No.

IN THE

SUPREME COURT OF THE UNITED STATES

MATTHEW BERCKMANN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

On Petition for Writ of Certiorari to the
Ninth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether other act evidence under Rule 404(b) that involves the same "victim" (alcoholic husband and wife who fight after drinking too much) is automatically admissible even if it does not prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident" or whether it is prohibited propensity evidence?

RELATED PROCEEDINGS

United States District Court

United States v. Matthew Berckmann, CR-17-710-SOM (D. Hawaii).

Ninth Circuit Court of Appeals

United States v. Matthew Berckmann, Ninth Circuit No. 18-10446

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Petitioner Matthew Berckmann respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit filed on August 20, 2020. The decision is published. *United States v. Berckmann,* 971 F.3d 999 (9th Cir. 2020).

OPINION BELOW

On August 20, 2020, the Court of Appeals entered its decision affirming petitioner's assault convictions and sentence. (Appendix A [opinion]; Appendix B [memorandum decision].) The petition for rehearing was denied on November 12, 2020. (Appendix C.)

JURISDICTION

On August 20, 2020, the Court of Appeals affirmed Petitioner's conviction and sentence. (Appendices A and B.) Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The petition for rehearing was denied on November 12, 2020. (Appendix C.) This petition is due for filing on April 9, 2021. Order of March 19, 2020. Jurisdiction existed in the District Court pursuant to 18 U.S.C. §3231 and in the Ninth Circuit Court of Appeals under 28 U.S.C. §1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment Due Process Clause

No person shall "be deprived of life, liberty, or property, without due process of law

Rule 403, Federal Rules of Evidence

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of other issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 404(b), Federal Rules of Evidence

(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. On request by a defendant in a criminal case, the prosecutor must:
>
> > (A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and
> >
> > (B) do so before trial – or during trial if the court, for good cause, excuses lack of pretrial notice.

STATEMENT OF THE CASE

Petitioner was convicted of assault with a dangerous weapon and assault of a spouse by strangulation [18 U.S.C. §§ 113(a)(3) and (a)(8)] after an incident at the Hosmer national campground in Maui. Petitioner pushed his wife, Jesse Fenton, to the ground in an angry voice and straddled her holding a knife. He eventually got up and sat down at the picnic table while banging the knife and continuing to yell. His wife got back up and sat down at the picnic table and drank a beer. Petitioner yanked the beer bottle out of her hand. He snatched a cigarette from her mouth and threw it on the ground. Appendix A at 3-4. Both Petitioner and his wife, Jesse Fenton, were longtime alcoholics.

When arrested Petitioner reeked of alcohol. (5 ER 961.) He later told police that he had started drinking hard liquor very early in the day. He

added that "Crazy things happen when we drink. We have to stop. We need counseling. We're alcoholics. We have to stop." (5 ER 1067.)

Two other incidents admitted as 404(b) evidence over defense objection, were also fueled by drinking too much:

- In October 2016, a police officer in New Jersey saw Berckman punch his wife while yelling, "I'm going to kill you, you fuckin' bitch." Appendix A at 4. The officer found Fenton in a closet crying. Although Petitioner was arrested, the charges were dismissed.[1]

- The second 404(b) incident took place at Waikiki beach after the Hosmer campground arrest. The opinion states that "a crowd of people" "intervened to stop Petitioner after he picked his wife up by the neck and flung her into a bench." Appendix A at 4. Petitioner flung his wife into the bench after *she attacked him*. (5 ER 1143.)

When the bystanders intervened, at first Fenton, who smelled of alcohol, helped them. Then she started defending Petitioner. (5 ER 1142.) By the time the officer got involved it was a big melee, with everyone fighting each other. The bystanders all ran away. The officer testified that physical

[1] There is an outstanding warrant for misdemeanor failure to appear. (1 ER 6.)

altercations at Waikiki are common. (5 ER 1126-1127, 1145.) The Waikiki charges against Petitioner were dismissed. (6 ER 1186-1187, 1201.)

On appeal, Petitioner argued that admission of the two prior incidents under 404(b) was prohibited propensity evidence. They were also more prejudicial than probative under Rule 403. The Ninth Circuit disagreed and held that other acts of domestic violence involving the same "victim" are admissible under 404(b):

> Other acts of domestic violence involving the same victim are textbook examples of evidence admissible under Rule 404(b), and courts have permitted this evidence under a variety of theories. Some have explained that additional assaults are admissible as a "critical part of the story" that clarifies the motive behind the charged crimes. Other courts have allowed this evidence to illustrate the "history of [the] relationship" between the defendant and victim, which speaks to a defendant's intent. These cases say essentially the same thing—prior (and subsequent) acts of violence towards the identical victim can shed light on the mindset of the defendant during the charged crime, such as whether there was a grudge between the two, a desire for payback of some sort, or that the defendant had the intent to exert control over this particular victim through violence. *See, e.g.*, *United States v. Lewis*, 780 F.2d 1140, 1142 (4th Cir. 1986) (prior assault involving same victim admissible under Rule 404(b) as evidence of '[r]ising animosity' that 'could easily provide the motive for an assault.').

Appendix A at 7-8 (footnotes omitted).

REASONS FOR GRANTING THE WRIT

ADMITTING OTHER ACT EVIDENCE BECAUSE IT INVOLVES THE SAME "VICTIM" MAY OPEN THE FLOODGATES TO THE ADMISSION OF PROHIBITED PROPENSITY EVIDENCE

A. Propensity Evidence is Inadmissible

"The rule excluding evidence of criminal propensity is nearly three centuries old in the common law." *People v. Falsetta*, 21 Cal.4th 903, 913 (1999), citing e.g. *Wigmore,* Evidence (3d ed. 1940) § 194, pp. 646-647 and *People v. Ewoldt,* 7 Cal.4th 380, 392 (1994) (rule excluding evidence of criminal disposition derives from early English law and is currently in force in all American jurisdictions by statute or case law).

See also *United States v. Castillo,* 140 F.3d 874, 881 (10th Cir. 1998) (ban on propensity evidence dates to 17th century England and early United States history); *McKinney v. Rees,* 993 F.2d 1378, 1380-138, and fn.2 (9th Cir. 1993) (rule of exclusion for propensity evidence has persisted at least since 1684 to the present day and is established in every United States jurisdiction).

> Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character (citation) but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The state may not show defendant's

> prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise, and undue prejudice.

Michelson v. United States, 335 U.S. 469, 475-476 (1948).

See also *Old Chief v. United* States, 519 U.S. 172, 191 (1997) (there is "no question that propensity evidence would be an 'improper basis' for a conviction"); *Marshall v. Longberger*, 459 U.S. 422, 448 n.1 (1983) (Stevens, J., dissenting) ("the common law has long deemed it unfair to argue that, because a person has committed a crime in the past, he is more likely to have committed a similar, more recent crime"); *Boyde v. United States*, 142 U.S. 450, 458 (1892) (proof of prior bad acts is prejudicial and however depraved in character a person is entitled to be tried only on evidence for the offense charged).

The erroneous admission of 404(b) evidence can violate due process when the trial is "infused with highly inflammatory evidence of almost no relevance." *United States v. LeMay*, 260 F.3d 1018, 1026-27 (9th Cir. 2001) citing *McKinney v. Rees*, 993 F.2d 1378, 1384-85 (9th Cir. 1993).

Rule 403 should "always result in the exclusion of evidence" that is so prejudicial as to deprive the defendant of his right to a fair trial." *LeMay*, at 1027, citing *United States v. Castillo*, 140 F.3d 874, 883 (10th Cir. 1998).

B. Rule 404(b) does not permit other act evidence solely because it involves the same "victim"

Rule 404(b) does allow other act evidence to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." However, nothing in 404(b) says anything about other acts involving the same "victim." The other incidents involving both Petitioner and his wife showed nothing more than two alcoholics engaging in a drunken brawl.

The Ninth Circuit found that *United States v. Hinton*, 31 F.3d 817 (9th Cir. 1994) "controls the outcome here." Appendix A at 9. *Hinton*, at 822, upheld admission of a prior assault on the wife because the "evidence of a prior incident involving the same victim has 'probative value in disproving claims that the defendant lacked intent.'" Appendix A at 8, citing *United States v. Lewis*, 837 F.2d 415, 419 (9th Cir. 1988). The facts of *Hinton*, however, are easily distinguishable.

In *Hinton*, 31 F.3d 817, the defendant was charged with assault with intent to murder [§ 113(a)(1)] after he stabbed his wife. Hinton's defense was that he only intended to frighten his wife, not stab her. *Id.* at 822. This Court upheld admission of prior assaults on his wife. By contrast, Petitioner's defense was that he drank too much. Although a prior incident involving the same victim was admissible under 404(b) in *Hinton*, the case did not hold that anytime a prior act involves the same victim, it is admissible. *Id.*

Indeed, *Hinton* took care to distinguish two other 404(b) assault cases, which are closer to the instant situation. *Id.* at 822, citing *United States v. Bettencourt*, 31 F.2d 817, 822 (9th Cir. 1994) and *United States v. San Martin*, 505 F.2d 918 (5th Cir. 1974). *Hinton* did not distinguish these cases because the 404(b) evidence involved a different "victim." This difference is critical to the proper analysis of 404(b) evidence.

Petitioner relied on *Bettencourt* and *San Martin* but the Ninth Circuit held that "neither of these cases involved attacks on the same victim, which is what distinguishes this case and which is often a defining feature of domestic violence cases." Appendix A at 9.

Bettencourt was charged with assaulting a federal officer. He was an attorney who had obtained permission to photograph the search of a car by Secret Service agents in the basement of the federal building. However, once he started taking pictures he was told by agents that this was prohibited in a federal building. He persisted, so agents decided to move the car to another part of the basement that was enclosed by a chain link fence. Bettencourt tried to stop them. As the agents tried to move the car, Bettencourt struck one of the agents twice by "body blocks" and by shoving. *Bettencourt*, 31 F.2d at 215. Bettencourt was arrested. *Ibid*.

At trial, the government introduced another incident as proof of state of mind and intent, where Bettencourt had been arrested for interfering with law enforcement. He once tried to prevent the police from entering a client's home by blocking the doorways because they had no warrant. He was not prosecuted and the arrest record was expunged. *Id.* at 216.

The Ninth Circuit held that the prior arrest should not have been admitted because even if it was relevant, its prejudicial effect was substantially outweighed by the probative value. *Id*. at 216. "The evidence may have tended to prove a turbulent or quarrelsome disposition, but that kind of proof was not relevant in this case." *Id*. at 217. "Moreover, except to

prove Bettencourt's propensity to resort to self help, a commentary on his character, there is no rational connection between the two occurrences." *Ibid*.

> A showing of intent to assault on an earlier occasion proves little, if anything, about an intent to assault at some later time. Finally, Bettencourt was never prosecuted or convicted following his state arrest, so his state of mind in the prior incident may have been wholly innocent.

Bettencourt, 31 F.3d at 217-218.

Even with a limiting instruction, "jurors are likely to regard such evidence of a past act as proof of a defendant's turbulent character and to conclude that he acted consistently with that character at the time charged in the indictment." *Id.* at 218. "The government had no business offering such evidence. *Id.*

In *San Martin*, the defendant was charged with assaulting a federal officer who had tried to arrest him for a complaint for obstructing justice. San Martin said he would not go anywhere until he saw a warrant. When the agent grabbed his arm, he forcefully struck the agent. The issue was whether he intended to strike the agent or did so accidently. *San Martin*, 505 F.2d at 920-921.

To prove the blow to the agent was intentional, the government introduced three prior misdemeanor convictions for resisting arrest,

interfering with a public officer, and assault and battery on a uniformed serviceman. *Id*. at 921. The Fifth Circuit reversed after finding these prior acts should not have been admitted.

> Although prior offenses may be valuable, and sometimes essential, to prove intent or design, the danger of their prejudicial effect is so great that all of the prerequisites must be met and the balancing test completely satisfied before the may be admitted safely into evidence. There is no talismanic effect to the words 'intent' or 'design,' and prior offenses must be carefully analyzed beyond the mere assertion of these code-words before the offenses are admitted into evidence lest the trial of fact devolve into a battle of innuendo.

San Martin, 505 F.2d at 923.

The Ninth Circuit disagreed with Petitioner:

> Simply put, *Bettencourt* and *San Martin* are examples of classic character evidence. The other acts were not introduced to help the jury understand the relationship between the defendant and a particular victim, but rather to characterize the defendant as someone who has a propensity to be violent towards law enforcement.

Appendix A at 10.

In this case, however, the only thing the government proved by the admission of the Waikiki and New Jersey arrests was that the fighting relationship between Petitioner and his wife was driven by their drinking problems. The evidence served only to cast aspersions on Petitioner's character and did nothing to show his intent to inflict bodily harm or an attempt to strangle. Petitioner was simply too inebriated to form any kind of intent. In short, he was a classic out-of-control drunk.

Moreover, whether a defendant has a propensity to be violent towards law enforcement or a propensity to fight with his wife after the two consume too much alcohol is a distinction without a difference. The other act evidence in this case was classic propensity evidence.

This Court should grant certiorari to evaluate whether other act evidence involving the same "victim" – whether it be a spouse or anyone else – is automatically admissible under Rule 404(b). This case presents the opportunity to determine whether drunken brawling by husband and wife alcoholics is prohibited propensity evidence when it does nothing to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."

CONCLUSION

For the reasons expressed above, Petitioner respectfully requests that a writ of certiorari issue to review the judgment of the Ninth Circuit Court of Appeals.

Date: April 2, 2021 Respectfully submitted,

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