No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Melvin Roshard Alfred,
Petitioner,

v.

United States of America,
Respondent

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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Question Presented

Over the objection of defense counsel, the government introduced during trial several inappropriate memes that Mr. Alfred had posted on social media. The district court admitted the memes under the theory that they were intrinsic to the charged crime. The district court reasoned that, because the crime involved communicating on social media, and Mr. Alfred had posted the memes on social media, the memes were intrinsic to the charged crime.

The question presented is:

Whether uncharged misconduct evidence that does not directly prove the charged crime may be deemed "intrinsic evidence" and admitted without the admissibility requirements and procedural protections of Rule 404(b) of the Federal Rules of Evidence.

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PETITION FOR WRIT OF CERTIORARI

Melvin Alfred respectfully petitions for a writ of certiorari to the review of the judgment of the United States Court of Appeals for the Tenth Circuit.

Opinion Below

The opinion below is the published decision of the United States Court of Appeals for the Tenth Circuit, *United States v. Alfred*, 982 F.3d 1273 (10th Cir. 2020) (Attachment A).[1]

Jurisdiction

The Tenth Circuit Court of Appeals entered judgment on December 14, 2020. This Court's general order of March 19, 2020, extends the deadline in 28 U.S.C. § 2101(c) to file a petition for a writ of certiorari in this case by 60 days, creating a deadline of May 13, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Rule Involved

Rule 404(b), Fed. R. Evid., Crimes, Wrongs, or Other Acts, provides:

> (1) Prohibited Uses. Evidence of any other crime, wrong, or 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. 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.

[1] Record references cited in this petition correspond to the volumes of the record on appeal as transmitted electronically to the Tenth Circuit Court of Appeals by the clerk of the District Court for the District of Colorado.

(3) Notice in a Criminal Case. In a criminal case, the prosecutor must:

(A) provide reasonable notice of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it;

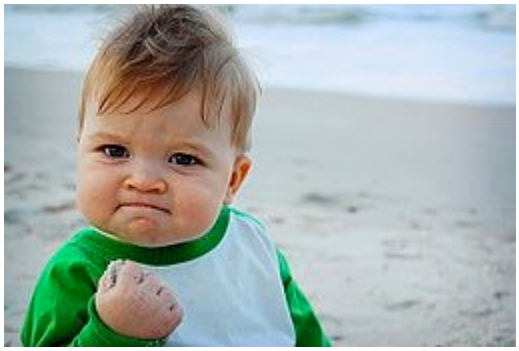
(B) articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and

(C) do so in writing before trial--or in any form during trial if the court, for good cause, excuses lack of pretrial notice.

STATEMENT OF THE CASE

I. Introduction

A meme is a concept that spreads rapidly from person to person over the internet.[2] In its most popular form, this "concept" consists of a photo that internet users creatively manipulate to make cultural-specific commentary or a joke. An example of one such popular meme is displayed below.



[2] Merriam-Webster, *Word History, The History of 'Meme'*, *available at* https://www.merriam-webster.com/words-at-play/meme-word-origins-history.

As the above examples demonstrate, memes are not reflective of a person's core beliefs, values, or ideas, but are riffs on oftentimes mundane social situations or cultural-specific wordplay. This case concerns the admission of such memes under the theory that they were "intrinsic" evidence of a charged crime.

II. Mr. Alfred posts memes on social media.

Melvin Alfred is a young black man who lives with his mom near Houston, Texas. Vol. IV at 815, Vol. I at 25-26. As stated at trial, references to pimping are "part of Melvin's culture." Vol. IV at 815. Mr. Alfred's favorite rapper is Pimp C, and the music he listens to speaks of "pimps and hoes." *Id.* References to pimping are representative of where Mr. Alfred "comes from" and his surrounding culture. *Id.*

In 2015, Mr. Alfred re-posted a handful of memes on the social media site Tagged.com. Vol. I at 152. The memes were created by an Instagram account called @Pimpthoughts and were emblazoned with a watermark bearing the account's

name.[3] *See id.* at 114. Mr. Alfred re-posted these memes in the "photos" section of his personal Tagged.com profile page. *See id.*

These memes were inarguably in bad taste—to say the least—as they demeaned women and celebrated violence. For example, one meme that the government introduced at Mr. Alfred's trial contained the picture of a famous murderous villain from a popular horror film and was captioned with the lines "What square bitches see when I say I'm a pimp." Vol. IV at 40.

III. Mr. Alfred is charged in federal court.

In 2018, three years after Mr. Alfred re-posted the offensive memes, Mr. Alfred reached out to a Tagged user who went by the screenname G-Baby. Vol. IV at 119. G-Baby's profile stated that she was a 19-year-old female from Englewood, Colorado. *Id.* In reality, G-Baby was a profile created and controlled by FBI Agent Craig Tangeman. *Id.*

Mr. Alfred started the conversation with G-Baby by asking her: "What's good wit cha ma?" *Id.* at 168. G-Baby responded and the two began to talk on Tagged's chat feature. *Id.* This conversation eventually evolved to include not only Tagged chats but also phone calls, Snapchats, and video chats. *See id.* at 167-210. At times, Agent Tangeman had a stand-in pretend to be G-Baby to maintain the ruse. *See id.* at 192.

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[3] The @Pimpthoughts account is based in Inglewood, California with nearly 9,000 followers and over 1,000 posts. Vol. I at 101. There is no evidence that Mr. Alfred is the owner of that account, or that he created any of the memes that he uploaded to his Tagged account. *Id.*

Mr. Alfred talked to G-Baby about making the "journey to the top" and informed her that if they were together they would have problems "like do we want the Rolls Royce or the Lambo." *Id.* at 176-77. G-Baby told Mr. Alfred that her ex-boyfriend had a new girl and she was looking to get out of Denver. *Id.* at 182. In response, Mr. Alfred encouraged her to find a "trick" to get the funds to travel to Houston. *Id.* at 184.

Eventually, G-Baby—who was going by the name Nikki at this point—informed Mr. Alfred that she had performed a commercial sex act and had gotten the money to travel to Houston. *Id.* at 230-37. Mr. Alfred agreed to pick her up at the Greyhound bus station. *Id.* at 238. Mr. Alfred got a friend to pick him up at his mom's house, and then drove with the friend to the bus station to meet Nikki. However, Nikki was not on the bus. Instead, law enforcement was waiting in the area and arrested Mr. Alfred. *Id.* at 561-62.

The government charged Mr. Alfred with one count of Coercion and Enticement in violation of 18 U.S.C. § 2422(a). Vol. I at 8. The government later filed a superseding indictment adding an additional count of Facilitating Prostitution in violation of 18 U.S.C. § 1952(a)(3)(A) and (2). Vol. I at 117.

IV. The district court admits the memes finding that they represent what Mr. Alfred is "about."

In order to obtain a conviction under 18 U.S.C. § 2422(a), the government had to prove that Mr. Alfred knowingly induced G-Baby to travel in interstate commerce in order to engage in a criminal sex act. 18 U.S.C. § 2422(a). To this end, the government filed notice that it intended to admit several memes under Rule 404(b) of the

Federal Rules of Evidence as evidence of Mr. Alfred's intent when he was communicating with G-Baby. *See* Vol. I at 99-100.

After filing its notice seeking to introduce Rule 404(b) evidence, the government filed the superseding indictment adding one charge to the initial indictment alleging a violation of 18 U.S.C. § 1952(a)(3)(A) and (2). *Id.* at 117. The government alleged that "on or about September 7, 2018 to September 14, 2018," Mr. Alfred used a cellular phone and internet to "promote, manage, carry on, and facilitate the promotion, management, carrying-on of an unlawful activity," specifically, a "business enterprise involving prostitution." *Id.* The government believed that the superseding indictment permitted it to change its theory of admissibility for the memes.

After filing its superseding indictment, the government withdrew its Rule 404(b) notice and argued, instead, that it was seeking to admit the memes as intrinsic evidence of the charged crimes. *Id.* at 134. Under this theory, the government claimed that, despite being posted years before the charged conduct, the memes were intrinsic evidence that Mr. Alfred was running a business enterprise involving prostitution Count Two. *Id.* The government clearly identify why the memes were intrinsic to Count One.

Mr. Alfred filed a written objection and pointed out that a "business enterprise" means a "continuing course of conduct, rather than sporadic casual involvement in a proscribed activity." *Id.* at 152 (quoting *United States v. Fox*, 902 F.2d 1508, 1518 (10th Cir. 1990)). Accordingly, the memes were not intrinsic to the charged crime because they were posted years ago, and then, there is a large gap of time where there

is no evidence that Mr. Alfred was using his Tagged profile in any way to "promote an unlawful business enterprise." *Id.* This temporal gap, Mr. Alfred argued, demonstrated that the posts were not intrinsic evidence that Mr. Alfred was running a continuous unlawful business enterprise during the dates of the charged offense—September 7, 2018 through September 14, 2018. *Id.* at 154.

At the hearing, the court readily admitted that it "was not on Facebook" and was "totally ignorant" of such social media websites. Vol. IV at 860. However, likely prompted by the government's motion, the court entered the hearing predisposed to consider Mr. Alfred's Tagged website as analogous to a public storefront. To that end, the court questioned why Mr. Alfred as "a businessman" wouldn't be "very sensitive" about the message he was communicating on that website. *Id.* at 859 ("I mean, wouldn't you – once again, assuming as the government's theory, assuming you are in business, don't you have a financial incentive to make sure that your landing page is communicating the right message to maximize revenue?").

Defense counsel tried to walk the court back from this idea that Mr. Alfred's Tagged profile was in anyway analogous to a brick-and-mortar storefront. Counsel explained that there is a "static" component on Tagged which consists of the user's profile page. *Id.* at 860. This profile is intended to be a representation of who the user is. *Id.* By contrast, a user can then make "posts" which consists of photos and thoughts which are date-stamped and are located on a page separate from the profile. *Id.* at 860-61. These posts are not intended to be continuous representations of who the user is, but instead, are just "things that happened historically," in-the-moment musings,

pictures of memes that for, whatever reason, captured the user's attention. *Id.* at 861. Counsel argued that such posts are not intended to be viewed as ongoing endorsements, nor does the online community view them as anything more than ephemera. *Id.*

Counsel also stressed that a Tagged account is not akin to a public storefront. Only Tagged users have the potential to view other Tagged profiles, and each individual Tagged user can personalize their security settings to limit who can view their posts and photos. *Id.* at 872.

The government, however, urged the court to reach for familiar analogies. The government maintained that Mr. Alfred was creating a "brand" through social media. *Id.* at 877. Thus, under the government's theory, whatever Mr. Alfred posted—no matter how old—operated to advance this "brand." *Id.* In the government's view, Mr. Alfred, by not removing the over-three-year-old memes about pimp culture, was "continuously endorsing" those memes as part of his brand. *Id.* at 881. This was so, the government maintained, even though there was no evidence that he made any additional posts referencing prostitution between 2015 and 2018 when the government began communicating with Mr. Alfred on Tagged. *Id.* at 877.

The court, in making its ruling, relied on the government's conceptualization of social media. The court found that because the photos were available to the public, they were part of Mr. Alfred's message and thus, were intrinsic to the charged counts. *Id.* at 896-97. In full, the court found:

> [T]hose memes were available and I find that they were readily available, the nature of the website readily available. And as a result, I find that in fact they are intrinsic because they are the types of things that can be easily seen. And at least under the government's theory about their relevance to Count 2, they would be evidence of his business enterprise, namely, that he is using those memes as displaying what he is about. And under the government's theory at least, what he is about is pimping.

Id. Because the court admitted the memes as intrinsic evidence of the charged crime, there was no limiting instruction narrowing the purpose for which the jury could consider the memes.

V. The Tenth Circuit Court of Appeals upholds the admission of the memes as intrinsic evidence of the charged crime.

On appeal, Mr. Alfred argued, in relevant part, that the district court committed reversible error when it concluded that the memes where intrinsic to the charged crimes. *United States v. Alfred*, 982 F.3d 1273, 1276 (10th Cir. 2020). The Tenth Circuit Court of Appeals affirmed Mr. Alfred's conviction. *Id.* In reaching its conclusion, the court began by noting the difference between intrinsic and extrinsic evidence. *Id.* at 1279. To that end, in the Tenth Circuit, "[e]vidence is considered 'intrinsic' when it is directly connected to the factual circumstances of the crime and provides contextual or background information to the jury, and 'extrinsic' when it is extraneous and is not intimately connected or blended with the factual circumstances of the charged offense." *Id.* (quoting *United States v. Kupfer*, 797 F.3d 1233, 1238 (10th Cir. 2015)).

The appellate court accepted the government's arguments that the memes were "intrinsic to count one because they were part of Mr. Alfred's efforts to persuade

Nikki to work as a prostitute, and they were intrinsic to count two because Mr. Alfred's attempt to brand himself as a pimp was part of an ongoing business enterprise." *Id.* at 1279-80. Thus, the court explained that the district court did not err when it admitted the memes as intrinsic evidence. According to the court, social media was "integral" to Mr. Alfred's attempts to solicit prostitution. *Id.* at. 181-82. "Tagged was the means by which the criminal conduct occurred and a jury could conclude Mr. Alfred's easily accessible memes and pictures were an integral part of the solicitation attempt and advancement of his business." *Id.* at 1282.

Mr. Alfred now seeks this Court's review.

REASONS FOR GRANTING THE WRIT

I. This Court has never considered the intrinsic evidence exception to Rule 404(b), but this is a recurring evidentiary issue.

This case is a vessel to determine the propriety of admitting evidence under the theory that it is "intrinsic" to a charged crime. This is an evidentiary doctrine never before addressed by this Court. Rule 404(b), which is "the most litigated provision in the Federal Rules of Evidence,"[4] enshrines the historically rooted practice, consistently enforced by this Court, of barring the admission of uncharged misconduct evidence to the extent it supports a propensity inference. Yet the improper admission of propensity evidence is consistently occurring in criminal trials despite the safeguards in Rule 404(b).

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[4] Edward J. Imwinkelreid, *An Evidentiary Paradox: Defending the Character Evidence Prohibition by Upholding a Non-Character Theory of Logical Relevance, the Doctrine of Chances*, 40 U. Rich. L. Rev. 419, 433 (2006) (Rule 404(b) "generates more published opinions than any other provision of the Rules.").

This is so because courts, like the Tenth Circuit in this case, routinely invoke a judicially crafted, expansive formulation of intrinsic evidence which allows uncharged misconduct evidence to bypass Rule 404(b). By way of background, American courts in the 19th and 20th centuries began mirroring the evidentiary rules of England with the adoption of the English rule that "evidence that the accused had committed some other crime was not admissible to prove that the defendant had a propensity for committing crimes, and therefore probability committed the charged crime." *United States v. Green*, 617 F.3d 233, 240 (3rd Cir. 2010).

But there were exceptions to this rule. Uncharged prior bad acts could be introduced to prove "(1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; [or] (5) the identity of the person charged with the commission of the crime on trial." *Id.* at 242 (internal quotation marks omitted). Under the "common scheme" exception, prior bad acts could be admitted "where two or more crimes are so connected that it is impossible to distinguish them and proof of all, in the effort to establish one, is a part of the res gestae." *Id.* (internal quotation marks omitted). "In other words, the res gestae evidence was so closely and inextricably mixed up with the history of the guilty act itself as to form part of the plan or system of criminal action." *Id.* at 243.

Congress adopted the Federal Rules of Evidence in 1975. *Id.* at 244. Rule 404(b) mirrored the judicially-created rule governing when "other crimes, wrongs, or acts" could be admitted. Specifically, under Rule 404(b), such evidence is inadmissible to

prove a person's character in order to show action in conformity therewith, but admissible for "other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Fed. R. Evid. Rule 404(b). Importantly, the rule comes with the protection that, before admitting such evidence, the prosecutor must

> (A) provide reasonable notice of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it;
>
> (B) articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and
>
> (C) do so in writing before trial--or in any form during trial if the court, for good cause, excuses lack of pretrial notice.

Fed. R. Evid. 404. Additionally, if requested, a defendant is entitled to a jury instruction limiting the purpose for which the jury may consider the evidence. *United States v. Butch*, 256 F.3d 171, 175 (3d Cir.2001).

Despite the Federal Rules of Evidence outlining when prior bad act evidence can be admitted, courts continue to admit evidence without reference to Rule 404(b) by relying on the theory of "intrinsic evidence" which is just the de-latinized label for "res gestae" evidence. *Green*, 617 F.3d at 245. But, the federal circuits, without this Court's guidance, have not arrived at a uniform definition of intrinsic evidence or developed a principled analytical method to decide whether uncharged misconduct evidence is intrinsic. This case presents the Court with an opportunity to consider whether the intrinsic/extrinsic dichotomy meaningfully assists in the analysis of admissibility, to do away with the "inextricably intertwined" formulation of intrinsic

evidence, or at least, to provide much-needed guidance on what constitutes intrinsic evidence falling outside the scope of Rule 404(b).

II. Certiorari should be granted because there is a lack of consensus among the federal circuits on when evidence is "intrinsic" and, thus, admissible without the protections afforded by Rule 404(b).

In general, evidence of a defendant's prior bad acts, not charged in the indictment, is inadmissible. *See* Fed. R. Evid. 404(b). To determine whether uncharged misconduct evidence falls within the scope of Rule 404(b), all federal courts of appeals divide such evidence into two categories: evidence that is "extrinsic" to the charged offense, and thus subject to the admissibility requirements and procedural protections of Rule 404(b), and evidence that is "intrinsic" to the charged offense, which means it can bypass Rule 404(b). But, "[b]ifurcating the universe into intrinsic and extrinsic evidence has proven difficult in practice" because there is no consensus on the very definition of "intrinsic" evidence. *United States v. Bowie*, 232 F.3d 923, 927 (D.C. Cir. 2000). This is a serious problem. Whether evidence of uncharged misconduct is admissible without reference to Rule 404(b) depends on how courts choose to define intrinsic evidence and, as explained below, these definitions are inconsistent and unclear.

In the Second, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits, evidence is intrinsic, and thus, not subject to Rule 404(b), if it is "inextricably

intertwined" with the charge crime. [5] Importantly, use of an inextricably intertwined exception by eight circuit courts has not led to uniformity. Even the circuits that agree on using the inextricably intertwined formulation do not classify intrinsic evidence in the same way.

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[5] *See, e.g., United States v. Carboni*, 204 F.3d 39, 44 (2nd Cir. 2000) (evidence is intrinsic "[a] if it arose out of the same transaction or series of transactions as the charged offense, [b] if it is inextricably intertwined with the evidence regarding the charged offense, or [c] if it is necessary to complete the story of the crime on trial.") *United States v. Lipford*, 203 F.3d 259, 268 (4th Cir. 2000) ("Other 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.") *United States v. Walters*, 351 F.3d 159, 166 n.2 (5th Cir. 2003) ("Evidence qualifies as intrinsic when it is 'inextricably intertwined' with evidence of the crime charged, is a 'necessary preliminary' to the crime charged, or both acts are part of a 'single criminal episode.'); *United States v. Hardy*, 228 F.3d 745, 748 (6th Cir. 2000) (evidence is intrinsic that is "inextricably intertwined with the charged offense or those acts, the telling of which is necessary to complete the story of the charged offense."); *United States v. Forcelle*, 86 F.3d 838, 841 (8th Cir. 1996) (when "evidence of other crimes is 'so blended or connected, with the one(s) on trial as that proof of one incidentally involves the other(s); or explains the circumstances thereof; or tends logically to prove any element of the crime charged,' it is admissible as an integral part of the immediate context of the crime charged."; *United States v. DeGeorge*, 380 F.3d 1203, 1220 (9th Cir. 2004) (evidence is inextricably intertwined when it "constitutes a part of the transaction that serves as the basis for the criminal charge" or "when [admission of the evidence] was necessary … in order to permit the prosecutor to offer a coherent and comprehensible story regarding the commission of the crime"); *United States v. Record*, 873 F.2d 1363, 1372 (10th Cir. 1989) (uncharged act may be intrinsic to charged act if a witness' testimony would be "confusing and incomplete without mention of the prior act"). *United States v. Wright*, 392 F.3d 1269, 1276 (11th Cir. 2004) (holding that evidence is intrinsic when it: (a) "[is] not part of the crime charged but pertain[s] to the chain of events that explain the context … [of] the charged crime"; (b) is "linked in time or circumstances with the charged crime"; (c) "forms an integral and natural part of an account of the crime"; or (d) "complete[s] the story of the crime for the jury."). In at least one case, the First Circuit has noted that evidence that is inextricably intertwined is admissible under Rule 404(b). *See United States v. Rodriguez-Estrada*, 877 F.2d 153, 156 (1st Cir.1989).

As the Tenth Circuit noted in this case, "[e]vidence is 'intrinsic' when it is directly connected to the factual circumstances of the crime and provides contextual or background information to the jury." *Alfred*, 982 F.3d at 1279. The Eleventh Circuit, which also uses the "inextricably intertwined" test, holds that uncharged misconduct evidence is "intrinsic" if it "pertain[s] to the chain of events that explain the context ... of the charged crime." *Wright*, 392 F.3d at 1276. Thus, as one commentator has observed: "The range of evidence that is inextricably intertwined with the crime charged is as varied as the fact patterns of specific cases....Courts have not defined the scope of inextricably intertwined evidence, however, and no guidelines for determining the limits of this class of evidence exist." Jennifer Y. Schuster, *Uncharged Misconduct Under Rule 404(b): The Admissibility of Inextricably Intertwined Evidence*, 42 U. Miami L. Rev. 947, 951 (1988).

By contrast, the Third, Seventh, and D.C. Circuits reject the inextricably intertwined test and apply a direct proof test to determine if evidence is intrinsic. Evidence in the Third and D.C. Circuits is admissible as intrinsic only if it "directly proves" the charged crime or is "'performed contemporaneously with the charged crime … if [it] facilitate[s] the commission of the charged crime.'" *Green*, 617 F.3d at 248-49 (quoting *Bowie*, 232 F.3d at 929). The Seventh Circuit likewise rejects the inextricably intertwined doctrine. In *United States v. Taylor*, 522 F.3d 731, 734 (7th Cir. 2007), Judge Posner explained that the inextricably intertwined doctrine was "unhelpfully vague" and overlapped with the "exceptions" enumerated in Rule 404(b). More recently, the Seventh Circuit has held that the "inextricable intertwinement

doctrine has outlived its usefulness" and, now, "resort to inextricable intertwinement is unavailable when determining a theory of admissibility" in the Seventh Circuit. *United States v. Gorman*, 613 F.3d 711, 719 (7th Cir. 2010). Thus, in the Seventh Circuit, unless the uncharged misconduct evidence directly proves the charged crime, the admissibility of the evidence must be tested under Rule 404(b).

III. The issue presented is one of exceptional importance.

The circuit-split on the evidentiary issue in this case has significant consequences for criminal defendants. There is "no principled way to choose among these competing incarnations of the test, yet the choice could well be determinative." "Simply stated, the indefinite phrasing of the doctrine is a virtual invitation for abuse." Edward J. Imwinkelried, *The Second Coming of Res Gestae*, 50 Cath. U.L.Rev. 719, 730 (2010). Thus, the admission of a prior bad act, and a defendant's chances at trial, hinge on the particular linguistic formulation used for the intrinsic evidence test.

For example, had Mr. Alfred been prosecuted in the D.C., Third, or Seventh Circuits, his re-posting of memes would likely not have been admissible outside the scope of Rule 404(b)—a theory of admission that the government intentionally abandoned in this case. It is fair to say, that the outcome of Mr. Alfred's trial would have likely been different had the jury not been exposed to the horrific images and sentiments depicted in these memes. It is of exceptional importance to ensure that a defendant's chances at trial do not fluctuate depending on the location of their arrest.

Moreover, the consequence of labeling uncharged misconduct evidence "intrinsic" are significant because such evidence escapes the admissibility standard of Rule 404(b). "[T]reating evidence as [intrinsic] not only bypasses Rule 404(b) and its attendant notice requirement, but also carries the implicit finding that the evidence is admissible for all purposes … thus eliminating the defense's entitlement, upon request, to a jury instruction." *Bowie*, 232 F.3d at 928; *see also United States v. Sasser*, 971 F.2d 470, 479 (10th Cir. 1992) (finding an instruction unwarranted because the evidence was "inextricably intertwined" with the charged crime). Indeed, as the Third Circuit stated when rejecting the inextricably intertwined formulation, "[a]ll that is accomplished by labeling evidence 'intrinsic' is relieving the Government from providing a defendant with the procedural protections of Rule 404(b)." *Green*, 617 F.3d at 248.

The protections attendant to Rule 404(b) – giving the defendant notice, offering the uncharged misconduct evidence for a permissible purpose, and providing the jury with a limiting instruction are critical. They prevent a jury from "generalizing a defendant's earlier bad act into bad character and taking that as raising the odds that he did the later bad act now charged (or, worse, as calling for preventive conviction even if he should happen to be innocent momentarily)." *Old Chief v. United States*, 519 U.S. 172, 180-81 (1997).

Here, the government disclaimed a Rule 404(b) theory of admissibility, relying instead on the Tenth Circuit's expansive formulation of intrinsic evidence. This selection of evidentiary theories mattered because it relieved the trial court of analyzing

whether uncharged misconduct evidence is offered for a proper purpose, and made futile any request for a limiting instruction to caution the jury against drawing an impermissible propensity inference. Significantly, in the absence of any indication from the district court that drawing propensity inferences was improper, the jury was free to consider evidence of Mr. Alfred's uncharged misconduct in any manner it chose. "The deep tendency of human nature to punish, not because [the defendant] is guilty this time, but because he is a bad man and may as well be condemned now that he is caught, is a tendency which cannot fail to operate with any jury." I Wigmore, *Evidence* § 57 (3d ed. 1940); *accord Griffin v. California*, 380 U.S. 609, 623 (1965) (Stewart, J., dissenting) ("No constitution can prevent the operation of the human mind.").

In fact, the government all but called for the jury to draw the most obvious and direct inferences from the memes re-posted by Mr. Alfred: He posted memes glorifying pimping; Mr. Alfred is therefore one who has the propensity to be a pimp; Mr. Alfred therefore acted in accordance with this propensity when he chatted with G-Baby on social media. Mr. Alfred received no procedural protections from these impermissible inferences as the evidence was admitted without reliance on Rule 404(b). And, when the government read the meme stating "I am a pimp" in its closing argument, the jury was free to consider that evidence for any purpose it wished.

Finally, the issue is bound to increase in importance as our individual bad acts and poor decisions have grown increasingly visible on the Internet. As this case demonstrates, a re-post on social media intended as a joke—admittedly tactless and

in poor-taste—now is forever memorialized and has the potential to change one's life for the worse. As social-media use increases, so too do the issues concerning the admissibility of social media posts at trial. *See, e.g., United States v. Phaknikone*, 605 F.3d 1099 (11th Cir. 2010). And as district court's struggle with these issues, the undefined and vague doctrine of "intrinsic" evidence unnecessarily complicates the matter. This Court's review is needed to provide clarity.

IV. This case demonstrates that there is no need for an intrinsic/extrinsic dichotomy.

Here, the district court admitted the evidence because it was "integral" to Mr. Alfred's solicitation attempt and his advancement of his business. *Alfred*, 982 F.3d at 1281-82. As the government argued on appeal, the memes "bore on [Mr. Alfred's] mental state and whether he was engaged in a prostitution business enterprise." Resp. Br. at 8. In other words, the memes showed Mr. Alfred's "intent," and his "plan." But evidence may be admitted for those exact purposes under Rule 404(b). As this case demonstrates, the government was able to bypass the protections of Rule 404(b)—even though the purpose for admitting the evidence is expressly recognized in the rule—by simply claiming that the evidence was intrinsic. By affirming the district court's admission of the evidence as intrinsic, the Tenth Circuit essentially invites the government to eschew any reliance on Rule 404(b) by seeking the admission of evidence that proves "intent" or "plan" through the intrinsic evidence doctrine.

Indeed, the concept of intrinsic evidence is simply a "technique[] to evade the strictures of Rule 404(b)," Charles Alan Wright and Kenneth W. Graham Jr., *Federal Practice and Procedure*: Evidence § 5239 at 555 (2011 supp.), and an invitation for

prosecutors "to expand the exceptions to [Rule 404(b)] beyond the proper boundaries of [those] exceptions." *Taylor*, 522 F.3d at 735. The doctrine has no limiting principle; and it is so broad that it "threatens to override" Rule 404(b). *Bowie*, 232 F.3d at 929. Because evidence is admissible under the doctrine if it merely "completes the story" of the charged crime, there is substantial overlap between the doctrine and the "exceptions" listed in Rule 404(b). *See, e.g., Taylor*, 522 F.3d at 735 ("intent and absence of mistake are express exceptions to Rule 404(b)" and, thus, there is "no need to spread the fog of 'inextricably intertwined'" to justify the admissibility of evidence on these grounds); *see also Rodriguez-Estrada*, 877 F.2d at 156 (reaffirming "that extrinsic offense evidence which is 'inextricably intertwined' with the crimes charged is often admissible under Rule 404(b)").

Judge Hartz of the Tenth Circuit Court of Appeals has criticized the inextricably intertwined test and called for the wholesale abandonment of the "intrinsic/extrinsic dichotomy in analyzing whether evidence of uncharged misconduct is admissible" because the dichotomy is "unclear and confusing" and "serves no useful function and consumes unnecessary attorney and judicial time and effort." *United States v. Irving*, 665 F.3d 1184, 1215 (10th Cir. Nov. 29, 2011) (Hartz, J., concurring). Such criticism is validated by this case. The government's evidence was best analyzed under Rule 404(b)'s clear standard and any reliance on the intrinsic/extrinsic dichotomy "serve[d] no useful function." *Id.*

The district court's analysis in this case also validates the Third Circuit's criticism that the doctrine leads lower courts to "substitute[] a careful analysis with boilerplate jargon," *Green*, 617 F.3d at 246, and otherwise "invites sloppy, non-analytical decision-making," *Id.* (quoting David P. Leonard, *The New Wigmore: Evidence of Other Misconduct and Similar Events* § 5.2 at 327 (2009)). The district court reasoned that because the memes were on social media, and because Mr. Alfred used social media as part of the alleged crime, the memes were intrinsic. *See* Vol. IV at 896-97. But this opens the door to all social media posts being admitted at trial, so long as the charged crime involves social media. This should not be the rule.

For these reasons, the Tenth Circuit's intrinsic evidence formulation should be abolished. Only then will courts "be forced to analyze whether uncharged misconduct evidence is offered for a legitimate purpose or whether it is offered only to show a defendant's character." Jason M. Brauser, *Comment, Intrinsic or Extrinsic?: The Confusing Distinction Between Inextricably Intertwined Evidence And Other Crimes Evidence Under Rule 404(b)*, 88 Nw. U. L. Rev. 1582, 1611-12 (Summer 1994). And "[m]ost importantly, stricter analysis is crucial to ensure that criminal defendants are judged not on the basis of the type of people they are, but rather on the basis of what they have done." *Id.*

CONCLUSION

For the foregoing reasons, Mr. Alfred respectfully ask this Court to grant his petition for certiorari.

Respectfully submitted,

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