

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 2017

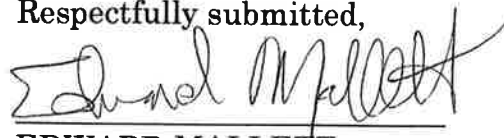
HUEY P. WILLIAMS, Jr.,
Petitioner,

VERSUS

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,



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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in finding that Rule of Evidence 404(b) only applies to specified criminal acts and does not apply to testimony making a general reference to a defendant's criminal past.

2. Did the Court of Appeals err in finding that a trial court is not required to conduct a balancing test when a defendant objects that testimony referring to his prior criminal record has risks of unfair prejudice that substantially outweigh any probative value?

PARTIES TO THE PROCEEDING

All parties to these proceedings are named in the caption of the case.

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PRAYER

Petitioner, Huey P. Williams Jr., prays that a writ of certiorari issue to review the judgment entered by the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in petitioner's case is attached to this petition as Appendix A.

The order of the United States Court of Appeals for the Fifth Circuit denying panel rehearing in petitioner's case is attached to this petition as Appendix B.

The judgment of the United States District Court for the Southern District of Texas is attached to this petition at Appendix C.

BASIS FOR JURISDICTION IN THE SUPREME COURT

Petitioner was convicted and sentenced under 18 U.S.C. § 1347 and 2. The district court had jurisdiction pursuant to 18 U.S.C. §3231. Petitioner gave timely Notice of Appeal on August 26, 2016, and a timely supplemental Notice of Appeal on September 19, 2016, pursuant to Fed. R. App. P. 4(b)(1)(A)(i). The jurisdiction of the Court of Appeals vested under 18 U.S.C. §1291 and 18 U.S.C. §3742(a).

The opinion of the Court of Appeals was issued on September 27, 2017. Petitioner's Motion for Rehearing and for Rehearing En Banc was denied on December 1, 2017.

This petition is filed within ninety days after the denial of the petition for rehearing. *See* Sup. Ct. R. 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right... to be informed of the nature and cause of the accusation; and to be confronted with the witnesses against him...

U.S. Const. amend. VI.

2. Federal Rules of Evidence, Rule 403:

The Court may exclude the 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.

3. Federal Rules of Evidence, Rule 404 (b) (1):

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.

4. Federal Rules of Evidence, Rule 801 (d)(2)(A)

(d) Statements that are not Hearsay: A statement that meets the following conditions is not hearsay:

(2) the statement is offered against an opposing party and

(A) was made by the party in an individual or representative capacity.

STATEMENT OF THE CASE

A. PROCEEDINGS BELOW

On January 15, 2014, a one-count indictment charged Petitioner and defendant-appellant, Huey P. Williams Jr., (“Williams”) with aiding and abetting healthcare fraud, in violation of 18 U.S.C. § 1347 and 2. The offense as charged was committed from December 2006 through July 2010. Williams entered a plea of not guilty. His jury trial commenced on March 9, 2015. He was convicted on March 11, 2015. His post-trial Motion for New Trial was denied on November 20, 2015. He was sentenced on August 14, 2015.

The District Court sentenced Williams to 63 months confinement, 3 years supervised release, ordered restitution of \$1,960,000 to Medicare and imposed a \$100 special assessment.

Williams timely filed two notices of appeal, the first was filed pro se and the second after appointment of counsel. The appeals were consolidated in a single Fifth Circuit case number, 15-20713.

B. FACTS

The facts of the case pertaining to this Petition are stated in the Opinion of the Court of the Appeals which, with modest adjustments for brevity, are set out below:

Williams owned and operated Herman Medical Supply, a business operating in Texas that supplied durable medical equipment to Medicare beneficiaries. To participate in Medicare, health care providers are required to submit an application in which the provider agrees to comply with all Medicare-related laws and regulations. Once the application is approved, providers are given a Medicare provider number to use when submitting claims for reimbursement. When submitting a claim form, the provider certifies, among other things, that the contents are true and the services rendered were medically necessary. Williams's wife, Marsha, signed the Medicare provider application for Hermann Medical Supply in 2005. The application did not disclose that Williams had any ownership or management role in the company. Marsha Williams testified that Hermann Medical started as a "family business."

Petitioner adds that no law requires that every person with an ownership or management role be stated on the government's forms. There also was no evidence that Williams has any conviction that disqualifies him from eligibility to start a medical supply business that receives Medicare funds. Williams does not have a disqualifying conviction.

The Opinion summarized the evidence, stating that from approximately 2006 to 2010, Williams, through Hermann Medical Supply, orchestrated a scheme to defraud Medicare by submitting bills for durable medical devices that were never provided or were not medically necessary. Hermann Medical has no affiliation with the large, well-known, not-for-profit Hermann Medical Health System. In

particular, Hermann Medical provided hundreds of patients with neoprene-type soft braces but billed Medicare for more expensive, hard, custom-fitted mechanical braces. Hermann Medical ultimately submitted \$3.4 million in false claims. Medicare paid about \$1.96 million on those claims.

C. EVIDENCE DISPUTE AT TRIAL

A pretrial dispute arose over whether the government was allowed to offer evidence that Williams has a criminal history.

Williams has had multiple run-ins with the law. His criminal record includes felony convictions for cocaine possession and misdemeanor convictions for assault, resisting an officer, and carrying a weapon.

The government wanted to elicit testimony from Marsha about Williams's criminal record, by asking why she signed the 2005 Medicare provider application for Hermann Medical Supply. The government explained, at a pretrial conference, "...there may be a witness [who] will testify about statements made by the defendant regarding his criminal record, and in the context of why he's not on the Medicare application." The prosecutor said: "We don't intend to go in what the criminal record is, or what the convictions are, if there are any. But the fact that the defendant made the statement about his criminal record and the context of why he is not on the Medicare application may come out in testimony."

Williams sought to preclude the government and its witnesses "from mentioning, eliciting or attempting to elicit information relating to Defendant's criminal history or even that Defendant has a criminal history." His written motion

was filed before trial and presented to the district court. He objected under the Federal Rules of Evidence, Rules 404(b) and 403. The district court preliminarily granted Williams's pretrial motion in limine to exclude the evidence, but clarified her ruling saying that "all it means is that at the time, when this is about to come out, you have to come up and convince – and tell me about it again."

During a sidebar at trial, the government stated that it was "about to get into the testimony regarding the defendant's past history as to why she [i.e., Marshal] was on the Medicare application." Williams again objected, arguing that the government's strategy was "a way to get into an extraneous offense that is not admissible." The government responded that the testimony was

"relevant to show that Ms. Williams was only on the application for a certain reason. Again, we will not ask what the actual offense was, but about the statement that he told her, which is covered under Federal Rule of Evidence 801(d)(2)(A)."

The district court overruled Williams's objection. For the jury, after some preliminary testimony regarding the Medicare provider application, Marsha was allowed to answer, as follows :

Q: Do you know – why did you sign it instead of the defendant?

A: Because he told me it would be difficult for him to start the business because of his past.

No further questioning was made regarding Williams's "past." The government did not mention Williams's criminal record during opening and closing statements or elicit such testimony from other witnesses.

D. ISSUES ON APPEAL

Williams complained in the Court of Appeals that his timely objections to the relevance and unfair harm of testimony that his wife signed as the Medicare application because of his past was a premediated, deliberate and harmful reference to his criminal record.

The Rule cited by the government, Fed. R. Ev. 801(d)(2)(A), simply defines a statement by a defendant and offered by the government against defendant as not hearsay. This is the only grounds asserted by the government in the trial court and has nothing to do with Rules 403 and 404(b). The government did not dispute or deny the defense statement that the government's only purpose in presenting this testimony was getting the fact that Williams had a criminal record into evidence.

In the trial when Marsha testified, the government, at the bench, announced its first theory of admissibility:

Ms. McFarlane (Prosecutor): Your Honor, we are about to get into the testimony regarding the defendant's past history as to why she was on the Medicare application. Your Honor instructed that we approach before we go into that testimony.

Mr. Tritico (Defense Counsel): I filed a brief on that as to why it is not admissible. He hasn't testified. It is not admissible. It is a factual way to get into an extraneous offense that is not admissible, and I object to it.

Ms. McFarlane: Your Honor, the defense has already questioned the witness about the principal being Marsha Williams, of this business. We think it is relevant to show that – we think it is relevant to show that Ms. Williams was only on the application for a certain reason.

Again, we will not ask what the actual offense was, but about the statement that he told her, which is covered under 801D21A, (*sic*) I believe.

Apparently the Court first indicated its ruling by sign or gesture.

Mr. Tritico (Defense Counsel): My objection overruled?

The Court: Your objection is overruled.

On October 19, 2017 that Court of Appeals held that the testimony was admissible on grounds neither expressly presented in the district court nor relied on when the district court overruled the objection:

1. That the testimony was intrinsic to the crime of health care fraud;
2. That the testimony was entirely outside the “other crimes” prohibited by Rule 404 (b) because a “criminal record” is not a specific offense;
3. That the testimony was more probative than unfairly prejudicial (which is a finding not stated by the district court).

REASONS FOR GRANTING THE WRIT

The Constitutional guarantees of the right to notice, confrontation and due process of law are protected by Federal Rules of Evidence 404(b) and 403. Here, those guarantees were violated.

The Court of Appeals first transgressed on the rule that issues not raised in the district court may not be raised for the first time on appeal. The entire “intrinsic evidence versus extrinsic evidence” articulated by the Court of Appeals was not argued in the trial court; the government said this planned testimony was offered “in the context of why he is not on the Medicare application,” though most of his criminal record preceded by many years the date the government claimed that the “scheme” to defraud Medicare began.

Second, even if Mrs. Williams’s understanding why she signed the application is somehow “intrinsic,” the court still violated Rule 403 by failing to balance any relevant admissible purpose against the probability of unfairly harmful use by the jury as “bad character” evidence. The government conceded that Williams’s brief “raises an unusual evidentiary issue.”

Third, the Court of Appeals also asserted, apparently as an alternative holding, that Rule 404(b) evidence is evidence of a “single wrong, such as a prior conviction for an offense similar to a charged offense.” No authority is cited. The plain language of Rule 404(b) prohibits evidence of “...a crime, wrong or other act...”

but by its terms is not self-limiting to a single and specific “crime, wrong or other acts.” Surely harmful evidence that a defendant has a criminal record falls within the ambit of Rule 404. This argument was not presented in the district court. In the government’s briefs for the Court of Appeals, the government commented that the “typical” 404(b) objection is to a specific event, but the government did contend its evidence was not 404(b) evidence.

Fourth, Rule 403 contemplates that a district court will make on the record findings that admissible purpose (s) substantially outweigh the risk of unfair prejudice. The cases are legion that Rule 403 requires a trial to conduct on-on-the-record balancing test. Here the Court of Appeals made a de novo review, without a balancing in the district court, and the Court of Appeals concluded that “the probative value of the statement was not substantially outweighed by the risk of unfair prejudice.” Williams did not have an opportunity to object the district court because the Court never made a ruling, or findings, based on Rule 403. On appeal, the government suggested that the rulings, if ever, made harmless, but did not deny that this evidence was premeditated, deliberate, and insisted upon by the government at trial.

Petitioner respectfully submits that his Constitutional rights were violated: The district court ruled, without comments and without valid grounds offered by the government, that Marsha Williams would be allowed to state that she signed the Medicare application at the request of her husband because “... it would be difficult for him to start the business because of his criminal past.” The record persuasively

demonstrates the prosecution the prosecution insisted on using this evidence. The objection to the testimony was preserved.

The district court's ruling, and the decision of the Court of Appeals which affirmed the district court, violates these previous decisions of the Supreme Court:

A. Rule 403:

1. *Spring v. Mendelsohn*, 552 U.S. 379 (387) 2008, holding that Admission under Rule 403 should be decided case-by-case and without a "per se" rule on what is admissible.

2. *Old Chief v. United States*, 519 U.S. 172, 183(1997), holding that it is an abuse of discretion to fail to weigh probative value against the danger of undue prejudices; also, that a court should consider evidentiary alternatives.

B. Rule 404 (a) and (b)

1. *Huddleston v. United States*, 485 U.S. 681, 691-692 (1988) holding that Rule 404(b) requires a preliminary finding by the trial court; and the rule is grounded in other Rules, including Rule 404(b) proper purpose; Rule 402 (relevance) enforced through Rule 104, a specific determination under Rule 403 whether the probative value is substantially outweighed by the potential for unfair prejudice; and the availability of a limiting instruction under Rule 105. Petitioner states that no proper purpose to the 404(b) objection was offered by the government and for that reason there was no basis to request a Rule 105 limiting instruction.

2. *Williamson v. United States* 512 U.S. 594 (1994), holding that Rule 801(d)(2)(A), which has an exception to the rule against hearsay for statements

against interest, does not allow admission of statements that are not inculpatory even if made within a broader, generally inculpatory, narrative. Petitioner's statements to Marsha Williams were offered by the government on the grounds they were inculpatory of the charge Williams had a scheme to defraud Medicare; to the contrary, Williams did not even work at Hermann Medical Supply until two years after Marsha signed the application for what, in her testimony, she described as a "family business."

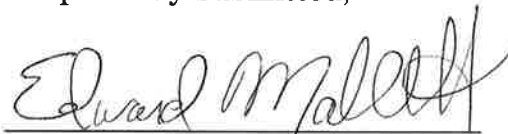
CONCLUSION

For the foregoing reasons, petitioner Huey Williams prays that this Court grant certiorari to review the judgment of the Fifth Circuit.

Date:

January 9, 2018

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Edward Mallett", written over a horizontal line.

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APPENDIX