No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2025

DESHAWN WHITED,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

6th Circuit Case No. 24-5253

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QUESTIONS PRESENTED

I.

Whether the Sixth Circuit Court of Appeals erred in finding that the District Court was correct in permitting evidence of an uncharged attempted robbery denying Whited of his right to a fair trial?

PARTIES TO THE PROCEEDING

Pursuant to United States Supreme Court Rule 14(1)(b), your Petitioner states that the parties to this Petition are as follows:

Petitioner: Deshawn Whited

Respondent: United States of America

There were no co-defendants and thus the Petitioner is not aware of any other Petition for Writ of Certiorari relating to this case.

RELATED CASES

None

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The Petitioner Deshawn Whited respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered in the above-styled proceeding on February 5, 2025.

OPINIONS BELOW

(1) Judgment in a Criminal Case, *United States of America v. DeShawn Whited*, Case No. 21-cr-29, United States District Court for the Eastern District of Tennessee entered on March 15, 2024. (Appendix 1).

(2) Opinion, *United States of America v. DeShawn Whited*, No. 24-5253, United States Court of Appeals for the Sixth Circuit entered on February 5, 2025. (Appendix 2)

STATEMENT OF JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth Circuit was entered on February 5, 2025, affirming the Petitioner DeShawn Whited's conviction. The District Court entered a judgment of conviction on March 15, 2024. A Petition for Rehearing with a Suggestion for Rehearing en banc was not filed.

The United States Court of Appeals for the Sixth Circuit had jurisdiction over Whited's appeal pursuant to 28 U.S.C. §1291 which confers upon the United States Court of Appeals jurisdiction from all final decisions of the District Courts of the United States.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1), which provides that cases in the Courts of Appeals may be reviewed by the Supreme Court by Writ of Certiorari granted upon the petition of any party. Jurisdiction is also invoked by United States Supreme Court Rules 10 and 13.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

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

US CONST., amend V.

The Sixth Amendment to the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

US CONST., amend VI.

FEDERAL RULES OF EVIDENCE INVOLVED

Federal Rule of Evidence 404(b) provides –

> (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.

Fed. R. Evid. 404(b).

STATEMENT OF THE CASE

A.

1. On January 20, 2021, Whited was arrested on a Criminal Complaint in the Eastern District of Tennessee charging him with carjacking in violation of 18 U.S.C. §2119, and Use of a Firearm in Furtherance of a Crime of Violence in violation of 18 U.S.C. §924(c). Whited's arrest was the result of a carjacking in East Knoxville where the perpetrator forced the owner of the vehicle out of the car at gunpoint.

2. On March 17, 2021, Whited was indicted on fifteen (15) counts after a lengthy investigation into various robberies in Knox County. Counts one (1), three (3), seven (7), nine (9) and eleven (11) charged Whited with Hobbs Act robbery in violation of 18 U.S.C. §1951. Counts two (2), four (4), six (6), eight (8), ten (10) and twelve (12) charged Whited with knowingly using and carrying a firearm in furtherance of the charged Hobbs Act robberies. Count thirteen (13) charged carjacking, count fourteen (14) charged another gun offense, and Count (15) charged Whited with being a felon-in-possession of a firearm.

3. Prior to Whited's trial the United States filed a Notice of Intent to Introduce Intrinsic Acts Evidence or Federal Rule of 404(b) evidence. The United States argued that the proffered evidence was "intrinsic" to the crimes charged and did not implicate Rule 404(b). In the alternative, the Government argued the evidence satisfied one of the exceptions under Rule 404(b).

4. Whited filed a Motion in Limine to exclude the evidence. Whited argued that the evidence was neither intrinsic nor admissible under Rule 404(b). Whited's position was that this was a back-door attempt by the United States to introduce prejudicial evidence that was nothing more than improper propensity or character evidence barred by Rule 404(b).

5. On January 5, 2023, the District Court denied Whited's motion:

> "Here, evidence of Defendant's alleged December 12, 2020, attempted robbery is admissible as both intrinsic evidence and under Rules 404(b) and 403. *First*, the evidence is inextricably intertwined with at least two (2) other charged offenses. The proposed evidence is closely-related to charged conduct, and it occurred close in time – approximately ten (10) days after the conduct charged in Count One and within approximately one (1) month of further conduct charged in Count Thirteen. *See United States v. DeOleo*, 697 F. 3d 338, 344 (6th Cir. 2012); *see also United States v. Churn*, 800 F. 3d 768, 777-80 (6th Cir. 2015) (affirming admission of uncharged conduct as "intrinsic evidence" where it was "set up the same" and occurred "at the same time" as indicted conduct). Evidence of the events of December 12 are both prelude to a charged offense and directly probative of a charged offense. And the significant probative value of evidence that is similar to and occurred around the same time as Defendant's indicted conduct is not substantially outweighed by the risk of undue prejudice to Defendant under Rule 403. *See United States v. Asher*, 910 F. 3d 854, 860 – 61 (6th Cir. 2018). Nor has defendant meaningfully articulated any "unfair prejudice" that would result from the proposed evidence. *See* Fed. R. Evid. 403. The evidence is not so inflammatory that it creates too much of a risk that the jury will generalize from prior examples of bad character. *United States v. Clay*, 667 F. 3d 689, 697 (6th Cir. 2012). Defendant's alleged conduct on December 12 is therefore "intrinsic" or "inextricably intertwined" with certain charged conduct, and it is properly admissible on that basis. *See De Oleo*, 697 F. 3d at 344.
>
> *Second*, even if evidence of the attempted robbery on December 12 was not inextricably intertwined, the evidence is independently admissible under Rule 404(b) because it tends to show Defendant's modus operandi and identity or absence of mistake. Rule 404(b)(1) prohibits admission of "[e]vidence 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 conformity with the character." Fed. R. Evid. 404(b)(1). But Rule 404(b)(2) permits the use of such evidence to show "intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b)(2). The Court assesses whether (1) the "other acts actually occurred," (2) the other acts "[a]re admissible for a permissible [Rule] 404(b) purpose," and (3) the other acts' "probative value [i]s not substantially outweighed by the danger of unfair prejudice under Rule 403. *See De Oleo*, 697 F. 3d at 343. Defendant does not contest that the alleged evince of December 12 actually occurred [*See* Doc. 89 at 9]. And the proposed evidence tends to show both (1) that Defendant used similar methods and means across charged and uncharged conduct: operating from the same vehicle and brandishing a similar firearm and (2) Defendant's identity or absence of mistake. *See*

United States v. Felix, 850 F. App'x 374 (6th Cir. 2021) (concluding that evidence of defendant's prior robbery was admissible under 404(b)(2) to show modus operandi and identity); *United States v. Mack*, 258 F. 3d 548, 553 – 54 (6th Cir. 2001) (affirming admission of subsequent bank robbery involving similar clothing and conduct where "the perpetrator's consistent use…in combination constituted a "signature"). For the reasons previously stated, the probative value of Defendant's involvement in an uncharged attempted robbery is not substantially outweighed by the danger of unfair prejudice." *See De Oleo*, 697 F. 3d at 343. Therefore, evidence of Defendant's alleged attempted robbery on December 12 is admissible under Rule 404(b)(2)."

6. Whited proceeded to trial on January 10, 2023. On January 11th, the Government presented their evidence of the uncharged robbery to the jury:

> "A: …So I get the two or three items that I was getting in Kroger, and when I was coming out to my car, I noticed the person was sitting in their car. They had backed in, smoking a cigar and was talking. You know, I saw his head back or whatever, so he was parked so close to me. I didn't want to hit his car. He was backed in, so I'm very careful going up through there. I got my Kroger bag in this hand. I've got my purse under my arm with the strap. It's a big purse.
>
> And so, I opened, unlocked my door, opened my door and got in, and I slid in without hitting that vehicle, and I then threw my stuff over in the passenger seat. And when I turned around to get my door, I still had my purse right here to get my door. I was holding the door 'cause I was trying not to hit his car, and when I did he came in the door at me. I can't remember if he said anything. He put the gun, he pointed to the strap on my purse, and then he put the gun in my face.
>
> And all I remember - - I would have told you. I would have been somebody that would have said 'Take my money, take my purse, this isn't worth it', but I didn't do that. I remember thinking I'm a born-again believer in Jesus Christ, and I remember thinking I know where I'm going, and at that moment I thought my life was over. At that moment, I just closed my eyes.
>
> The next thing I remember, I'm still sitting like this. I am screaming bloody murder, and I open my eyes, and he's leaving out of my door. And then something came over me, and I actually stood up as he got back in the car and pulled out. I actually stood up and kept screaming and screaming and screaming.
>
> …And at this point I don't know why I didn't sit in the seat. I just sit down in the door frame of my car. I'm almost on the ground, and as the car was leaving, I tried my best as I was standing there screaming to remember the license plate number, and I don't know how that came to mind."

Whited argued that the victim's description of the gun used in the attempted robbery did not match the description of the gun used in the other robberies:

> Q: Okay. What type of gun was it?
> A: I don't know a whole lot about guns, but it was, it had the roller thing on it, like the ones you see in Westerns, Gunsmoke, you know, that kind of thing"

Whited also argued that the victim's description of the Jeep Cherokee only included three letters of the license plate:

> "Q: You identified the first three letters of the license tag 8W4, correct?
> A: 8W, and I could not be sure about the third number, but I thought it was a 4.
> Q: …but you did not know the last three numbers, you didn't know what the complete license tag was?
> A: I could not remember all that, no."

Additional evidence included a store employee testifying to witnessing a robbery while she was out in the parking lot picking up grocery carts. She recalled the perpetrator wearing a black hoodie, a tattoo on the face, and having a lighter skin tone.

7. On January 18, 2023, Whited was found guilty on all charges. On March 15, 2024, the District Court sentenced him to 546 months.

B.

8. Whited appealed his conviction to the Sixth Circuit Court of Appeals. Among the issues presented was the District Court's decision to admit evidence of the uncharged attempted robbery. Whited argued that the inclusion of this evidence infringed on his constitutional right to a fair trial; that the evidence was not intrinsic as there was no temporal, causal, or spatial connection to the other charged crimes; and that it was not in the alternative – as the District Court found – permissible evidence under Rule 404(b)(2).

9. On February 5, 2025, the Court of Appeals denied Whited's appeal. On the issue of the uncharged attempted robbery, the Sixth Circuit found:

"Evidence of the attempted robbery was highly probative as to Whited's identity and has minimal prejudicial effect. Start with probative value. The attempted robbery's victim provided a partial plate number that matched a Jeep belonging to Whited's mother, which police later say Whited driving. Also, three aspects of the attempted robbery – the silver Jeep, the assailant's light complexion and facial tattoo, and his use of a gun- connected its perpetrator to the charged offenses. *See, United States v. Mack*, 258 F. 3d 548, 554 (6th Cir. 2001). Thus, testimony on the attempted robbery helped identify Whited as the perpetrator of the charged crimes. As for its prejudicial effect, it doesn't appear that evidence from the uncharged attempted robbery "inflame[d] the passions of the jury" or caused them to ignore other evidence. *United States v. Whittington*, 455 F. 3d 736, 739 (6th Cir. 2006). The jury convicted Whited of some offenses but acquitted him of one robbery count and two firearms counts, suggesting it didn't assume Whited simply had a propensity to commit crime. The district court did not abuse its discretion by admitting this evidence."

C.

10. Whited seeks review of the Sixth Circuit's decision and submits that an important question exists as to the scope of Rule 404(b) and what is known as "res gestae" evidence and what guardrails apply to the admissibility of such evidence.

REASON FOR GRANTING THE WRIT

I. THE COURT OF APPEALS APPLIED A MIXED STANDARD OF REVIEW IN AFFIRMING THE DISTRICT COURT'S INTRODUCTION OF RULE 404(b) EVIDENCE, WHICH DEMONSTRATES A CIRCUIT SPLIT ON THE PROPER STANDARD OF REVIEW THAT THIS COURT CAN AND SHOULD CLARIFY

Supreme Court Rule 10 provides, in relevant part:

"Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons. The following, although neither controlling or fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) A United States court of appeals has entered a decision in conflict with the decision of the United States court of appeals on the same important matter…"

U.S. Sup. Ct. Rule 10(a)

The District Court allowed testimony regarding an uncharged attempted robbery by Whited by concluding that the evidence was "res gestae" or "intrinsic" and without which the complete story of the case could not be satisfactory told to the jury. Curiously, the Court of Appeals analyzed

the admission under Rule 404(b) and in a throw away footnote stated: "Alternatively, the district court held that evidence of the attempted second robbery was admissible as "intrinsic" evidence. (Opinion, page 10, footnote 1, Appendix 2). That best demonstrates the problem with reviewing 404(b) evidence by the various Courts of Appeals. The standard is all over the place leading to confusing results that this Court should review and clarify. It appears in this case the Sixth Circuit analyzed the District Court's decision under an abuse of discretion standard which goes contrary to its own precedent and also conflicts with decisions from other circuit courts.

In this case the Sixth Circuit purported to use a familiar three-step process, citing the case of *United States v. Gibbs*, 797 F.3d 416 (6th Cir. 2015). In Gibbs, the Sixth Circuit found, "[f]irst, we review for clear error whether there is a sufficient factual basis for the occurrence of the bad acts that is being proffered as evidence (and challenged pursuant to Rule 404(b)." *Id*. at 422 (citing, *United States v. Murphy*, 241 F. 3d 447, 450 (6th Cir. 2001)). "Second we determine de novo whether the evidence was proffered for an admissible purpose." *Id*. "Third, we review for an abuse of discretion whether the probative value of the proffered evidence is substantially outweighed by any undue prejudice that will result from its admission." *Id*.

This three-part analysis was first stated by the Sixth Circuit in the case of *United States v. Clay*, 667 F. 3d 689 (6th Cir. 2012). But Clay recognized an intra-circuit split of authority. The majority opinion adopted the test that included *de novo* review. In dissent, however, Judge Ketchledge firmly disagreed and argued that a familiar "abuse of discretion" standard should apply to these as well other evidentiary matters:

> "Every trial presents its own field of maneuver, with issues rising up in different places on the terrain. Some issues reach commanding heights, others are just a gentle rise; some have evidence arranged densely on each side, others have evidence more thin. Whatever the layout, the district court knows the ground better than we do. Its understanding comes from the front lines, whereas we are back in a headquarters tent. And thus we defer a great

> deal to the district court's judgment as to whether a particular piece of evidence aligns with one issue, or another, or instead does not belong on the field at all.
>
> But here the majority manages Clay's trial from afar. It reviews de novo the question, whether, under Rule 404(b), the district court admitted evidence of Clay's prior crimes for proper purposes. I believe that is an incorrect standard of review. Although our court has a longstanding intra-circuit conflict regarding the appropriate standard of review for evidentiary decisions under Rule 404(b), the correct standard, I submit, is the deferential one that we apply to every evidentiary ruling."

Id. at 702 – 03.

The Third, Eighth, and Ninth Circuits also apply a de novo standard of review. *See, United States v. Cruz*, 326 F. 3d 392, 394 (3d Cir. 2003) ("We make a de novo determination of whether evidence falls within the scope of Rule 404(b)). *See, United States v. Givan*, 320 F. 3d 452, 460 (3d Cir. 2003). But, if the evidence could be admissible in some circumstances, we review the district court's allowing it to be admitted for abuse of discretion. *See, United States v. Console*, 13 F. 3d 641, 658 – 59 (3d Cir. 1993)).

See also, United States v. Smith, 383 F. 3d 700, 706 (8th Cir. 2004) ("We review de novo the district court's interpretation and application of the rules of evidence, and review for abuse of discretion the factual findings supporting its evidentiary rules); and *United States v. Akin*, 213 Fed. App'x 606, 608 – 09 (9th Cir. 2006) ("In reviewing a decision to admit evidence under Rule 404(b), we review the legal determination that evidence has a legitimate purpose de novo. The district court's ultimate decision to admit evidence pursuant to Rule 403 and 404(b) is review for abuse of discretion").

In contrast the First and Seventh Circuits default to the abuse of discretion standard. *See, United States v. Gilbert*, 229 F. 3d 15 (1st Cir. 2000) (we review its [Federal Rules of Evidence] application of Rule 404(b) and 403 to the proffered evidence only for abuse of discretion). *See also, United States v. Hite*, 364 F. 3d 874, 881 n. 10 (7th Cir. 2004) ("Hite argues incorrectly that

the determination of whether or not evidence falls within the scope of Federal Rule of Evidence 404(b) should be reviewed de novo. To support the position, he cites a Ninth Circuit decision, *United States v. Rrapi*, 175 F. 3d 742, 748 (9th Cir. 1999). However, this Court consistently held that evidentiary decisions, including those concerning Rule 404(b) are reviewed for an abuse of discretion. *See, e.g., United States v. Williams*, 216 F. 3d 611, 614 (7th Cir. 2000) ("We review rulings determining the admissibility of evidence under Rule 404(b) for an abuse of discretion")).

Here, the Sixth Circuit stated:

> "Federal Rule of Evidence 404(b) bars admitting evidence of someone's prior bad acts to show their propensity to act badly. See, *Flagg v. City of Detroit*, 715 F. 3d 165, 175 (6th Cir. 2013). But it allows using evidence of prior bad acts to prove motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. Fed. R. Evid. 404(b)(2). To determine whether evidence of bad acts can come in under Rule 404(b), district courts consider: (1) whether there is sufficient evidence that the other act in question actually occurred; (2) whether the evidence of the other act is probative of a material issue other than character; and (3) whether the probative value of the evidence is substantially outweighed by its potential prejudicial effect. *United States v. Emmons*, 8 F. 4th 454, 474 (6th Cir. 2021) (quoting, *United States v. Adams*, 722 F. 3d 788, 810 (6th Cir. 2013)). Whited doesn't dispute that the attempted parking-lot robbery occurred, so we focus on probative value and prejudicial effect.
>
> Evidence of the attempted robbery was highly probative as to Whited's identity and had minimal prejudicial effect. Start with probative value. The attempted robbery's victim provided a partial plate number that matched a Jeep belonging to Whited's mother, which police later saw Whited driving. Also, three aspects of the attempted robbery – the silver Jeep, the assailant's light complexion and facial tattoo, and his use of a gun – connected its perpetrator to the charged offense. *See United States v. Mack*, 258 F. 3d 548, 554 (6th Cir. 2001). Thus, testimony on the attempted robbery helped identify Whited as the perpetrator of the charged crimes. As for its prejudicial effect, it doesn't appear that evidence from the uncharged attempted robbery inflame[d] the passions of the jury or caused them to ignore other evidence. *United States v. Whittington*, 455 F. 3d 736, 739 (6th Cir. 2006). The jury convicted Whited of some offenses but acquitted him of one robbery count and two firearms counts, suggesting it did not assume Whited simply had a propensity to commit crime. The district court did not abuse its discretion by admitting this evidence.
>
> Whited's arguments to the contrary don't convince us otherwise. He points to differences between the facts of the uncharged attempted robbery and those of other charged crimes. But in analyzing bad acts introduced to prove identity we don't require that the crimes be identical in every detail. *United States v. Perry*, 438 F. 3d 642, 648 (6th Cir. 2006) (quoting, *United States v. Hamilton*, 684 F. 2d 380, 385 (6th Cir. 1982)). It's enough for the uncharged

> and charged conduct to be substantially similar and reasonably near in time. *Emmons*, 8 F. 4th at 475 (quotations omitted). For example in *Perry* we held that robberies committed nearly two months apart were reasonably near in time under Rule 404(b). *Perry*, 438 F. 3d at 648. And despite certain distinctions between the two robberies, we held they were substantially similar because the robber entered both banks carrying a gun in a bookbag and seeking change for $50. *Id*. Here too the charged and uncharged crimes were sufficiently similar."

(Opinion, pp. 9 – 10 (Appendix 2).

While articulating the Circuit's three-part test, it appears the Sixth Circuit overruled Whited's appeal on this issue based on abuse of discretion. The court of appeals appears to have not even followed its own precedent making the applicable standard of review more confusing that it is already.

And the proper standard of review is important in Whited's case. There is no question that the evidence of an uncharged robbery was exactly what the government wanted. It was the only occasion in the entire trial where a "victim" could positively identify Whited as the perpetrator. The robber was disguised in the charged robberies. Under a low abuse of discretion standard Whited's argument to the Sixth Circuit had little chance of succeeding due to the very low bar that standard entails. On the other hand with a de novo review, the Sixth Circuit could take a fresh view of whether the facts firmly established enough of a similarity to allow this evidence to be admitted.

Whited respectfully requests this Court undertake review and clarify the proper standard for review of the introduction of 404(b) evidence.

CONCLUSION

This case presents an issue that has different application across the Courts of Appeal. Thus pursuant to Supreme Court Rule 10, the Defendant-Appellant Deshawn Whited respectfully requests this Court grant his Petition for Writ of Certiorari.

Respectfully submitted this 5th day of May 2025

/s/ Mark E. Brown
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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of May 2025, I served a true and exact copy of this document on the following: OFFICE OF THE SOLICITOR GENERAL OF THE UNITED STATES OF AMERICA, DEPARTMENT OF JUSTICE, ROOM 5616, 950 PENNSYLVANIA AVENUE, N.W., WASHINGTON, D.C. 20530-0001 by placing the same in the United States Mail, first class postage pre-paid.

This document has also been served via this Court's electronic filing system.

/s/ Mark E. Brown
Mark E. Brown

APPENDECIES