

NUMBER _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2019

MICHAEL BLANKENSHIP, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

APPENDIX A

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

JONATHAN D. BYRNE

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FEDERAL PUBLIC DEFENDER

LORENA E. LITTEN

ASSISTANT FEDERAL PUBLIC DEFENDER

2019 WL 4805766

Only the Westlaw citation is currently available.

This case was not selected for publication in West's Federal Reporter.

See Fed. Rule of Appellate Procedure 32.1

generally governing citation of judicial

decisions issued on or after Jan. 1, 2007. See

also U.S.Ct. of Appeals 4th Cir. Rule 32.1.

United States Court of Appeals, Fourth Circuit.

UNITED STATES of America, Plaintiff - Appellee,

v.

Michael BLANKENSHIP, Defendant - Appellant.

No. 19-4072

Submitted: September 25, 2019

Decided: October 1, 2019

Synopsis

Background: Defendant was convicted in the United States District Court for the Southern District of West Virginia, Irene C. Berger, J., of violating the Clean Water Act. Defendant appealed.

Holdings: The Court of Appeals held that:

[1] district court's error in finding that defense counsel attacked government witness's reputation for character and thus opened door to bolstering of such character did not substantially sway judgment, and thus was harmless;

[2] district court did not abuse discretion in refusing to admit chart into evidence;

[3] witnesses' testimony regarding instances in which defendant allegedly dumped waste matter into creek was admissible as probative of defendant's knowledge and intent; and

[4] evidence was sufficient to establish that defendant knowingly dumped waste matter into creek, and thus jury instruction on lesser-included offense of negligent dumping was not warranted.

Affirmed.

West Headnotes (5)

[1] Criminal Law



Defense counsel, by establishing government witness's bias during cross-examination of witness that was limited to facts of case, did not attack witness's reputation for truthfulness, and thus district court erred in finding that such attack occurred and opened door for character witness to bolster witness's character in prosecution for violation of Clean Water Act.

[2] Criminal Law



District court's error in finding that defense counsel, by establishing bias of government witness, attacked witness's reputation for truthfulness and thus opened door for character witness to bolster witness's character did not substantially sway its judgment, and thus error was harmless in prosecution for violation of Clean Water Act; bolstering witness's testimony lasted approximately five minutes and occupied only four pages of transcript. Fed. R. Evid. 608(a).

[3] Criminal Law



District court did not abuse its discretion in refusing to admit into evidence chart offered by defendant, which purportedly demonstrated alternative sources of pollution in creek into which defendant allegedly dumped untreated waste matter, in prosecution for violation of Clean Water Act; although defendant argued that chart could explain source of foul odors described by witnesses, chart listed bacteria testing results at different times over 16-year period at various places along creek, but no testing date or location matched any of defendant's alleged acts of dumping, and thus

chart was not probative of detected odors, and given that quality of stream had no bearing on whether defendant dumped waste matter into it, chart was not relevant. Federal Water Pollution Control Act §§ 301, 309, 33 U.S.C.A. §§ 1311(a), 1319(c)(2)(A); Fed. R. Evid. 401, 402, 403.

[4] **Criminal Law**

Witnesses' testimony regarding instances in which defendant allegedly dumped waste matter into creek was admissible as probative of defendant's knowledge and intent to dump such waste, and thus district court did not err in admitting such testimony in prosecution for violation of Clean Water Act, even though instances were undated. Federal Water Pollution Control Act §§ 301, 309, 33 U.S.C.A. §§ 1311(a), 1319(c)(2)(A); Fed. R. Evid. 404(b).

[5] **Criminal Law**

Evidence was sufficient to establish that defendant knowingly dumped waste matter into creek, as necessary to establish violation of Clean Water Act, and thus jury instruction on lesser-included offense of negligent dumping was not warranted; state Department of Environmental Protection inspectors testified that defendant's truck was discharging waste matter into creek on day in question, neighbors' testimony established that defendant had history of dumping waste matter, and defendant twice admitted to investigators that he had dumped waste matter on date charged. Federal Water Pollution Control Act §§ 301, 309, 33 U.S.C.A. §§ 1311(a), 1319(c)(2)(A).

Appeal from the United States District Court for the Southern District of West Virginia, at Beckley. Irene C. Berger, District Judge. (5:17-cr-00200-1)

Attorneys and Law Firms

Brian J. Kornbrath, Acting Federal Public Defender, Jonathan D. Byrne, Lorena E. Litten, Assistant Federal Public Defenders, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Charleston, West Virginia, for Appellant. Michael B. Stuart, United States Attorney, Erik S. Goes, Assistant United States Attorney, Perry D. McDaniel, Special Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Charleston, West Virginia, for Appellee.

Before WILKINSON, MOTZ, and RICHARDSON, Circuit Judges.

Opinion

Affirmed by unpublished per curiam opinion.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

*1 A jury convicted Michael Blankenship of two counts of violating the Clean Water Act for knowingly discharging untreated sewage and portable toilet waste into Little Huff Creek near Hanover, West Virginia, in violation of 33 U.S.C. §§ 1311(a), 1319(c)(2)(A) (2012). The district court sentenced him to 15 months in prison and ordered him to pay a \$10,000 fine. Blankenship timely appealed and challenges four of the district court's rulings. We affirm.

First, Blankenship argues that the district court erred in its determination that his counsel had attacked Government witness Denver Lester's reputation for truthfulness and opened the door for a character witness to bolster Lester's character. We review evidentiary rulings for abuse of discretion. *United States v. Caro*, 597 F.3d 608, 633 (4th Cir. 2010). Evidentiary rulings are also subject to harmless error analysis. *United States v. Johnson*, 617 F.3d 286, 292 (4th Cir. 2010). An error is harmless when we can "say with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error." *Id.* (internal quotation marks omitted).

A witness's credibility may be attacked or supported by testimony

about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

Fed. R. Evid. 608(a). "Opinion or reputation that the witness is untruthful specifically qualifies as an attack under the rule, and evidence of misconduct ... and of corruption also fall within this category. Evidence of bias or interest does not." Fed. R. Evid. 608(a) advisory committee's notes to 1972 proposed rules.

No firm line can be drawn regarding whether cross-examination of a witness amounts to an attack on the witness's character for truthfulness. But a useful test employed by the courts is whether the questioning attacks the veracity of the witness's account of the facts in the specific case before the court or attacks the witness's veracity in general.

United States v. Martinez, 923 F.3d 806, 816 (10th Cir. 2019); see also *United States v. Dring*, 930 F.2d 687, 691 (9th Cir. 1991) ("Rule [608(a)] prohibits rehabilitation by character evidence of truthfulness after direct attacks on a witness's veracity in the instant case. However, the Rule permits rehabilitation after indirect attacks on a witness's general character for truthfulness.").

[1] [2] We conclude that the district court erred in finding that Blankenship's counsel attacked Lester's general character for truthfulness. Blankenship's cross-examination was limited to the specifics of the case and established Lester's bias. This error, however, is harmless. The error permitted the Government to call a character witness to bolster Lester's character for truthfulness, but this testimony lasted approximately five minutes and occupies just four pages of transcript. In these circumstances, we can "say with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that

the judgment was not substantially swayed by the error." *Johnson*, 617 F.3d at 292 (internal quotation marks omitted).

*2 Second, Blankenship contends that the district court abused its discretion in excluding a chart demonstrating that there were other sources of fecal coliform pollution in Little Huff Creek other than Blankenship's alleged acts of dumping. Blankenship argues that the chart could explain the source of the foul odors described by the witnesses as emanating from the creek. The district court found that the chart was not relevant and that, even if it was, its admission could confuse the jury.

"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." Fed. R. Evid. 401. Relevant evidence is generally admissible, Fed. R. Evid. 402, but the district court may "exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. "The threshold for determining whether evidence is relevant is comparatively low, and we rarely reverse such decisions because they are fundamentally a matter of trial management." *United States v. Recio*, 884 F.3d 230, 235 (4th Cir. 2018) (internal quotation marks omitted). We review a decision to exclude relevant evidence for the reasons listed in Rule 403 for abuse of discretion. *Huskey v. Ethicon, Inc.*, 848 F.3d 151, 159-60 (4th Cir. 2017). "Improper exclusion of evidence warrants a new trial only if it results in a high probability that the error affected the judgment." *Id.* at 160 (alterations and internal quotation marks omitted).

[3] The chart lists fecal coliform bacteria testing results at different times from 2000 to 2016 at various places along Little Huff Creek. No testing date or location matches one of Blankenship's alleged acts of dumping. Accordingly, the chart is not probative of the odors the witnesses detected. Furthermore, the chart is not relevant. The quality of the stream has no bearing on whether Blankenship dumped sewage into it and the district court properly found that admission of the chart may confuse the jury. The district court did not abuse its discretion in refusing to admit the chart.

Third, Blankenship asserts that the district court abused its discretion in permitting witnesses to testify to undated instances of dumping. The district court admitted the evidence as intrinsic of the charged dates. Alternatively, the district

court determined that the evidence was admissible, pursuant to Fed. R. Evid. 404(b), as probative of Blankenship's knowledge and intent.

Evidence that "serve[s] to complete the story of the crime on trial do[es] not qualify as evidence of other crimes subject to scrutiny under Rule 404(b)." *United States v. McBride*, 676 F.3d 385, 396 (4th Cir. 2012) (internal quotation marks omitted). "Evidence is intrinsic if it is necessary to provide context relevant to the criminal charges." *United States v. Basham*, 561 F.3d 302, 326 (4th Cir. 2009) (internal quotation marks omitted).

Alternatively, evidence of undated acts of dumping may be admissible pursuant to Rule 404(b). "To be admissible under Rule 404(b), the evidence must be (1) relevant to an issue other than the general character of the defendant, (2) necessary to prove an essential claim or element of the charged offense, and (3) reliable." *United States v. Sterling*, 860 F.3d 233, 246 (4th Cir. 2017). Furthermore, the evidence must satisfy Rule 403—that is, "the evidence's probative value [must] not be substantially outweighed by its unfair prejudice to the defendant." *Id.* at 247.

*3 [4] Assuming without deciding that the evidence was not intrinsic to the charged crimes, we conclude that the district court did not abuse its discretion in admitting the evidence pursuant to Rule 404(b). To prove the charged offenses, the Government was required to establish that Blankenship dumped sewage knowingly. Accordingly, evidence that Blankenship had dumped sewage on other occasions was probative of his knowledge and intent to dump sewage and that it was not an accident. Furthermore, the district court did not abuse its discretion in determining that the evidence was reliable and not unduly prejudicial.

Finally, Blankenship contends that the district court abused its discretion in refusing to give a jury instruction on the lesser-included offense of negligent dumping as to one count. He argues that the evidence supported the instruction because the element of his knowledge of the dumping was in dispute. We review a decision not to give a jury instruction for abuse of discretion. *United States v. Hill*, 927 F.3d 188, 209 (4th Cir. 2019).

A refusal to grant a requested instruction is only reversible error if the instruction (1) was correct; (2) was not substantially covered by the court's charge to the jury; and (3) dealt with some point in the trial so important, that failure to give the requested instruction seriously impaired the defendant's ability to conduct his defense.

Id. (internal quotation marks omitted). "Even if these factors are met, however, failure to give the defendant's requested instruction is not reversible error unless the defendant can show that the record as a whole demonstrates prejudice." *United States v. Hager*, 721 F.3d 167, 184 (4th Cir. 2013).

[5] Negligent dumping is a lesser-included offense of knowingly dumping. 33 U.S.C. § 1319(c)(1)(A) (West 2016 & Supp. 2019). Blankenship's argument, however, has no merit. West Virginia Department of Environmental Protection inspectors testified that Blankenship's truck was discharging sewage into the creek on the day in question, and neighbors' testimony established that Blankenship had a pattern of dumping sewage into the creek. Furthermore, Blankenship twice admitted to investigators that he dumped sewage into the creek on the date charged. Blankenship's argument that he admitted to dumping sewage but not doing so knowingly makes little logical sense, and we conclude that the district court did not abuse its discretion in refusing to give the negligent dumping instruction.

Accordingly, we affirm Blankenship's convictions and sentence. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

All Citations

--- Fed.Appx. ----, 2019 WL 4805766

NUMBER _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2019

MICHAEL BLANKENSHIP, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

APPENDIX B

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

JONATHAN D. BYRNE

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LORENA E. LITTEN

ASSISTANT FEDERAL PUBLIC DEFENDER

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

BECKLEY DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

CRIMINAL ACTION NO. 5:17-cr-00200

MICHAEL BLANKENSHIP,

Defendant.

MEMORANDUM OPINION AND ORDER

The Court has reviewed the *United States Motion in Limine to Exclude Water Quality Data and Evidence Concerning Lack of Harm* (Document 48), the *Defendant's Response to United States Motion in Limine to Exclude Water Quality Data and Evidence Concerning Lack of Harm* (Document 54), and the attached exhibit in question. For the reasons stated herein, the Court finds that the United States' motion should be granted.

The Defendant, Michael Blankenship, was indicted on November 16, 2017, for eleven counts of discharging untreated sewage and portable toilet waste into waters of the United States without a Clean Water Act permit in violation of 33 U.S.C. §§ 1311(a) and 1319(c)(2)(A).¹ During discovery, the Defendant provided a water quality table "purportedly representing data on

¹ The Court previously explained in greater detail the procedural history regarding the charges against the Defendant in its *Memorandum Opinion and Order* (Document 52) regarding a prior motion in limine, and refers to that opinion herein.

the fecal [coliform] levels at different areas of Little Huff Creek at different dates, ranging from 2000 to 2016.” (United States’ Mot., at 3.)

The United States argues that the stream table the Defendant proposes to introduce should be excluded because it is irrelevant under Rule 401 of the Federal Rules of Evidence. The United States asserts that it will not attempt to introduce any evidence of the fecal coliform levels in the stream at issue because the quality of the stream itself is immaterial to their case against the Defendant. Because the level of pollutant in the stream, or harm to the stream in general, is not an element the United States must prove, it argues that the general water quality data is irrelevant under Rule 401. The United States also argues the stream table should also be excluded under Rule 403 because it would be prejudicial and confusing to the jury.

The Defendant counters that the United States’ motion should be denied because it was not timely filed. He further argues that the water quality table is admissible because there is a clear path to the authenticity of the data in question, and because it is relevant. The Defendant contends that the table “provides the jury with an alternative explanation for why Mr. Blankenship’s neighbors smelled a sewage odor emanating from Little Huff Creek.” (Def.’s Resp. at 1-2.) According to the Defendant, this evidence will speak to the photos taken by the Defendant’s neighbors that the United States intends to introduce and will “demonstrate that sewage was present in Little Huff Creek in 2015-2016 from sources other than Mr. Blankenship” (*Id.* at 9.) The Defendant argues that this evidence is relevant because “the sewage odor is the basis the neighbor witnesses have for alleging that Mr. Blankenship was discharging.” (*Id.*)

Rule 401 of the Federal Rules of Evidence states that “[e]vidence 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.” Further, pursuant to Rule 403, “[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues” Fed. R. Evid. 403.

Without addressing the timeliness² issue in great detail, the Court finds that the water quality chart the Defendant seeks to introduce is not relevant. Based on the charges in the indictment, the United States must prove that the Defendant knowingly discharged a pollutant from a point source without a permit issued in accordance with the Clean Water Act. *See, United States v. Cooper*, 482 F.3d 658, 663 (4th Cir. 2007); *United States v. Wilson*, 133 F.3d 251, 264 (4th Cir. 1997). The quality of the stream, before and during the time in which the Defendant is charged with discharging into the stream, is not relevant to the elements of the charged offense. Further, appropriate cross examination of the testimony of the neighbor witnesses, with respect to the odor of the stream, can fully address this issue from the Defendant’s perspective without introducing the water quality table.

However, even if the evidence were relevant, the Court finds that the water quality table should be excluded under Rule 403. The water quality of the stream is not determinative of whether or not the Defendant illegally discharged pollutants into a water of the United States without a permit. The quality of the stream is not at issue. Any possible probative value of the water quality table is substantially outweighed by the potential for confusing the jury regarding the actual elements of the charged offense.

2 Although the United States’ motion was filed outside of the deadline established for motions in limine, the Court would have necessarily ruled on the issue had it arisen during trial and therefore finds that a ruling before trial, which will assist the parties in planning trial strategy, is appropriate.

CONCLUSION

WHEREFORE, after thorough review and careful consideration, the Court **ORDERS** that the *United States Motion in Limine to Exclude Water Quality Data and Evidence Concerning Lack of Harm* (Document 48) be **GRANTED**.

The Court **DIRECTS** the Clerk to send a copy of this Order to the Defendant and counsel, to the United States Attorney, to the United States Probation Office, and to the Office of the United States Marshal.

ENTER: April 13, 2018

A handwritten signature in black ink, reading "Irene C. Berger", is written over a horizontal line.

IRENE C. BERGER
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF WEST VIRGINIA

NUMBER _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2019

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APPENDIX C

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

BECKLEY DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

CRIMINAL ACTION NO. 5:17-cr-00200

MICHAEL BLANKENSHIP,

Defendant.

MEMORANDUM OPINION AND ORDER

The Court has reviewed the *Defendant's Second Motion in Limine to Exclude Other Bad Acts Evidence at Trial* (Document 36), the *Defendant's Memorandum in Support* (Document 37), and the *United States' Response to Defendant's Second Motion in Limine to Exclude Other Bad Acts Evidence at Trial* (Document 40). For the reasons stated herein, the Court finds that the Defendant's motion should be denied, subject to a limiting instruction, and the Government's evidence should be admitted.

The United States alleges that the Defendant, Michael Blankenship, owned Hanover Contracting Company, LLC, a business engaged in "cleaning portable toilets, hauling domestic sewage, and disposing of the sewage" (Indictment, at ¶ 3.) In order to perform these tasks, Mr. Blankenship allegedly used two sewage-hauling trucks, each capable of carrying between 400 and 800 gallons of sewage. On November 16, 2017, the Defendant was indicted on eleven counts of discharging untreated sewage and portable toilet waste into waters of the United States without

a permit issued pursuant to the Clean Water Act in violation of 33 U.S.C. §§ 1311(a) and 1319(c)(2)(A).

On March 20, 2018, Mr. Blankenship filed a *Motion in Limine to Exclude Other Bad Acts Evidence at Trial* (Document 24) and a *Motion to Exclude Untimely Noticed 404(b) Evidence, or in the Alternative, Motion for Leave to File Any Additional Motions in Limine to Exclude 404(b) Testimony* (Document 30). United States Magistrate Judge Omar Aboulhosn held a pre-trial motions hearing on March 27, 2018, wherein the parties informed the Court that they had reached an agreement on the Defendant's motion in limine to exclude evidence of prior bad acts in that the United States had agreed not to present any evidence at trial of the Defendant's prior state court misdemeanor convictions. Magistrate Judge Aboulhosn therefore terminated the motion in limine as moot. Magistrate Judge Aboulhosn also denied the Defendant's motion to exclude 404(b) evidence, finding that the United States "exercised good faith in disclosing the additional witness statements as soon as that information became known, and did not disclose same untimely due to the United States continuing obligation and duty to disclose discovery when it becomes known." (*Order*, at 2) (Document 34.)

In response to the Magistrate Judge's findings, the Defendant filed this second motion in limine. Mr. Blankenship argues that the United States intends to introduce at trial evidence consisting of testimony from his neighbors, Denver and Virginia Lester, regarding the illegal discharges. The Defendant argues that this evidence will consist of pictures and testimony from Mr. and Mrs. Lester showing that Mr. Blankenship discharged the sewage inappropriately on unspecified dates that are separate from the specific dates charged in the indictment. Because this evidence falls outside the time for which Mr. Blankenship is charged with a crime, the Defendant

argues that this evidence constitutes prior bad acts evidence not admissible pursuant to Rule 404(b) of the Federal Rules of Evidence. The Defendant argues this evidence amounts to “other crimes” evidence that is not necessary to complete the story of the crime for which he will be tried, that it does not prove his intent to violate the Clean Water Act, that it is unreliable, and that the unfair prejudicial effect it will have on the jury substantially outweighs its probative value.

The United States counters that the evidence is admissible because it does not fall under the purview of Rule 404(b). The United States contends that the evidence is not evidence of prior bad acts, but that it is intrinsic to, and completes the story of, the crimes for which the Defendant is charged. The United States asserts that the evidence from Mr. and Mrs. Lester which falls outside of the charging period “provides context to the eleven charges to be presented to the jury” such that it is not subject to exclusion under Rule 404(b). The United States alternatively argues that, even if the evidence does fall under the purview of Rule 404(b), it is still admissible because it is relevant to an issue the United States must prove, it is probative of an element of the crime, it is reliable, and its probative value is not substantially outweighed by the danger of unfair prejudice.

Rule 404(b) of the Federal Rules of Evidence provides that “[e]vidence 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.” Fed. R. Evid. 404(b)(1). The rule further states that “[t]his evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.” *Id.* at 404(b)(2). “Rule 404(b) only applies, however, to evidence relating to acts extrinsic to the conduct being prosecuted. Evidence intrinsic to the story of the crime does not fall under Rule 404(b)’s prohibition.” *United States v. Cooper*, 482 F.3d 658, 663 (4th Cir. 2007)

(citing *United States v. Lipford*, 203 F.3d 259, 268 (4th Cir. 2000)). In order for extrinsic evidence to be admissible under Rule 404(b), it must be (1) relevant to an issue other than the defendant's character, (2) probative of an essential element of the crime for which the defendant is charged, (3) reliable, and (4) admissible under Rule 403 such that its probative value is not substantially outweighed by the danger of confusion or unfair prejudice to the jury. *See, United States v. McBride*, 676 F.3d 385, 395 (4th Cir. 2012).

The Court finds 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). According to its discovery disclosures, the United States intends to introduce evidence at trial from Mr. and Mrs. Lester that they witnessed and took photographs of the Defendant discharging sewage waste into Little Huff Creek both before and during the time period alleged in the indictment. This evidence constitutes the history of Mr. Blankenship's discharges and is inextricably intertwined with the Clean Water Act violations that the United States must prove at trial. Although some of the discharges Mr. and Mrs. Lester will testify to fall outside of the charging period in the indictment, they are sufficiently connected to the criminal activity charged in the indictment such that they tell the story of the crime. *See, United States v. Kennedy*, 32 F.3d 876, 887 (4th Cir. 1994) ("[E]vidence of uncharged conduct is not considered 'other crimes' evidence if it arose out of the same series of transactions as the charged offense or if it is necessary to complete the story of the crime (on) trial.") (internal citations omitted). Mr. and Mrs. Lester will testify that the discharges arose out of the same series of discharges contained in the indictment. Their testimony is expected to complete the story regarding the activities for which

Mr. Blankenship is charged. Thus, the evidence does not fall within the purview of Rule 404(b) and admissible.

However, even if the evidence was not intrinsic, it would still be admissible under Rule 404(b) analysis. The evidence is relevant to issues other than the Defendant's character, such as his intent to discharge the pollutants without a permit, and whether he did so in the absence of mistake or accident. The United States must prove at trial that the Defendant committed the alleged acts knowingly, and the Lester evidence is probative of this element. Although the Defendant argues otherwise, the Lester evidence is also reliable. Mr. and Mrs. Lester provide specific details about the allegations, including photographs, such that their testimony is not "so preposterous that it could not be believed by a rational and properly instructed jury." *United States v. Aramony*, 88 F.3d 1369, 1377 (4th Cir. 1996). Finally, the probative value of the evidence and testimony is not substantially outweighed by unfair prejudice. Under an appropriate limiting instruction, the evidence relating to undated discharges is not confusing and will not be unduly prejudicial under Rule 403.¹ Therefore, the evidence should not be excluded.

CONCLUSION

WHEREFORE, after thorough review and careful consideration, the Court **ORDERS** that the *Defendant's Second Motion in Limine to Exclude Other Bad Acts Evidence at Trial* (Document 36) be **DENIED**.

¹ The Court further notes that this same limiting instruction would prevent Mr. and Mrs. Lester's testimony from removing the Government's burden to prove criminal conduct on the dates charged in the indictment. Such a limiting instruction would explain that the testimony outside the timeline in the indictment provides context and history to the charged activity, but does not, on its own, prove that the Defendant acted on the dates and in the manner charged in the indictment.

The Court **DIRECTS** the Clerk to send a copy of this Order to the Defendant and counsel, to the United States Attorney, to the United States Probation Office, and to the Office of the United States Marshal.

ENTER: April 10, 2018

A handwritten signature in black ink, reading "Irene C. Berger". The signature is written in a cursive style with a horizontal line underneath the name.

IRENE C. BERGER
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF WEST VIRGINIA

NUMBER _____

IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES OF AMERICA, Respondent.

APPENDIX D

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LORENA E. LITTEN

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UNITED STATES DISTRICT COURT

Southern District of West Virginia

UNITED STATES OF AMERICA

v.

MICHAEL BLANKENSHIP

JUDGMENT IN A CRIMINAL CASE

Case Number: 5:17-CR-00200-01

USM Number: 14799-088

Lorena Litten

Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.☒ was found guilty on count(s) 4 & 9 of the Indictment
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
33 U.S.C. §§ 1311(a) & 1319(c)(2)(A)	pollutant discharge without a permit	9/29/2015	9

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.☒ The defendant has been found not guilty on count(s) 1, 2, 3, 5, 6, 7, 8, 10 and 11 of the Indictment☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

1/16/2019

Date of Imposition of Judgment



IRENE C. BERGER

UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF WEST VIRGINIA

Name and Title of Judge

1/17/2019

Date

DEFENDANT: MICHAEL BLANKENSHIP
CASE NUMBER: 5:17-CR-00200-01

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

FIFTEEN (15) MONTHS.

☒ The court makes the following recommendations to the Bureau of Prisons:

The Court recommends that the defendant be placed in a facility as near as possible to his home in Hanover, West Virginia.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____

☒ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: MICHAEL BLANKENSHIP

CASE NUMBER: 5:17-CR-00200-01

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :

ONE (1) YEAR.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - ☒ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: MICHAEL BLANKENSHIP
CASE NUMBER: 5:17-CR-00200-01**STANDARD CONDITIONS OF SUPERVISION**

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____

Date _____

DEFENDANT: MICHAEL BLANKENSHIP

CASE NUMBER: 5:17-CR-00200-01

ADDITIONAL SUPERVISED RELEASE TERMS

While on supervised release, the defendant must not commit another federal, state, or local crime, must not possess a firearm or other dangerous device, and must not unlawfully possess a controlled substance. The defendant must also comply with the standard terms and conditions of supervised release as recommended by the United States Sentencing Commission and as adopted by the United States District Court for the Southern District of West Virginia, including the special condition that the defendant shall participate in a program of testing, counseling, and treatment for alcohol abuse as directed by the probation officer, until such time as the defendant is released from the program by the probation officer; the defendant shall not, however, be required to participate in drug treatment. In addition, the defendant shall comply with the Standard Conditions of Supervision adopted by the Southern District of West Virginia in Local Rule of Criminal Procedure 32.3, as follows:

- 1) If the defendant is unemployed, the probation officer may direct the defendant to register and remain active with Workforce West Virginia;
- 2) The defendant shall submit to random urinalysis or any drug screening method whenever the same is deemed appropriate by the probation officer and shall participate in an alcohol abuse program as directed by the probation officer. The defendant shall not use any method or device to evade a drug screen;
- 3) As directed by the probation officer, the defendant will make co-payments for drug testing and drug treatment services at rates determined by the probation officer in accordance with a court-approved schedule based on ability to pay and availability of third-party payments; and
- 4) A term of community service is imposed on every defendant on supervised release or probation. Fifty hours of community service is imposed on every defendant for each year the defendant is on supervised release or probation. The obligation for community service is waived if the defendant remains fully employed or actively seeks such employment throughout the year.

DEFENDANT: MICHAEL BLANKENSHIP
CASE NUMBER: 5:17-CR-00200-01

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>JVTA Assessment*</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 200.00	\$ 0.00	\$ 10,000.00	\$ 0.00

- ☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.
- ☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage

TOTALS	\$	<u>0.00</u>	\$	<u>0.00</u>
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- ☐ Restitution amount ordered pursuant to plea agreement \$ _____
- ☒ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- ☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:
- ☐ the interest requirement is waived for the ☐ fine ☐ restitution.
- ☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: MICHAEL BLANKENSHIP
CASE NUMBER: 5:17-CR-00200-01

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A ☐ Lump sum payment of \$ _____ due immediately, balance due
- ☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☒ Special instructions regarding the payment of criminal monetary penalties:
The \$200 special assessment was paid in full on January 16, 2019. The defendant shall pay the \$10,000 fine in monthly installments of \$300 each, with the first payment becoming due 60 days after the defendant's release from custody. The defendant shall make the fine payments to the Clerk, United States District Court, 110 North Heber Street, Room 119, Beckley, WV 25801.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVT A assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.