No. _____

In The

Supreme Court of the United States

WILLIAM JON PATRIC EBERT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT ERRED IN AFFIRMING THE DISTRICT COURT'S RULING TO ADMIT EVIDENCE OF THE APPELLANT'S PRIOR BAD ACTS OR CONDUCT IN VIOLATION OF RULE 404(b) OF THE FEDERAL RULES OF EVIDENCE IN CONTRADICTION TO THE SIXTH CIRCUIT OPINION OF *United States v. Stout*, 509 F.3d 796, 799 (6th Cir. 2007).

LIST OF THE PARTIES

WILLIAM JON PATRIC EBERT, *Petitioner*

UNITED STATES OF AMERICA, *Respondent*

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PETITION FOR WRIT OF CERTIORARI

Petitioner William Jon Patric Ebert (hereinafter "Petitioner") respectfully prays for a Writ of Certiorari to review the decision and judgment of the United States Court of Appeals for the Fourth Circuit.

OPINION BELOW

The opinion of the Fourth Circuit is reported at *United States v. Ebert,* 61 F.4th 394 (4th Cir. 2023) (21-4283).

JURISDICTION

The United States Court of Appeals for the Fourth Circuit decided this case on 3 March 2023. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1), and this Petition is timely filed within ninety days of the underlying Judgment of the Fourth Circuit pursuant to United States Supreme Court Rule 13(1) and 28 U.S.C. § 2101.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Rule 403 of the Federal Rules of Evidence states that "the 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."

Rule 404(b) of the Federal Rules of Evidence states:

> **(b) Other Crimes, Wrongs, or Acts.**
>
> **(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.
>
> **(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

William Jon Patric Ebert (hereinafter "Ebert") was charged through a Superseding Bill of Indictment for: (1) one count of transporting H.H. in interstate commerce with the intent that H.H. engage in criminal sexual activity between on or about November 2006 and on or about February 2007 in violation of 18 U.S.C. § 2423(a) (hereinafter "Count One"); (2) one count of using H.H. to produce child pornography between on or about April 2011 and on or about March 30, 2013, in violation of 18 U.S.C. § 1343 (hereinafter "Count Two"); and (3) one count of possession of child pornography between on or about April 2011 and September 22, 2016 in violation 18 U.S.C. § 1957(a) (hereinafter "Count Three"). (J.A. 41-42). Ebert plead not guilty to all Counts, and a trial before a jury took place beginning on July 15, 2020. (J.A. 96). The jury found Ebert not guilty of Count One, and guilty of Counts Two and Three. (J.A. 602-603). Ebert was sentenced on May 25, 2021 (J.A. 666). The judgment was entered on June 3, 2021. (J.A. 681).

On June 2, 2021, Ebert filed a direct appeal of his conviction to this Court. (J.A. 677). Jurisdiction of this Court is authorized by 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a), as the appeal was timely filed within fourteen (14) days from which the judgment was entered.

On December 7, 2022, the Fourth Circuit entered an Order affirming the judgment of the District Court. Petitioner timely files this Writ of Certiorari before the United States Supreme Court.

STATEMENT OF THE FACTS

This appeal stems from the admission into evidence during the District Court trial of two pieces of evidence: (1) two videos which depict alleged H.H. in lingerie, wherein Ebert's voice was heard and his image was depicted in a reflection (the "Sexually Charged Videos"); and (2) testimonial evidence from alleged Z.N. that he instructed her on how to make a "boobie potion" and encouraged her to have a sexual relationship with alleged H.H. Ebert objected to the admission of both.

Ebert specifically objected that the videos are irrelevant, and depict an entirely different situation of noncriminal conduct. (J.A. 171). The Government argued during the trial that the Sexually Charged Videos were relevant, even if alleged H.H. was over the age of eighteen (18), because "they go to the identity of the person who took the child pornography photographs." (J.A. 171). The Government also argued: (1) that Rule 404(b) of the Federal Rules of Evidence was not controlling; (2) that it was direct evidence of Ebert's lewd and lascivious intent with respect to the nature of the contraband images; (3) that it is direct evidence of Ebert's knowledge with respect to

his actual possession of the contraband images; and (4) that it is direct evidence of Ebert's ongoing and exploitative sexual interest in H.H. (J.A. 53)

The District Court ultimately allowed the videos of H.H. (and transcripts of the videos) to be introduced because the District Court reasoned it was inextricably intertwined with evidence of the crime charged in the indictment and it assisted the trier of fact in determining the identity of the photographer. (J.A. 171) The Court issued a limiting instruction which read:

> The Government is introducing additional evidence outside of those three charges. The reason the Government is attempting to introduce this evidence is because the Government is trying to show that the defendant in – committed other acts, but he's not charged with those acts. But you can use those alleged acts to consider whether the defendant had planning and preparation to commit the actual acts he's charged with, or whether he had intent, a long-term intent with – to have a certain relationship with his daughter, and that intent would lead – would suggest to you that he had interests in committing the charged acts, the three charged Acts.

(J.A. 255).

The Government also argued to allow introduction of the testimony of Z.N. as evidence of intent to arouse a sexual response in the viewer, and evidence of his sexual interest in children. (J.A. 251-252). Ebert's counsel also objected to the introduction of this evidence as irrelevant. (J.A. 251) The Court found that the prior ruling related to the videos of H.H. was similarly applicable here, and the evidence was inextricably intertwined. The Court allowed introduction of the evidence to the jury with a limiting instruction which read as:

> ...about an hour ago you heard certain evidence was to be used only by you for purposes of the issue of intent or planning or preparation, and that evidence does not alone have -- that evidence

> alone cannot result in the defendant being found guilty of the three charges against him. It can only be used by you for those issues of intent, planning or preparation. So understand that you can't think because he might have done these alleged wrongs over here, the Government still has to prove beyond a reasonable doubt every element of the crimes that he's actually charged for.

(J.A. 370).

Ebert appealed the admission of the videos of H.H. and the testimony of Z.N. to the Fourth Circuit Court of Appeals, arguing that the evidence is prohibited by Rule 404(b) of the Federal Rules of Evidence and that the evidence is more prejudicial than probative in violation of Rule 403 of the Federal Rules of Evidence. *United States v. Ebert*, 61 F.4th 394, 402-5 (4th Cir. 2023) at 402. Ebert relied on the appeal on an opinion from the Sixth Circuit Court of Appeals, *United States v. Stout*, 509 F.3d 796, 799 (6th Cir. 2007).

The Fourth Circuit Court of Appeals did not analyze the applicability of the *Stout* opinion. *United States v. Ebert*, 61 F.4th 394, 402-5 (4th Cir. 2023). However, the Fourth Circuit did find that both the videos of H.H. and the testimony of Z.N. were not more prejudicial than probative, and therefore concluded that the admission of all evidence did not violate Rule 403. *Id.*

The Fourth Circuit also found that the evidence of H.H. in the videos was inextricably intertwined with evidence regarding the charged offense reasoning that: (1) the videos documented Ebert's relationship with H.H. months after she turned eighteen (18); and (2) they depicted the same type of conduct that H.H. testified to occurring when she was a minor; and (3) providing grooming evidence. *Id*, at 403 (4th Cir. 2023). In analyzing the admissibility of Z.N.'s testimony, the Fourth Circuit also

found that the evidence was "properly admitted under Rule 404(b), which 'is an inclusionary rule, allowing evidence of other crimes or acts to be admitted, except that which tends to prove *only* criminal disposition.'" *Id*. citing *United States v. Lighty*, 616 F.3d 321, 352 (4th Cir. 2010). The Fourth Circuit found that Z.N.'s testimony was "relevant for several permissible purposes, including establishing the absence of mistake or accident as well as showing Ebert's intent in pursuing photographs of minors for personal sexual arousal." *Id*. In addition, the Fourth Circuit found that it corroborates the testimony of H.H. *Id*.

Through the balancing test under Rule 403, the Fourth Circuit also found that the evidence "did not involve conduct in roughly the same timeframe as the charged conduct and, critically, 'did not involve conduct any more sensational or disturbing than the crimes with which [Ebert] was charged.'" *United States v. Boyd*, 53 F.3d 631, 637 (4th Cir. 1995) *Id.* at 404.

Ultimately, the Fourth Circuit upheld the District Court's admission of the evidence finding the admission was not an abuse of discretion. *Id*. at 403. The Fourth Circuit also found that even if the evidence was not properly admitted, the limiting instructions of the District Court "cure[d] any unfair prejudice except in the most extraordinary circumstances." *Ebert,* at 404. The Fourth Circuit reasoned that "any error in admitting the challenged evidence was harmless" because the Jury could have convicted Ebert based on: "(1) multiple images that Ebert took of H.H. when she was a minor, some of which depicted her without closing and focused on her genitalia, and (2) H.H.'s detailed testimony of Ebert's interactions with her - the only

minor victim of the charged offenses - over several years, which mirrored events Z.N. described." *Id.* at 404-5.

REASONS FOR GRANTING THE WRIT

I. The Fourth Circuit erred in Finding the Video of H.H. and the testimony of Z.N to be inextricably intertwined

Federal Rules of Evidence, Rule 404(b) limits the admission of evidence of extrinsic acts to what has actually been charged. *United States v. Lighty*, 616 F.3d 321, 352 (4th Cir. 2010). Intrinsic acts are not limited through Rule 404(b). *Id.* "Other 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.'" *Id.* citing *United States v. Chin*, 83 F.3d 83, 87 (4th Cir. 1996).

In *Lighty*, the defendant was charged with murder. *Id.* at 321 (4th Cir. 2010). During the trial, the Government sought to introduce evidence that the defendant made a statement in a separately investigated criminal incident wherein the defendant purportedly made a statement about using the same handgun for the charged offense, as for this separate incident. *Id.* at 352-3. On appeal, the Fourth Circuit found that this evidence was not inextricably intertwined with the charged offense because the other incident was "not an integral part of any witness's account of the circumstances surrounding Hayes kidnapping and murder." *Id.* The Court went on to reason that "the events occurred at different times, at different places, and involved completely different motives, so there were not gaps in the government's case without the evidence." *Id.*

Although the Fourth Circuit considered the *Lighty* opinion, it was inappropriately applied to the facts here. Like the case in *Lighty*, the circumstances here did not support a finding by the Fourth Circuit that the video evidence of H.H. or the testimony of Z.N. was intertwined with the circumstances surrounding the charge. The video of H.H. took place when H.H. was over the age of eighteen, and does not depict any criminal act. The inclusion of this evidence is not intertwined to the facts of what was charged because it is a later time.

Similarly, the testimony of Z.N. is not inextricably intertwined because Z.N. is a third-party - who is not an alleged victim in the charges before the district court. She is a separate party, testifying to alleged separate actions by Ebert. Her testimony is not necessary to fill in any gaps of H.H.'s testimony as to what she alleges occurred when she was a minor.

For these reasons, the Fourth Circuit erred in finding that the evidence of the videos of H.H. or the testimony of Z.N. were inextricably intertwined with the charges against Ebert.

II. The Fourth Circuit erred in failing to consider *United States v. Stout*, the prejudicial effect of the admitted evidence, and its limited probative value

The issue before the Fourth Circuit was similar to an issue faced by the Sixth Circuit Court of Appeals in 2007 in *United States v. Stout*. Ebert argued the applicability of this case in its opening brief to the Court of Appeals; the Fourth Circuit did not address the applicability of *Stout* in the published opinion.

In *Stout*, the Appellant was indicted for possession of pornographic images of children in violation of 18 U.S.C. § 2252A(a)(2). *Stout,* 509 F.3d 796, 799 (6th Cir. 2007). However, the Government in *Stout* sought to introduce unrelated evidence of the criminal defendant's prior conviction for filming a fourteen year old in the shower.

The Court in *Stout* found that a prior bad act can be admitted under Rule 404(b) of the Federal Rules of Evidence when it is shown: "(1) use of evidence for a proper purpose (that is, other than as character or propensity evidence), (2) relevance, (3) that the evidence not be substantially more unfairly prejudicial than probative pursuant to Rule 403, and (4) that the Court give a limiting instruction, if requested, such that the jury will only consider the evidence for the proper purpose rather than as character or propensity evidence." *Stout,* at 799 (6th Cir. 2007); *citing Huddleston v. United States*, 485 U.S. 681, 691-92, 108 S. Ct. 1496, 99 L. Ed. 2d 771 (1998). In *Stout*, the Court held that the prior criminal acts were probative to prove he had actual knowledge he was viewing child pornography "but only for the reason that the government's evidence connecting Stout to the actual possession and receipt...is slight." *Stout*, at 800 (6th Cir. 2007).

However, while the Court in *Stout* found the evidence of him filming a fourteen year old in the shower to be probative, the Court also found that its probative value was clearly outweighed by the prejudicial nature of the evidence. The *Stout* Court suppressed this evidence because it would overwhelm the evidence of the photographs which were the subject of the charges set forth in the indictment and confuse the issues for the trier of fact. *Stout*, at 801 (6th Cir. 2007).

Specifically, the district court judge presiding in *Stout* found that the evidence of prior bad acts "is potentially prejudicial because it is both inflammatory and distracting. It is more lurid and frankly more interesting than the evidence surrounding the actual charges. Any jury will be more alarmed and disgusted by the prior acts than the actual charged conduct." *Id.* The District Court Judge Presiding later opined that "filming a 14-year-old girl in her shower -- will predominate this trial, not the stored still-life images that actually occasioned the current charges...There is high probability that the jury would improperly consider the prior bad acts evidence as propensity evidence, and an equally high probably of conviction because of the improper use of that evidence." *Id.*

The Sixth Circuit Court of Appeals in *Stout* found that the District Court's ruling was not an abuse of discretion, and that the evidence was properly excluded. It held that sexual offense convictions come with unique stigmas which naturally tip the scale of analysis under Rule 403 of the Federal Rules of Evidence and require the evidence to be suppressed, such that even a limiting instruction could not overcome the prejudice that would result in the defendant. *Stout*, at 802 (6th Cir. 2007).

Here, the videos of H.H. and the testimonial evidence of Z.N. are both highly prejudicial because they confuse the jury, mislead the jury, and inflame the jury into convicting the Appellant based on an emotional response to the type of relationship he maintained with his daughters as young adults. The videos of H.H., are more salacious than still photographs, because Ebert's image is visible as a reflection and depicts that Ebert was taking the video. The video also contains audio of Ebert's voice,

which otherwise is never heard during the trial in any other evidence. Ebert also does not appear in the photographs, and the only evidence that Ebert took the photographs was H.H.'s testimony.

The Sexually Charged Videos of H.H. are also more prejudicial than probative because a video is *always* going to be more salacious than a photograph. The content of the videos is also salacious, odd, and to most, creepy. Even with limiting instructions, human nature alone leads a trier of fact to not like Ebert and to conclude that if Ebert is taking lewd pictures of his *adult* daughter that he must have taken the photographs of his *minor* daughter. However, the Government actually argued that the videos are evidence of *who* took the photographs of H.H. when she was a minor.

The videos will also mislead the jury as to what images constitute a criminal offense, and what images do not. Pursuant to the closing argument made by the Government, the videos are not needed for the Government to prove their case to the Jury because of the other evidence in the record which could lead the trier of fact to find the Appellant had taken the photographs. However, the videos become the focal point to the jurors despite the fact that they are not the images which constitute a criminal offense. It would be reasonable for a juror to assume that because they disagree with the Appellant's conduct in this video, that he should be convicted based on this alone. The video of a father and daughter engaging in a relationship where sexual promiscuity is encouraged defies society's expected bounds of these types of relationships, and therefore shocks and prejudices the viewer based on this alone.

The Fourth Circuit further erred in relying on the more distinguishable Fourth Circuit opinion of *United States v. Boyd*, 53 F.3d 631 (4th Cir. 1995). The *Boyd* Court found that evidence of the defendant's personal marijuana and cocaine use would not be more prejudicial than probative because it "did not involve conduct any more sensational or disturbing than the crimes with which he was charged." *Id*. at 637 (4th Cir. 2023). However, drug use is not in and of itself sensational, as is evidence like the evidence here of a "boobie potion" to enlarge your breasts, or a father's voice being heard directing his adult daughter in lingerie photo sessions. The admitted evidence in *Ebert* is sensational, and it is more sensational than just seeing the nude and semi-nude photographs of H.H.

The jury instruction also did not curb the risk that the jury would misuse the evidence. The instruction allows the jury to consider whether evidence of the Appellant *after* the alleged crime shows that the Appellant had planning and preparation. It defies logic that a video taken years later could show the Appellant had planned and prepared. The Fourth Circuit opinion fails to explain why conduct after the fact can prove planning and preparation before the criminal conduct.

The instruction also allows the Jury to consider whether the Appellant had a type of relationship with his daughter that would lead one to suggest he had interest in committing the charged acts. This very instruction is harmful and prejudicial for the same reasons outlined in *Stout*, which is unaddressed in the Fourth Circuit opinion. This instruction also cuts directly and clearly against the tenets of Rule 404(b) of the Federal Rules of Evidence which prohibits the use of any other crime,

wrong, or act "to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." As the Court found in *Stout*, the video evidence becomes the focal point of the evidence before the jury as the most salacious evidence before them. It prejudices the Appellant by introducing character evidence to show that the person acted in accordance with the character evidence.

The Court's failure to *even consider* the *Stout* opinion is an error that must be addressed. The issuance of this Fourth Circuit opinion, with the exclusion of a discussion about *Stout,* creates a division amongst the circuits as to when past or prior when lewd, unrelated conduct of a criminal defendant charged under 18 U.S.C. § 1343 becomes prejudicial in a Rule 403 analysis. Through the *Ebert* and *Stout* opinions a divide will exist between the Fourth Circuit and the Sixth Circuit as to where the line is drawn under Rule 403 for lewd conduct to become prejudicial. This will result in the District Court judges having unbridled discretion under Rule 403, to admit evidence against a criminal defendant that is otherwise inadmissible.

The testimonial evidence from Z.N. is similarly prejudicial because it is inflammatory, confusing to the jury, and misleading. These conversations would be considered by an average individual to be unusual, and even creepy. It is designed to make the trier of fact convict the Appellant because they dislike him and believe he just has a propensity for "creepy" behavior. However, the Fourth Circuit did not fully consider its inflammatory nature in light of *Stout* and failed to analyze whether the testimonial evidence of Z.N. "is potentially prejudicial because it is both inflammatory

and distracting.." *Stout*, at 801 (6th Cir. 2007). Z.N. testified that Ebert instructed her on how to make a "boobie potion" that would enlarge her breasts. (J.A. 387). Not only is that testimony irrelevant to actions taken with a separate individual, but it is extremely distracting to the jury.

The Fourth Circuit also failed to consider that the testimonial evidence of Z.N. is not probative. As stated in *Stout*, the evidence there was found to be probative to prove the defendant had committed the offense because the other evidence was slight. At the point in time wherein Z.N. testified, the Government had the testimonial evidence of H.H., photographs of H.H. posing nude or semi-nude, and the Sexually Charged video evidence of H.H. wherein Ebert is seen in the reflection of the glass filming the video and his voice is heard giving his daughters direction. Unlike the evidence in *Stout*, the evidence here was not probative. Z.N.'s testimony is also not necessary to complete the story for the trier of fact because she is not depicted in the photographs with the alleged victim and never took similar photographs with the alleged victim or Appellant.

The Fourth Circuit also erroneously concluded that the evidence of the videos of H.H. and the testimony of Z.N. was not prejudicial because the record contained evidence that could sway a jury in that there are: " (1) multiple images that Ebert took of H.H. when she was a minor, some of which depicted her without clothing and focused on her genitalia, and (2) H.H.'s detailed testimony of Ebert's interactions with her - the only minor victim of the charged offenses - over several years, which mirrored events Z.N. described." *Ebert*, at 405 (4th Cir. 2023). However, the Court

was incorrect in referring to the photos of H.H. as images that Ebert had definitely taken. The evidence in the record shows that photos of H.H. were taken, but the only other evidence in the record to definitely state that Ebert took the photos is H.H.'s testimony. The jury also clearly did not believe H.H.'s testimony in its entirety because the Court found Ebert not guilty of the only charge where the evidence rested solely on H.H.'s testimony. In other words, the jury did not believe H.H.'s testimony in its entirety. What is more likely, is that the jury found Ebert guilty because of the admission of the video evidence and Z.N.'s testimony, which were both more prejudicial than probative.

The Fourth Circuit failed to consider the probative nature of the evidence in its analysis because it failed to consider, as *Stout*, directs, what other evidence was in the record at the time Z.N. began to testify. The failure of the Fourth Circuit to consider the probative nature of Z.N.'s testimony creates a difference amongst the circuits in how evidence is analyzed under Rule 403.

CONCLUSION

For the reasons outlined above, Ebert asks this Court to grant this Writ of Certiorari as the Supreme Court is the only court with the authority to resolve the conflicts of the two jurisdictions. Ebert also asks this Court to find that the Fourth Circuit erred in incorrectly applying the precedent of the *Lighty* opinion to conclude that the contested evidence was inextricably intertwined. The Fourth Circuit also erred in not considering the persuasive precedent from the Sixth Circuit in *Stout*, and

erred in upholding the admission of the video evidence of H.H. when she was over the age of eighteen (18) and the testimony of Z.N.

RESPECTFULLY SUBMITTED,

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