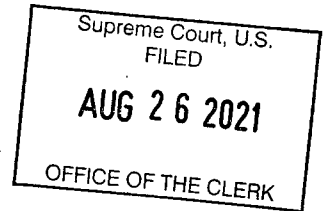


21-5570

ORIGINAL

No. _____



IN THE

SUPREME COURT OF THE UNITED STATES

RICHARD BOYLE

— PETITIONER

(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE THIRD ^{CIRCUIT}
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

RICHARD BOYLE ● DOC # HR8086

(Your Name)

SCI-PHOENIX

P.O. BOX 244

(Address)

COLLEGEVILLE, PA 19426

(City, State, Zip Code)

N/A

(Phone Number)

QUESTION PRESENTED

Petitioner alleged that the district court failed to follow Supreme Court precedent in the admission of evidence pursuant to Federal Rule of Evidence 404(b), resulting in due process violation. Petitioner was convicted of eleven bank robberies, that were committed over the course of four years, without any direct evidence or witness testimony connecting him to the robberies. In finding no error, the Third Circuit relied upon the Government's statement of the facts on direct appeal, but significantly misstated even those slanted versions of the facts, rejecting vertical *stare decisis*. This case thus presents the following question:

Whether the federal courts are free to withdraw the protection from undue prejudice which emanates from the required four-step process as set forth in *Huddleston v. United States*, 485 U.S. 681, 691-92, 108 S.Ct. 1496, 99 L.Ed. 771 (1988) prior to the admission of a prior conviction, for the same crime as that being tried, pursuant to Federal Rule of Evidence 404(b)?

LIST OF PARTIES

☒ All parties appear in the caption of the case on the cover page.

☐ All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix ^A_____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☐ For cases from federal courts:

The date on which the United States Court of Appeals decided my case was MARCH 9, 2021.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: JUNE 1, 2021, and a copy of the order denying rehearing appears at Appendix B.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from state courts:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONSTITUTION AMENDMENT V

No person shall be held for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arises in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Petitioner was convicted of eleven bank robberies over the course of four years and sentenced to seventy-one (71) years in prison. App.13. The conviction was affirmed on direct appeal in an unpublished decision by the Third Circuit Court of Appeals. App.1. Petitioner filed a petition for rehearing which was denied by the Court. App.11.

Prior to trial, the Government filed a motion *in limine* seeking to introduce evidence of petitioner's 2008 state conviction for robbery and any information provided to the parole board or parole officer under Federal Rule of Evidence 404(b). App.27. The Government's motion listed all nine of the Rule 404(b) purposes for the evidence and conceded that there was a "high risk" that the jury would use the evidence for propensity. App.52.

At the pretrial motion hearing, the district court summarily ruled that the inherently prejudicial Rule 404(b) evidence was admissible, without any discussion or argument by defense counsel, or the Government. The Government did not provide the district court with any facts or circumstances of the prior conviction which would enable the court to balance the probative value of the evidence against its prejudicial effect. Defense counsel objected, the district court replied, "it may be that you can revisit the issue of an over-the-top kind of prejudice problem." App.57.

After *voir dire*, defense counsel requested that the Rule 404(b) evidence be held for rebuttal and motioned the court for an analysis of the evidence pursuant to Federal Rule of Evidence 403. The court did not respond, and the reason for denying the motion is not apparent from the record. App.68.

The record reflects that the district court abdicated the admission of the Rule 404(b) evidence, and remained disengaged throughout the proceedings. The Court was not aware that the Rule 404(b) evidence was admitted without any opinion by the Court, and with only the Court's signature on the motion's order page, which contained multiple material Scrivener errors. App.14, App.27, App.60. The district court instructed the Government and defense counsel to collaborate on the purposes for the evidence, then, "agree on what the issue is that it's germane to and then

I'll be happy to incorporate that in a limiting instruction." App.65.

On the first day of trial, the Government called its first Rule 404(b) witness, the arresting officer from 2008. Defense counsel requested a sidebar to notify the court, who was unaware, and had to read the limiting instructions to the jury. App.70. The officer testified that defendant's face was never covered, and read the defendant's statement, from 2008, accepting responsibility and expressing remorse. App.74.

The district court interrupted the officer's testimony and called counsel to sidebar. The district court pressed the prosecutor to clearly articulate how the evidence tended to establish a material fact at issue in the case. The prosecutor equivocated and the district court replied, "I'd like to see something that's more similar to justify the 404(b)." App.73.

The 404(b) witness's testimony was presented to the jury without explanation, context, reason, or relevance to the purposes that the jury was instructed to use it for: state of mind, knowledge, or intent, or acted with a method of operating that demonstrates some sort of unique pattern, and did not commit these acts for which he is on trial here by accident or mistake. App.22. These purposes were not at issue in this case. The facts and circumstances of the witness's testimony were not relevant to any Rule 404(b) purpose. At the close of the witness's testimony, defense counsel made a motion to strike. The district court did not rule, saying, "I mean, this is all a work in progress as we say."

The next Rule 404(b) witness was the defendant's parole officer whose testimony was not relevant to any of the purposes in the jury instructions.

The district court permitted the Government to introduce evidence to the jury that the defendant had committed a felony before, had pled guilty, then went to prison. The jury heard testimony that when the defendant was released from prison he had difficulty finding a job, and suffered financial difficulties. This was all before the Government presented its case for the crimes charged in the indictment.

The Government called a total of seventy witnesses.

Twenty-two of them were eyewitnesses. None of them identified the defendant. The Government presented no direct evidence or witness testimony linking the defendant to the robberies during the trial. There was no fingerprint or DNA evidence, and there was no evidence that petitioner ever owned or used any of the items seen in the surveillance videos of the robberies presented to the jury.

Petitioner testified in his own defense at the pre-trial hearing, and at trial, and that testimony negated the circumstantial evidence the Government contended supported his guilt. Petitioner presented over 1200 pieces of documentary evidence which corroborated his testimony.

At the post-trial motion hearing, the district court referred to the prosecutor, Robert Livermore, as the "air traffic controller" for the Rule 404(b) evidence. App.77. The district court addressed petitioner and told him that they had held back even more 404(b) evidence, but, "it was excluded on the theory that enough was enough." The Court recalled, "being somewhat stingy in terms of allowing any of it in." App.78.

REASONS FOR GRANTING THE PETITION

I. THE THIRD CIRCUIT'S REJECTION OF THE RULE 404 (B) ADMISSION REQUIREMENTS OF *HUDDLESTON* WARRANTS THIS COURT'S ATTENTION

The Third Circuit's opinion missapprehended the *Huddleston v. United States*, 485 U.S. 681, 691-92, 99 L.Ed. 2d 771, 108 S.Ct. 1496 (1988) directives for the admissibility of evidence of prior bad acts pursuant to Federal Rule of Evidence 404(b), in three important ways. First, the Court flagrantly misstated the record. It stated, "the Government used evidence...for proper purposes, such as motive, preparation, and identity." App.4. However, the Rule 404(b)(2) purposes the Government used the evidence for at trial were: state of mind, knowledge, or intent, or acted with a method of operating that demonstrates some sort of unique pattern, and did not commit these acts for which he is on trial here by accident or mistake. App.22. Misstating the record again, the Court said, "the Government explained that he used many of the same techniques...he always covered his face, and left his mobile phone at home." App.5. This is pure *ipse dixit*. The Government's 404(b) witness testified at trial that his face was never covered, and the Government's photograph corroborated his testimony. App.74. The Memorandum of Law the district court filed after trial, conceded that the Rule 404(b)(2) purposes used for the evidence at trial were improper, "the Court does not believe that these stated purposes are so unique in the context of this case to have warranted admission of Mr. Boyle's prior crimes on these bases [sic] alone." App.26.

The second step of this Court's requirements in *Huddleston* direct that any Rule 404(b) evidence must first meet the relevancy requirements of Rule 402 prior to its admission. The Government, district court, and the Court of Appeals never explained how the evidence of petitioner's prior conviction for robbery was relevant in this case. The availability of precedent that balances the relevance of bad acts evidence and decides to admit it does not excuse prosecutors or courts from asking in each new case whether and how prior bad acts evidence might be relevant, probative, and fair. Rule 404(b) requires a case-by-case determination, not a categorical one. The trial judge must balance the relevance of the proposed use of the evidence to the case, and the evidence's relevance to that proof, against the

high risk that the evidence will also tend to establish bad character and propensity to commit the charged crime. The record reveals that the district court did not evaluate the proposed use of the evidence prior to its introduction, or how the evidence should work in the mind of a juror to establish the fact the Government claims to be trying to prove.

The third step under *Huddleston* requires that the trial judge make an assessment under Federal Rule of Evidence 403 to determine whether the probative value of the evidence is substantially outweighed by its potential for unfair prejudice. The record is clear and free of any ambiguity. The district court never evaluated the Rule 404(b) evidence pursuant to Rule 403. At the start of trial, defense counsel objected to the use of the highly prejudicial evidence. The district court did not explain why it was denying defendant's motion under Rule 403, and the reason for doing so is not otherwise apparent from the record. App. 68. It is clear that the Court of Appeals here disregarded Third Circuit precedent which directed that before prior act evidence may be admitted under Rule 404(b), district courts are required to balance the probative value of the proffered evidence against its prejudicial effect under Federal Rule of Evidence 403. Where the court's reasoning is not apparent from the record, the decision will be reversed. See *United States v. Caldwell*, 760 F.3d 267, 284 (3d Cir. 2014) (emphasis added).

The Court of Appeals went on to hold, based on this recitation and its factual errors discussed above, "On balance, admitting the evidence was not error." App.5. But this analysis ignored the fact that the jury convicted without any direct or testimonial evidence establishing the guilt of the petitioner.

For example, the opinion states, "while the Government never presented physical evidence or eyewitness testimony connecting him to these robberies, the circumstantial evidence was more than adequate." App.9-10. The Court of Appeals disregarded two eyewitnesses (twenty-two eyewitnesses testified at trial) who saw the face of the perpetrator, from arm's length, and identified someone else. During cross-examination, the eyewitness was shown the photograph of the suspect he identified, with 85% certainty, after the robbery, and was asked if it resembled the defendant. He replied, "No, it's not even close." The Court of Appeal's opinion failed to note the circumstantial evidence it used to support the inference that established guilt beyond a reasonable

doubt for a robbery where it was someone else, and NOT the defendant, who was identified by the eyewitness to the robbery.

The government's evidence was insufficient to support the jury's verdict of guilty. The Court of Appeals conceded, in its opinion, there was no physical evidence or witness testimony linking petitioner to any of the robberies. There is no circumstantial evidence that is sufficient to prove guilt beyond a reasonable doubt, leaving only the highly inflammatory Rule 404(b) evidence. The purposes were improper, the evidence was irrelevant, and the district court did not perform a Rule 403 balancing of the evidence. Notably, the jury instruction was of no use correcting these errors.

The highly prejudicial evidence of a prior conviction, over a decade old, was enough for the jury to convict on all counts, including money laundering, where there was no evidence whatsoever put forth by the Government. The opinion flagrantly misstates the record again, stating that the credit card company's employee who testified at trial provided "expert testimony". App.10. The employee was not qualified as an expert, and testified that there was nothing concealed, that everything was transparent.

The protection provided by Rule 404(b) was impinged by the rejection of Supreme Court precedent by the Third Circuit resulting in the violation of petitioner's rights under the Due Process Clause of the Fifth Amendment.

These factual issues do not require the attention of this Court. What does merit review is the emerging practice of the Third Circuit of ignoring vertical *stare decisis* and the Federal Rules of Evidence.

Because the Third Circuit Court of Appeals has truncated the protections from undue prejudice that come forth from the requirements in the unanimous decision, *Huddleston v. United States*, 485 U.S. 681, 691-92, 99 L.Ed. 2d 771, 108 S.Ct. 1496 (1988), this Court must grant review.

II. THE DECISION OF THE THIRD CIRCUIT IS IN CONFLICT WITH EXISTING CIRCUIT PRECEDENT

In the analogous case of *United States v. Hans*, 738 F.2d 88 (3d Cir. 1984); the conviction was reversed because the district court erred in allowing testimony linking defendant to alleged past and future robberies. In the similar case of *United States v. Morena*, 547 F.3d 191 (3d Cir. 2008); the Court held that the repeated injection of prejudicial evidence into the trial testimony constituted prosecutorial misconduct resulting in a denial of due process and that the district court plainly erred in allowing introduction of the quantum of this evidence. The conviction was reversed.

The Court of Appeals disregarded the robust consensus of cases in the Third Circuit that direct that district courts *must* determine that the Rule 404(b) evidence is more probative than prejudicial under Federal Rule of Evidence 403 prior to its admission. See *United States v. Sampson*, 980 F.2d 883 (3d Cir. 1992); a legitimate relevance had not been properly demonstrated and the record did not show that the district court conducted the Rule 403 balancing test. The conviction was reversed. *United States v. Smith*, 725 F.3d 340 (3d Cir. 2013); the conviction was reversed because the district court's Rule 403 reasoning "is not apparent from the record." *United States v. Davis*, 726 F.3d 434 (3d Cir. 2013); prior conviction evidence failed the first three steps of *Huddleston* four-part test and "No instruction could have eliminated the infirmity at the heart of this case: Davis' convictions were inadmissible for any purpose." The conviction was vacated. *United States v. Heinrich*, 971 F.3d 160 (3d Cir. 2020); the appellate court declined to undertake a Rule 403 analysis, and instead remanded, because the record lacked any meaningful discussion by the district court of Rule 403 and application of its balancing test.

These cases illustrate the fact that the Third Circuit Court of Appeals is out of step with this Court, and its own precedent, in its consideration of the *Huddleston v. United States*, 485 U.S. 681, 691-92, 99 L.Ed. 2d 771, 108 S.Ct. 1496 (1988) four-step process. Certiorari should be granted to correct this error.

III. THE DECISION OF THE THIRD CIRCUIT CONFLICTS WITH DECISIONS OF OTHER CIRCUITS

In the closely analogous case of *United States v. Owens*, 424 F.3d 649 (7th Cir. 2005); the Court confronted a situation where the government admitted evidence of a prior uncharged bank robbery to prove intent. 18 U.S.C. § 2113(a) is a general intent crime so proof of intent was not necessary. The appellate court found that admission of prior uncharged bank robbery was improper under Federal Rule of Evidence 403. The conviction was vacated. See also *United States v. Hall*, 858 F.3d 254 (4th Cir. 2017); there was no evidence linking defendant to the charged crimes, no evidence proffered by the Government connecting prior conviction to the charged crimes, and limiting instruction was of no use if the evidence was inadmissible. The conviction was vacated. *United States v. Clay*, 667 F.3d 689 (6th Cir. 2012); the prior bad act evidence was not admissible for a permissible 404(b) purpose, the evidence was so unrelated to the charged crime that it created too much of a risk. The convictions were reversed.

These cases show that the Third Circuit's decision is in conflict with other Courts of Appeals on the same issue and it has sanctioned such a departure by the district court. This Court should grant Certiorari to correct this miscarriage of justice.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Richard Boyle

RICHARD BOYLE

August 26, 2021

Date