This case involves a stream in rural West Virginia called Little Huff Creek, which flows into the Guyandotte River. Blankenship was accused of dumping waste collected from portable toilets into the creek over a period of several months in 2015 and 2016. J.A. 10-12. He was eventually convicted of doing so on two particular days and sentenced to fifteen months in prison. J.A. 554-555.

1. Blankenship is charged with multiple counts of dumping sewage into Little Huff Creek.

Blankenship ran a business, Hanover Contracting Company, "which engaged in the business of cleaning portable toilets, hauling domestic sewage, and disposing of the sewage." J.A. 570. As part of the business he owned two trucks that he used for hauling sewage. Blankenship's home and business were located on Little Huff Creek in Wyoming County, West Virginia. *Id.*

On September 29, 2015, investigators with the West Virginia Department of Environmental Protection ("WVDEP") received an anonymous tip that there was a truck at Blankenship's property that was discharging waste into Little Huff Creek. Agents went to the scene to investigate and eventually spoke to Blankenship's neighbors, Denver Lester ("Lester") and his wife, Virginia ("Virginia"), who alleged that Blankenship had been dumping in the creek on a regular basis. J.A. 571-572.

As a result of that investigation, Blankenship was charged with eleven counts of violating the Clean Water Act by dumping sewage into Little Huff Creek. J.A. 10-12. Count Nine alleged dumping on September 29, 2015, when the WVDEP was called. The other counts alleged dumping on specific dates between February 6, 2015, and May 9, 2016. J.A. 12.

2. The district court allows the Government to present evidence of dumping outside the instances charged in the indictment, while ruling that Blankenship cannot inform the jury about the condition of Little Huff Creek.

Prior to trial, Blankenship filed motions seeking to prevent the Government from presenting evidence of other alleged incidents of dumping. J.A. 13-14. As relevant to this appeal, Blankenship argued that the Government had disclosed its intention to present several witnesses at trial who allegedly saw Blankenship dumping into Little Huff Creek on dates other than those charged in the indictment. J.A. 15-26. Blankenship argued that the statements of three of his neighbors – Lester, Virginia, and Bill Lester ("Bill") –were untimely disclosed and that their testimony was not intrinsic to the offenses charged and should be

excluded as evidence of other bad acts under Rule 404(b) of the Federal Rules of Evidence. J.A. 18-25. The Government countered that the testimony of the Lesters was intrinsic to the charges against Blankenship, arguing that the "story of [Blankenship's repeated] discharges provides context to the eleven charges to be presented to the jury." J.A. 45. In the alternative, the Government argued that the testimony was admissible under Rule 404(b) because it was relevant to the issue of intent, was reliable, and was not more prejudicial than probative. J.A. 46-51.

The district court denied Blankenship's motion in a written order prior to trial. J.A. 66-71. The district court concluded that "the evidence and testimony of Mr. and Mrs. Lester does not constitute evidence of prior bad acts such that it is subject to exclusion or analysis under Rule 404(b)." J.A. 69. That was because it was "inextricably intertwined with the Clean Water Act violations that the United States must prove at trial" and was "sufficiently connected to the criminal activity charged in the indictment such that they tell the story of the crime." *Id.* In the alternative, the district court held that the testimony would be admissible under Rule 404(b) because it was relevant to "issues other than [Blankenship's] character, such as his intent to discharge the pollutants without a permit, and whether he did so in absence of mistake or accident." J.A. 70. Any danger of undue prejudice could be addressed by a limiting instruction to the jury. *Id.*

The Government also filed a motion in limine seeking the exclusion of evidence at trial. J.A. 54-65. Specifically, the Government argued that the district court should exclude a "chart purportedly representing data on fecal levels at

different areas of Little Huff Creek" that was "created using data that is publicly available on the WVDEP website." J.A. 56, 64-65. Such evidence was "not relevant because it has no probative value" because the Government did not have to prove that Blankenship damaged the creek in order to secure a conviction. J.A. 56. The Government argued that the "only reason to introduce evidence that there may be other sources of fecal coliform in the stream . . . is to claim that [Blankenship] is not the only one guilty of polluting the stream or that the stream is so polluted that [Blankenship's] illegal discharges should be excused." J.A. 58.

In response, Blankenship argued that the chart was relevant without any relation to whether his alleged dumping damaged the creek. Blankenship argued that the chart was admissible because it was authentic under Rule 901(a) of the Federal Rules of Evidence and was relevant. J.A. 76-78.[1] The chart was relevant because it was expected that Blankenship's neighbors would testify that "they smelled sewage odors and believed that Mr. Blankenship is the source," but the chart showed that "sewage was present in Little Huff Creek . . . from sources other than Mr. Blankenship." J.A. 79-80. That was "of consequence because the sewage odor is the basis the neighbor witnesses have for alleging Mr. Blankenship was discharging." J.A. 80. The evidence was not going to be "used as an 'everyone else does it defense.'" J.A. 81.

[1]Blankenship also argued that the Government's objection was untimely because its motion was filed after the deadline set by the district court for pretrial motions and the chart had been disclosed in a timely fashion. J.A. 73-76.

The district court granted the Government's motion in a written order prior to trial. J.A. 94-97. The district court concluded that "the water quality chart [Blankenship] seeks to introduce is not relevant." J.A. 96. "The quality of the stream," the district court explained, "is not relevant to the elements of the charged offense." *Id.* In addition, "appropriate cross-examination of the testimony of the neighbor witnesses, with respect to the odor of the stream, can fully address this issue." *Id.* In the alternative, the district court held that the chart should be excluded because any probative value would be "substantially outweighed by the potential for confusing the jury regarding the actual elements of the charged offense." *Id.*

3. Blankenship goes to trial on the eleven-count indictment.

Blankenship's trial began on April 16, 2018. The Government's case consisted of numerous witnesses that can generally be broken down into three groups – those who testified about the September 29 incident that led to the investigation, those who testified about other alleged dumping incidents, and those witnesses who provided other relevant testimony to the jury. After hearing the evidence, the jury acquitted Blankenship on nine counts and convicted him on Counts Four and Nine of the indictment. J.A. 554-555.

a. Evidence about the September 29, 2015, incident

The Government produced testimony from two WVDEP employees who responded to the anonymous complaint about Blankenship made on September 29,

2017 – Michael Puckett ("Puckett") and Lily Kay ("Kay"). J.A. 125-162, 172-197. Puckett testified that Kay received a complaint by email that involved "a septage hauler being discharged into the creek" and they decided to investigate. J.A. 126. When they arrived at Blankenship's property Puckett "saw a septage hauler truck parked on a concrete pad adjacent to Little Huff Creek with an attached hose leading from the back of the truck down the slope into Little Huff Creek." J.A. 127. Puckett testified that he could see "septage spilled all over the concrete pad" and "over the bank" and that there "was septage spilled all over the bank." J.A. 130. He also saw "a dark pool at the end of the nozzle" that he believed to be septage based "on observation, smell, overall characteristics of septage that I've encountered over my career." *Id.* Kay testified that she saw "a hose attached to the sewage valve on the back of the truck with the hose leading into Little Huff Creek" and that there was "sewage sludge directly underneath the sewage valve on the truck" as well as "all over the concrete pad." J.A. 174-175. In addition, there was "the very distinct odor of sewage" and the "creek was discolored." J.A. 175. Puckett and Kay took pictures then left the scene in order to make a phone call for backup out of "prudence" and based "on the magnitude of what we observed." J.A. 130-131.

When they returned to the scene with two West Virginia State Police officers,[2] the truck had "been disconnected from the end of the hose" and the truck had been "moved to the opposite side" of the street, away from the creek. J.A. 138. Although Puckett could "no longer see that [the truck] had been discharging sewage

[2]One of those officers testified about returning to the scene with Puckett and Kay and similar observations of the truck, creek, and general area. J.A. 163-171.

. . . there was still some sewage on the rear-end of the truck, the rear bumper." J.A. 138-139. However, the hose that had been connected to the truck had not been moved and was in "the same place" as when Puckett and Kay had left. J.A. 145.

As part of their investigation, Puckett and Kay took samples from various locations. One was taken from the valve on the truck which, when opened, produced a "trickle" of septage. J.A. 149. They also collected a sample from the concrete pad where the truck was originally parked. J.A. 151. Kay put those samples on ice and transported them to a company called Analabs for testing.[3] J.A. 179, 184. Both samples tested positive for the presence of fecal coliform bacteria which is "in the feces of all humans." J.A. 183-174. Puckett testified that testing the samples was not necessary to prove fecal material was involved because he could make that determination "based on personal experience." J.A. 157. Lab tests would only "confirm" his observations. *Id.* Kay suggested the same thing, calling test results "a good backup." J.A. 183.

Puckett testified that they did not take samples from Little Huff Creek itself because the "steepness of the bank was such that we decided there were safety issues involved." J.A. 152. They lacked the proper equipment because they had not "start[ed] the day anticipating that we were going to encounter a situation like that." J.A. 156. Kay confirmed that no samples were taken from the creek for "safety reasons." J.A. 180. In addition, she admitted that she "did not confirm that the valve was discharging or taking in water." J.A. 194.

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[3]The Government also presented testimony from the Analabs employees who received the samples and tested them. J.A. 198-218.

The Government also produced testimony from two federal agents who followed up on the initial investigation of Puckett and Kay. J.A. 220-236, 253-279. FBI agent Hugh Mallet ("Mallet") and EPA agent Nicholas Gillespie ("Gillespie") testified that they went to speak with Blankenship on multiple occasions. J.A 221-222, 255. On one occasion Blankenship was present and "agreed to speak with us about . . . incidents with the dumping of sewage into Little Huff Creek." J.A. 223. Blankenship explained that his business involved servicing about two dozen portable toilets for a local mining company. J.A. 224. When asked about the incident where the WVDEP investigators came to his property, Blankenship "admitted to dumping the sewage from his truck into the creek," although he could not recall the specific date. J.A. 225. According to Gillespie, he said "[y]es, I did it." J.A. 266. Blankenship explained that he did so because he had a "metal container . . . about five miles up the road" but that it "wasn't set up to retrieve the sewage and that's why he dumped it into the creek." J.A. 225-226.

Mallet and Gillespie also testified about talking with Blankenship about other incidents of dumping, over Blankenship's objection and with a limiting instruction for the jury. J.A. 226-229, 231. Mallet testified that when asked about other instances Blankenship "said he did it one or two other times . . . but he wasn't able to provide" dates. J.A. 229. Gillespie also testified that Blankenship admitted to dumping into the creek "on one or two other occasions." J.A. 267.

b. Evidence about the other alleged dumping incidents

The Government presented testimony from three related neighbors of Blankenship as evidence regarding dumping incidents outside of the September 29 incident.

Lester had lived all of his sixty-seven years on Little Huff Creek next door to Blankenship, downstream from his property. J.A. 298, 300, 302, 336. For thirty-seven of those years, Lester's wife Virginia lived there as well. J.A. 349-350. In addition to being Blankenship's neighbor, Lester was also related to him. J.A. 336. Lester testified that between February 6, 2015, and May 9, 2015, he saw Blankenship repeatedly dump sewage into the creek from one of his septage trucks. He did this by walking through a series of photographs he took purporting to show such dumping. Each had a date stamp and Lester testified that he saw dumping and smelled sewage. One of those dates was "4-14" – April 14, 2015 – which corresponded with Count Four of the indictment. J.A. 12, 317. Virginia testified about some of the incidents, as well as about how she developed the pictures that were introduced at trial. J.A. 350-355.

As for how Lester knew what he saw being dumped into the creek, Lester relied on two factors. One was his sense of smell, repeatedly explaining that his "nose don't lie." J.A. 310, 320, 323. He denied any knowledge of other neighbors further upstream who "straight-pipe[d] their sewage into" the creek. J.A. 341. The other factor was because he saw the water in the creek turn "black." J.A. 309, 310, 317, 318, 327. However, on cross-examination, Lester admitted that the water in

some photographs was the same color upstream from Blankenship's property as it was downstream. J.A.345. Virginia also testified that the creek "was black and it stunk really bad." J.A. 350.

But Lester was more than Blankenship's neighbor and relative. At the time of trial, he was, as the Government solicited during direct examination, embroiled in a long-running property dispute with Blankenship that was still tied up in court. J.A. 335. Blankenship further explored that issue during cross examination. J.A. 335-340. Lester admitted that, were he to succeed in court, he would gain some of Blankenship's property including, ironically, the concrete pad where Puckett and Kay first saw the truck when they investigated. J.A. 340. Lester also admitted that while he purported to see Blankenship engage in dumping when he took photographs, he did not manage to get a picture with Blankenship in it. J.A. 342.

The other neighbor witness was Lester's brother, Bill, who lived across the street from Lester. J.A. 359, 368. Bill testified that he, too, observed Blankenship dumping into the creek in 2015 and 2016, but could not provide specific dates as to when it occurred. J.A. 360, 363, 369. Blankenship objected to his testimony under Rule 404(b), but the district court overruled the objection, holding that the lack of dates made it impossible to determine if the testimony was intrinsic to the charged crimes, but that it was admissible under Rule 404(b) "going towards the element of the offense that he knowingly dumped." J.A. 361. Bill testified that he did not know what was being dumped, but that "in a few minutes you could smell it" and that it

"didn't smell nice." J.A. 364-365. As with Lester, he denied having any knowledge of other neighbors who dumped household waste into the creek. J.A. 370.

The Government's next witness was Ronald Connors ("Connors"). J.A. 373-376. The Government called him a "character witness" at a sidebar prior to his testimony who was called "under Rule 608 [to] vouch for the truthfulness of Denver Lester." J.A. 371. Blankenship objected, arguing that Lester's "reputation wasn't attacked" and that "a motive to fabricate is different than showing that his character is one of . . . lying or being untruthful." *Id.* The district court overruled the objection, holding that "the witness's credibility has, in fact, been attacked" because some cross-examination questions went "to not only the motive in terms of the complaint which goes to his credibility but also questions like, you know, Mr. Blankenship doesn't appear in any of these photographs when he testified he saw him on each of those occasions." *Id.*

Connors testified that he lived in Wyoming County all his life and had known Denver for more than fifty years. J.A. 374-375. He testified that "Lester's reputation for truthfulness" is that he was "honest as the day is long." J.A. 375. He reiterated, "I know he's truthful." *Id.*

c. Remaining testimony

In addition to those witnesses, the Government presented several others as part of its case. Two witnesses from local facilities that dealt with waste testified about their dealings with Blankenship. Michael Preston, of the water treatment plant for the town of Gilbert, testified that he discussed the business with

Blankenship and told him that he could not dump portable toilet waste at the plant and that the nearest facility that could handle that waste was in Beckley. J.A. 240. Ray Perdue, of the Beckley Sanitary Board, testified that Blankenship did not dump waste in Beckley in 2015 or until "towards the end of the year" in 2016. J.A. 250-251. The Government also presented evidence from Mark Bolling of the WVDEP, who testified that Blankenship had never had any permit to discharge waste into Little Huff Creek. J.A. 390-391. William Cox, of the Wyoming County Health Department, testified that Blankenship did not have a permit issued for his trucks that he used to haul septage until September 2016. J.A. 384.

Finally, John Wirts ("Wirts") of the WVDEP testified about the perennial nature of Little Huff Creek and that it was a tributary of the Guyandotte River. J.A. 268-267. Wirts also testified that in 2015 and 2016 he and his team "did an extensive monitoring of the upper Guyandotte watershed in 2015 and '16," making assessments at "four locations along the main stem of Little Huff Creek" up to nearly eleven miles from where it entered the Guyandotte. J.A. 285-286. Blankenship sought to recall Wirts to testify about the results of those assessments, which formed the basis for the water data chart that the district court excluded by granting the Government's motion *in limine*, because "the bulk of the Government's case, that is, the bulk of the counts in the indictment are corroborated by smell." J.A. 411. The district court denied that request. J.A. 412.

4. Blankenship is convicted on two counts and acquitted on the other nine.

After the close of evidence, Blankenship requested that the jury be instructed "on the lesser included offense of negligent discharge, specifically for Count Nine," which arose from the September 29 incident. J.A. 421.[4] Blankenship argued that the element of "knowledge" in the offense as charged was "sufficiently in dispute" because while there was testimony about sewage being found in various locations, "testimony showed that no one had tested the pipe itself." J.A. 422. Because Kay testified that she could not say whether the hose was sucking in water or discharging sewage "the jury could fairly infer that the discharge on that specific date was due to an accidental spillage." *Id.* As to the witnesses who testified about Blankenship's statements about that incident, "[n]o one specifically testified that Mr. Blankenship said that he intentionally or knowingly dumped into Little Huff Creek." J.A. 423.

The district court rejected Blankenship's request, holding that "I do not believe that there is a fair inference or a reasonable inference to be made from the evidence that's been presented here that a jury could find it to be negligence." J.A. 424-425. While recognizing that the Lester eyewitnesses did not testify about that date, the district court found that "the admissions and the testimony about the questions that were being asked of him and what his responses were" showed any discharge was intentional. J.A. 425. The district court concluded that "I think that

[4]The proposed instruction was tendered to the district court as Defense Exhibit 4. J.A. 425-426, 493.

the jury has to find either he didn't do it or they could find that it was intentional and maybe not find some other element," however, "I don't believe there's any evidence to support my giving an instruction that it could have been negligent." *Id.*

The jury found Blankenship guilty on two counts of the indictment – Counts Four and Nine – and found him not guilty on the other nine counts. J.A. 483-484.

5. The Fourth Circuit affirms Blankenship's convictions and sentence.

Blankenship appealed his convictions to the Fourth Circuit Court of Appeals, which affirmed them in an unpublished opinion. *United States v. Blankenship*, ___ F. App'x ___, 2019 WL 4805766 (4th Cir. 2019). As relevant to this Petition, Blankenship raised two issues. First, he argued that the district court erred by not allowing him to introduce the water quality chart into evidence. The court rejected that argument, holding that it was not relevant because the chart showed results taken at "different time from 2000 to 2016," none of which matched the dates of the acts charged against Blankenship, and therefore it was "not probative of the odors the witnesses detected." *Id.* at *2. Second, he argued that the district court erred by allowing the Government to present evidence of other instances of dumping. The court rejected that argument as well, concluding that if the evidence was not intrinsic to the acts charged it was nonetheless properly admitted under Rule 404(b). *Id.* at *3.

IX. REASONS FOR GRANTING THE WRIT

I. The writ should be granted to determine whether in a prosecution for illegally dumping waste into a creek, where a major part of the Government's case was based on eyewitness testimony about the smell of the creek when the defendant was allegedly dumping, a chart showing a consistently high level of fecal coliform in the creek was relevant to show there were other potential sources of the odors to which witnesses testified.

Most of the evidence of Blankenship's dumping activities consisted of neighbors who explained that they could smell the odor of sewage. Statistics compiled by the Government's own expert witness showed that Little Huff Creek was full of fecal coliform and could have been the source of such odors. The chart showing that contamination was relevant to the issue of whether Blankenship, based on the odor associated with his actions, was dumping waste. The admissibility of such evidence is an important question of federal law that has not been, but should be, settled by this Court. Rules of the Supreme Court 10(c).

A. The water quality chart was relevant to show the source of the sewage smell of Little Huff Creek could have come from sources other than Blankenship.

The Government's case against Blankenship was largely built on its witnesses' sense of smell – they testified that they smelled sewage. The district court abused its discretion by prohibiting Blankenship from presenting the water quality chart to the jury which showed there were other sources of that sewage smell. It was relevant to show Blankenship was not necessarily the cause of the odors in question.

At trial, several witnesses testified that they smelled sewage odors and believed that Blankenship was the source. Most notably, Lester testified repeatedly that he knew Blankenship was dumping sewage because his "nose don't lie." J.A. 310, 320, 323. Lester was the Government's primary witness for all but Count Nine of the indictment. He took photos of what he testified were days on which Blankenship allegedly discharged sewage into Little Huff Creek. Blankenship does not appear in any of these photos. What brings these photos alive and gives them relevance are the testimony of Lester and others about what they smelled. In addition to Lester, Virginia testified that the creek "stunk really bad." J.A. 350. Bill also testified that Blankenship was dumping sewage because "you could smell it" and it "didn't smell nice." J.A. 364-365. Puckett and Kay both testified that they concluded sewage was involved based on smell, each going so far as to say that lab testing of collected material was merely to "confirm" their nasal impressions, "a good backup." J.A. 130, 157, 175, 183.

Rule 401 of the Federal Rules of Evidence states that evidence is relevant when "it has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action. Courts have recognized that "the threshold for relevancy is relatively low." *United States v. Powers*, 59 F.3d 1460, 1465 (4th Cir. 1995). The water quality chart cleared that low threshold.

The water quality chart was relevant because it showed that sewage was present in Little Huff Creek in 2015 and 2016 from sources other than Blankenship.

The chart, made an exhibit to the Government's motion *in limine*, shows the fecal coliform levels in the creek at multiple points upstream from where it empties into the Guyandotte river. J.A. 64-65. According to Wirts, through whom Blankenship would have admitted this evidence at trial, only the sampling point 0.1 mile from the river was downstream from Blankenship's property – the other three were further upstream. J.A. 86. The chart, prepared by Wirts and WVDEP, shows that fecal coliform levels at the points further upstream are as high – sometimes much higher – as the one downstream from Blankenship's property. J.A. 64-65. Evidence of such pollution was relevant because the sewage odor was the basis the neighbor witnesses have for alleging Blankenship was discharging. That is particularly true because the data reflected in the chart is from roughly the same time as the incidents charged in the indictment to which Lester and Virginia testified. Without the smell there would not be sufficient evidence that Blankenship was violating the Clean Water Act.

While the district court was correct that the issue of the water quality of Little Huff Creek was "not relevant to the elements of the offense," J.A. 96, that was not the end of the inquiry. The water quality chart was relevant to another issue – whether there was a source besides Blankenship for the sewage smell reported by many witnesses. The district court was incorrect that cross-examination of the witnesses who smelled sewage "can fully address the issue," *id.*, because the witnesses were obviously convinced that Blankenship was the source of the sewage smell. Lester and Bill were, at best, oblivious to the fact that other neighbors

dumped their own waste directly into the creek. J.A. 341, 370. Without the hard evidence from the WVDEP of the condition of the creek to balance out their testimony, cross-examination was hardly sufficient.

The district court also concluded, in the alternative, that even if relevant the water quality chart would be more likely to cause confusion with the jury than be probative. J.A. 291. There was no reason for the jury to be confused. The district court instructed the jury on the elements of a Clean Water Act violation, elements that would have been the same had the water quality chart been admitted. J.A. 440-445. Jurors are presumed to abide by the instructions given. *Young v. Catoe*, 205 F.3d 750, 764 (4th Cir. 2000). There is no reason to think the jury would have read into the instructions given by the district court a *sub silentio* defense that Blankenship did not actually harm the creek or the fact that he was far from the only person dumping waste into the creek. Furthermore, the issue for which the chart would have been admitted – that there were other sources to make Little Huff Creek smell like sewage – was clearly delineated and within the common sense of jurors to analyze.

The evidence that Little Huff Creek was polluted by far more persons than Blankenship, in the proof of the WVDEP's own data, was relevant to a fact of consequence to this case – whether the witnesses who testified that they smelled Blankenship dumping sewage were credible. That evidence was probative and would not have confused the jury. Therefore, the Fourth Circuit erred that the

district court did not abuse its discretion by preventing Blankenship from admitting it.

II. The writ should be granted to determine whether allowing the Government to present testimony from multiple witnesses about the defendant's admissions to dumping on days outside the dates charged in the indictment violated Rule 404(b) of the Rules of Evidence.

Blankenship was charged with illegally dumping into Little Huff Creek on eleven occasions. In addition to testimony about those dates, the district court allowed the Government to produce testimony about other acts of dumping. Whether such evidence is admissible under Rule 404(b) is an important question of federal law that has not been, but should be, settled by this Court. Rules of the Supreme Court 10(c).

A. The district court was incorrect that the Government could properly present evidence of alleged discharges beyond those charged in the indictment.

Federal Rule of Evidence 404(b) provides the authority for excluding evidence which would serve to improperly taint the defendant's character where the Government cannot establish all of the requirements for admitting evidence of other bad acts allegedly committed by the defendant. *United States v. McBride*, 676 F.3d 385, 395 (4th Cir. 2012); *United States v. Johnson*, 617 F.3d 286, 296 (4th Cir. 2010); *United States v. Siegel*, 536 F.3d 306, 314 (4th Cir. 2008). Rule 404(b) prohibits the introduction of evidence of other bad acts to show bad character or the propensity to break the law. *Siegel*, 536 F.3d at 317. In order to be considered to be admissible under Rule 404(b), evidence must be (1) relevant to an issue other than

character; (2) necessary in the sense that it is probative of an essential claim or element of the offense; (3) and reliable. *United States v. Basham*, 561 F.3d 302, 326 (4th Cir. 2009). In addition, any such evidence must be more probative than it would be unfairly prejudicial under Rule 403. *McBride*, 676 F.3d at 396.

The district court concluded that the testimony about alleged discharges that occurred at times other than those charged in the indictment "does not constitute evidence of prior bad acts such that it is subject to exclusion or analysis under Rule 404(b)." J.A. 69. Contrary to the district court's conclusion, that evidence was not "inextricably intertwined with the Clean Water Act violations that the United States much prove at trial," nor was it "sufficiently connected to the criminal activity charged in the indictment such that they tell the story of the crime." *Id.* The district court was also incorrect by holding, in the alternative, that the testimony was admissible under Rule 404(b) because it was relevant to "issues other than [Blankenship's] character, such as his intent to discharge the pollutants without a permit, and whether he did so in absence of mistake or accident." J.A. 70. As a result of those incorrect conclusions of law, the district court abused its discretion by allowing the Government to present evidence of other, uncharged, incidences of dumping during Blankenship's trial.

B. Testimony about undated discharges was neither intrinsic to the charged offenses nor did it complete the Government's story of the charged offenses.

Evidence of uncharged conduct is not considered 'other crimes' evidence if it 'arose out of the same . . . series of transactions of the charged offense . . . or if it is

necessary to complete the story of the crime (on) trial." *United States v. Kennedy*, 32 F.3d 876, 885 (4th Cir. 1994); *see also United States v. Masters*, 622 F.2d 83, 87 (4th Cir. 1980). In other words, if it is "intrinsic" to the crime charged and "is necessary to 'provide context relevant to the criminal charges.'" *Basham*, 561 F.3d at 326, quoting *United States v. Cooper*, 482 F.3d 658, 663 (4th Cir. 2007); *see also United States v. Chin*, 83 F.3d 83, 88 (4th Cir. 1996)("[o]ther criminal acts are intrinsic when they are inextricably intertwined or both acts are part of a single criminal episode or the other acts were necessary preliminaries to the crime charged")(internal quotation mark omitted).

The defendant in *Kennedy* was charged with a drug conspiracy and objected to testimony by a police officer about his investigation of the defendant prior to the dates alleged in the indictment. *Kennedy*, 32 F.3d at 885. The district court admitted the evidence because it provided context to the drug distribution scheme. *Id.* at 885-886. The court determined that the evidence of the defendant's uncharged conduct was admissible because it "served to complete the story of the crime on trial" by providing background information and that the defendant erroneously assumed that "all evidence falling outside of the charged conspiracy period necessarily involves a separate, unrelated offense." *Id.* at 885.

In *Masters*, the defendant was charged with dealing in firearms or ammunition without a valid license. *Masters*, 622 F.2d at 83. Evidence of conduct outside the dates alleged in the indictment was admitted by the trial court over the defendant's objection. *Id.* at 84-85. The court affirmed the admission of that

evidence in order "to complete the story of the crime on trial" and to provide "context" to show the defendant's status as a gun dealer. *Id.* at 86-87. In order to prove its case, the Government had to show that the defendant had a "willingness to deal, a profit motive, and a greater degree of activity than occasional sales by a hobbyist." *Id.* at 88.

This case is distinct from *Kennedy* and *Masters* in one very important way – the evidence at issue in those cases did not relate to a different crime, separate and distinct from those charged in the indictment. The opposite is true here, where each incident of discharge constitutes a separate violation of the Clean Water Act. *See United States v. Oxford Royal Mushroom Products*, 487 F. Supp. 852, 856 (E.D. Pa. 1980)(rejecting multiplicity challenge to Clean Water Act charges because "each count requires proof of a fact that the others do not, namely proof that unlawful discharges occurred on the specific day charged"). Blankenship was charged with eleven separate and distinct counts of discharging a pollutant. The Government sought to prove those charges by showing that, on other undated occasions, Blankenship had committed the same violation. Evidence of other discharges amounts to additional allegations of the same exact crime: a Clean Water Act violation.

Furthermore, additional, undated discharge incidents did not provide background information or context as the prior conduct evidence did in *Kennedy* and *Masters*. The period of time during which these undated incidents allegedly took place occurred was the same time frame as the alleged dates of sewage discharge in

the current indictment. This is not a case where the Government sought to put into evidence prior acts of misconduct to provide context for the more recent allegations set forth in the indictment. *See, e.g.*, *Siegel*, 536 F.3d at 319 ("[f]or purposes of Rule 404(b), evidence of other crimes or bad acts is necessary if it is an essential part of the crimes on trial, or where it furnishes part of the context of the crime")(internal quotation marks omitted). For example, this is not a case like *Basham* where evidence of other conduct provided needed context for the defendant's "decision to give [the victim's] ring to McGuffin and to write inculpatory letters to her from prison." *Basham*, 561 F.3d at 327. There is no indication that the Government's "story of the crime" would have been incomplete without this evidence or that the contextual nature of the alleged activity was clarified through this testimony. It did not serve to provide any information other than that Blankenship's conduct on these undated incidents is similar to the conduct alleged in the indictment.

C. The testimony about undated discharges did not prove Blankenship's intent with regard to the charged Clean Water Act violations.

The Government had the burden to prove beyond a reasonable doubt that Blankenship knowingly discharged sewage into Little Huff Creek. *United States v. Law*, 979 F.2d 977, 978 (4th Cir. 1992)(under the Clean Water Act, "it is a felony to (a) knowingly (b) discharge (c) a pollutant (d) from a point source (e) into a navigable water of the United States (f) without, or in violation of, an NPDES permit"). The testimony about undated discharges was irrelevant to prove that intent.

United States v. Cooper, 482 F.3d 658 (4th Cir. 2007), does not suggest otherwise. In *Cooper*, the defendant had applied for and received permits through the Commonwealth of Virginia's environmental regulatory department to discharge sewage into a lagoon. *Id.* at 661. The district court permitted the Government to introduce evidence that before the U.S. Environmental Protection Agency investigated Cooper for Clean Water Act violations, he had violated the Virginia permit hundreds of times. *Id.* at 662-663. The district court determined that such evidence was intrinsic to the case because the "extended history of Cooper's dealing with" Virginia's environmental permit authority was relevant to proving his *mens rea*, namely that he needed a permit to discharge sewage, an element necessary to prove the Clean Water Act violation. *Id.* at 663. Further, the court found that the permit violations demonstrated "that Cooper did not act mistakenly or accidently but knew that he was discharging sewage and was doing so into the creek." *Id.*

In this case, the undated incidents serve no purpose in establishing any of the facts necessary for the Government to prove that Blankenship knowingly violated the Clean Water Act on the specific dates set forth in the indictment. The undated discharges, which were allegedly viewed from afar by lay witnesses, did not offer any insight into Blankenship's state of mind at the undated times observed, let alone into his state of mind on the dates set forth in the indictment.

D. The testimony about other uncharged discharges was unreliable.

Evidence of other bad acts should also be excluded if it is unreliable, as it was in this case. *See United States v. Queen*, 132 F.3d 991, 995 (4th Cir. 1997). The

Government relied upon Lester's photographs depicting what he alleged to be sewage discharges into Little Huff Creek as the basis for all counts in the indictment but Count Nine. Presumably the photographic evidence was sufficient to corroborate Lester's memory and convinced the grand jury to indict Blankenship. However, it did not prove particularly convincing to the jury, which acquitted Blankenship on nine of the ten counts that relied on Lester's testimony. J.A. 483-484. The unreliability of the other act evidence was heightened by the vagueness of the testimony about when those acts allegedly took place. Bill testified that he could not provide specific dates when he saw Blankenship dumping. J.A. 360, 363, 369. In addition, both Mallet and Gillespie testified about other incidences of dumping to which Blankenship allegedly admitted, but could not provide specific dates. J.A. 229, 267.

The Government's case was largely dependent on a witness with a clear bias against Blankenship. To bolster that witness, the Government was allowed to place before the jury uncorroborated evidence of precisely the same alleged criminal conduct for which Blankenship was charged. It was an abuse of discretion to admit such evidence.

E. Testimony about undated discharges was unfairly prejudicial even if it was probative.

Even evidence which would serve to "complete the story of the crime on trial "or otherwise be admissible under Rule 404 must be analyzed under Rule 403 to determine if its probative value is outweighed by the danger of unfair prejudice to the defendant. *Masters*, 622 F.2d at 87. Unfair prejudice means more than that the

evidence in question is damaging to the defense. *United States v. Grimmond*, 137 F.3d 823, 833 (4th Cir.1998)("[e]vidence that is highly probative invariably will be prejudicial to the defense"). Rather, unfair prejudice "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." *Old Chief v. United States*, 519 U.S. 172, 180 (1997).

Any probative value that unreliable allegations that Blankenship discharged sewage into Little Huff Creek on unknown dates was substantially outweighed by unfair prejudice. The Government's case on ten of the charged counts was based on a witness of dubious credibility. By allowing other witnesses to testify about similar incidents that took place on unknown dates the jury was presented with precisely the kind of evidence Rule 404(b) prohibits – propensity evidence: because Blankenship did it on other occasions, he must have done it when Lester said he did. Allowing the Government to introduce such evidence was an abuse of discretion.

X. CONCLUSION

For the reasons stated, the Supreme Court should grant certiorari in this case.

Respectfully submitted,

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