No. 10-

In the Supreme Court of the United States

JOHN D. VILLANUEVA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

PHILIP UROFSKY
Counsel of Record
STEPHEN MARZEN
BRYAN DAYTON
SHEARMAN & STERLING LLP
801 Pennsylvania Ave. NW
Suite 900
Washington, DC 20004
(202) 508-8000
philip.urofsky@shearman.com

Attorneys for Petitioner

June 20, 2011

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Blank Page

QUESTION PRESENTED

In the Second, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits, evidence is deemed intrinsic and thus admissible without the protections afforded by Federal Rule of Evidence 404(b) if it is "inextricably intertwined" with the charged crime. In the Third, Seventh, and District of Columbia Circuits, evidence is intrinsic only if it "directly proves" the charged crime or is "performed contemporaneously with the charged crime . . . if [it] facilitate[s] the commission of the charged crime."

The question presented is whether evidence that is "inextricably intertwined" with the charged crime but does not directly prove that crime may be admitted without the limited-admissibility instruction otherwise required by Federal Rule of Evidence Rule 404(b).

PARTIES TO THE PROCEEDING

All parties are listed in the caption.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES AND RULES

MISCELLANEOUS

Blank Page

In the Supreme Court of the United States

No. 10-

JOHN D. VILLANUEVA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

John D. Villanueva respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Virginia (App. A, *infra*, at 6a-11a) is unreported. The opinion of the United States Court of Appeals for the Fourth Circuit (App. B, *infra*, at 15a) is reported at *United States v. Villanueva*, 410 F. App'x 638, 2011 WL 494592 (4th Cir. 2011).

JURISDICTION

The judgment of the court of appeals was entered on February 11, 2011. A timely petition for rehearing was denied on March 22, 2011 (App. C, *infra*, at 21a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

After a three-day trial, a jury convicted Petitioner of aiding and abetting, and conspiring with, a government official in improperly obtaining a government contract in violation of the conflict of interest law based, in part, on evidence of the Petitioner's conduct related to a separate contract that was never put out for tender or awarded. The district court denied Petitioner's request for a limiting instruction under Federal Rules of Evidence 404(b) and 105 and the court of appeals affirmed.

STATEMENT OF THE CASE

The United States charged John D. Villanueva in the Eastern District of Virginia with accessory liability for violating the federal conflict of interest law through his involvement in obtaining a "contract [with the Defense Threat Reduction Agency ('DTRA')] valued at approximately $450,000" in which his business partner, a government official, had a financial interest in violation of 18 U.S.C. §§ 208(a), 216(a). (App. D at 25a.) At trial the government introduced evidence Mr. Villanueva sought to obtain a future contract worth approximately $9.1 million. DTRA never put out that contract for tender and Mr. Villanueva's company never bid for it. When the government offered the evidence of the uncharged contract, defense counsel requested a limiting instruction pursuant to the model jury instruction Rule 404(b): the defendant is not on trial for any acts or crimes not alleged in the indictment and that the defendant should not be convicted of the crime charged even if you were to find that he committed other crimes – even crimes similar to the one charged in this indictment. (App. A at 6a.) The

government objected to the requested instruction. (*Id.*) The trial court found that the evidence was "intimately intertwined in the indictment itself as well as the evidence that has been put before the jury" and, as a result, no instruction was warranted. (*Id.* at 10a-11a.) The jury later convicted Mr. Villanueva.

The Fourth Circuit affirmed in an unpublished opinion. It concluded that under the "controlling [Fourth Circuit] legal standards . . . the district court did not err in determining that the evidence was inextricably intertwined with the charged offenses." (App. B at 20a.) The Fourth Circuit did not address whether this error was harmless.

On appeal, the government conceded that "[i]f the evidence had only been admissible pursuant to Rule 404(b), Villanueva would have been entitled to a limiting instruction." (App. E at 63a (citing *Huddleston v. United States*, 485 U.S. 681, 691-92 (1988)).) The government contended, however, that evidence of the $9.1 million contract was "inextricably intertwined" with the charged crimes under binding Fourth Circuit law. (*Id.* at 65a.) The government acknowledged that the Third and D.C. Circuits, applied "a more restrictive definition of intrinsic evidence than most circuits" and that the direct proof test in those circuits should be avoided and that the question presented "should by reviewed under the precedent of [the Fourth Circuit]." (*Id.* at 68a.)

REASONS FOR GRANTING THE PETITION

Because (a) the circuits are split on the standard in determining whether evidence is intrinsic, (b) the disagreement between the circuits has real consequences to criminal defendants, (c) the Fourth Circuit's approach invites abuse and threatens to override Rule 404(b), and (d) this case is a good vehicle for addressing the circuit split, this Court should grant review.

I. THIS COURT'S REVIEW IS REQUIRED TO RESOLVE A CONFLICT AMONG THE CIRCUITS

This Court should grant review to determine if the inextricably intertwined test or the direct proof test govern whether evidence intrinsic to the charged crime within the meaning of Rule 404(b).

In the Second, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits evidence is intrinsic if it is inextricably intertwined[1] with the charged crime and may therefore be introduced without the protections afforded by Rule 404(b). For example, in the Fourth Circuit, evidence is intrinsic when it "forms an integral and natural part of the witness's account of the circumstances surrounding the offenses for which the defendant was indicted," *United States v. Wilson*, 624 F.3d 640, 652 (4th Cir. 2010)), quoting *United States v. Edouard*, 485 F.3d 1324, 1344 (11th Cir. 2007), or arises "out of the same series of transactions as the charged offense . . .

[1] These courts are not consistent or clear in whether the inextricably intertwined doctrine is their exclusive test to determine whether evidence is intrinsic or just one component thereof. This Petition will view the doctrine broadly as embracing all grounds upon which these circuits treat evidence as intrinsic.

or [is] necessary to complete the story of the crime on trial," *United States v. Kennedy*, 32 F.3d 876, 885 (4th Cir. 1994).[2]

---

[2] The other circuits applying the inextricably intertwined doctrine are in accord. *See, e.g., United States v. Wright*, 392 F.3d 1269, 1276 (11th Cir. 2004) (holding that evidence is intrinsic when it: (a) "[is] not part of the crime charged but pertain[s] to the chain of events that explain the context . . . [of] the charged crime"; (b) is "linked in time or circumstances with the charged crime"; (c) "forms an integral and natural part of an account of the crime"; or (d) "complete[s] the story of the crime for the jury."); *United States v. DeGeorge*, 380 F.3d 1203, 1220 (9th Cir. 2004) (evidence is inextricably intertwined when it "constitutes a part of the transaction that serves as the basis for the criminal charge" or "when [admission of the evidence] was necessary . . . in order to permit the prosecutor to offer a coherent and comprehensible story regarding the commission of the crime"); *United States v. Walters*, 351 F.3d 159, 166 n.2 (5th Cir. 2003) ("Evidence qualifies as intrinsic when it is 'inextricably intertwined' with evidence of the crime charged, is a 'necessary preliminary' to the crime charged, or both acts are part of a 'single criminal episode.'); *United States v. Carboni*, 204 F.3d 39, 44 (2d Cir.2000) (evidence is intrinsic "[a] if it arose out of the same transaction or series of transactions as the charged offense, [b] if it is inextricably intertwined with the evidence regarding the charged offense, or [c] if it is necessary to complete the story of the crime on trial."); *United States v. Hardy*, 228 F.3d 745, 748 (6th Cir. 2000) (evidence is intrinsic that is "inextricably intertwined with the charged offense or those acts, the telling of which is necessary to complete the story of the charged offense."); *United States v. Forcelle*, 86 F.3d 838, 841 (8th Cir. 1996) (when "evidence of other crimes is 'so blended or connected, with the one(s) on trial as that proof of one incidentally involves the other(s); or explains the circumstances thereof; or tends logically to prove any element of the crime charged,' it is admissible as an integral part of the immediate context of the crime charged." (quoting *United States v.*

The Third, Seventh, and D.C. Circuits reject the inextricably intertwined test and apply a direct proof test to determine if evidence is intrinsic and a limiting instruction must be given. Evidence in the Third and D.C. Circuits is admissible as intrinsic only it "directly proves" the charged crime or is "'performed contemporaneously with the charged crime . . . if [it] facilitate[s] the commission of the charged crime.'" *United States v. Green*, 617 F.3d 233, 248-49 (3d Cir. 2010) (quoting *Bowie*, 232 F.3d at 929). The Seventh Circuit likewise rejects the inextricably intertwined doctrine. In *United States v. Taylor*, 522 F.3d 731, 734 (7th Cir. 2007), Judge Posner explained that the inextricably intertwined doctrine was "unhelpfully vague" and overlapped with the "exceptions" enumerated in Rule 404(b). More recently, the Seventh Circuit has held that the "inextricable intertwinement doctrine has outlived its usefulness" and, now, "resort to inextricable intertwinement is unavailable when determining a theory of admissibility" in the Seventh Circuit. *United States v. Gorman*, 613 F.3d 711, 719 (7th Cir. 2010). Unless the evidence directly proves the charged crime in the Seventh Circuit, the admissibility of the evidence must be considered under Rule 404(b). *Id.*

Bass, 794 F.2d 1305, 1312 (8th Cir. 1979)); *United States v. Record*, 873 F.2d 1363, 1372 (10th Cir. 1989) (uncharged act may be intrinsic to charged act if a witness' testimony would be "confusing and incomplete without mention of the prior act") (quoting *United States v. Richardson*, 764 F.2d 1514, 1521-22 (11th Cir. 1985)). In at least one case, the First Circuit has noted that evidence that is inextricably intertwined is admissible under Rule 404(b). *See United States v. Rodriguez-Estrada,* 877 F.2d 153, 156 (1st Cir.1989).

A panel of the Second Circuit, after noting *Bowie*, found that it was bound the Second Circuit's rules of admissibility. *See United States v. Graziano*, No. 09-3062-cr, 2010 WL 3467173, at *1 (2d Cir. Sept. 7, 2010). Although petitioner asked the Fourth Circuit to reject the inextricably intertwined test below, the court declined to review that question *en banc*. Considering the number of circuits that have split on this question, the persistence of the split for eleven years, and the circuit's inability to resolve the division, this court's review is warranted.

II. THE TWO APPROACHES TAKEN BY THE COURTS OF APPEAL CREATE A MEANINGFUL DIFFERENCE

The division among the circuits has practical consequences in the instruction of juries in criminal cases. As even the government acknowledged below, the D.C., Third and now Seventh Circuits apply "a more restrictive definition of intrinsic evidence than most circuits," a definition the government did not attempt to meet (and does not claim was met) in this case. (App. E at 68a.)

The difference between the circuits' approaches can best be seen in a comparison between the D.C. Circuit's approach in *Bowie* and the Fifth Circuit's approach in *United States v. Miranda*, 248 F.3d 434, 440-41 (5th Cir. 2001). In *Bowie,* although the defendant was indicted for having counterfeit currency in May 1997, the government at trial introduced evidence of the defendant's possession of identical counterfeit currency in April 1997 that was "doubtless from the same supplier and possibly the same batch[.]" *Bowie,* 232 F.3d at 929. Rejecting the trial court's finding that the counterfeit bills seized in April and May were "'in some sense really evidence

of the same crime,'" the D.C. Circuit found that evidence was not intrinsic because it did not "directly prove" the charged crime and, accordingly, should only have been admitted under Rule 404(b) lest Rule 404(b) be rendered "a nullity." *Id.* at 927-29, The D.C. Circuit nevertheless upheld the conviction, in part, because the defendant had not requested a limiting instruction. *Id.* at 932 & n.5. In contrast, in *Miranda*, the government charged the defendant with distributing or possessing cocaine, and conspiring to possess drugs with the intent to distribute, from May 1996 to June 1997. *Miranda,* 248 F.2d at 439. The government introduced evidence that a witness had bought drugs from the defendant "sometime 'around 1989, 1990, 1991.'" *Id.* at 440. The Fifth Circuit found that the trial court did not abuse its discretion in admitting the evidence as intrinsic because the evidence established "background information establishing a connection between a witness and a defendant." *Id.* at 441. Accordingly, the Fifth Circuit did not require that the evidence meet the admissibility standard under Rule 404(b).

Nor can it be contended that the question presented here is merely academic because evidence admitted under the inextricably intertwinement doctrine might otherwise be admissible under Rule 404(b). To the contrary, as explained by Judge Randolph, "treating evidence as [intrinsic] not only bypasses Rule 404(b) and its attendant notice requirement, but also carries the implicit finding that the evidence is admissible for all purposes . . . thus eliminating the defense's entitlement, upon request, to a jury instruction." *Bowie*, 232 F.3d at 928. *See also United States v. Sasser*, 971 F.2d 470, 479 (10th Cir. 1992) (finding an instruction unwarranted because the evidence was "inextricably intertwined"

with the charged crime). As such, there are real consequences as to whether evidence of "other crimes, wrongs, or acts" is admissible as intrinsic or under Rule 404(b). *See Green*, 617 F.3d at 248 ("All that is accomplished by labeling evidence 'intrinsic' is relieving the Government from providing a defendant with the procedural protections of Rule 404(b).").

III. THE INEXTRICABLY INTERTWINED DOCTRINE IS FATALLY FLAWED

The Fourth Circuit's use of the inextricably intertwined doctrine invites abuse and threatens to circumvent Rule 404(b) and the protections it affords.

First, the inextricably intertwine doctrine invites abuse. As explained in *Bowie*:

> Some [formulations of the inextricably intertwined doctrine] are circular: inextricably intertwined evidence is intrinsic, and evidence is intrinsic if it is inextricably intertwined. . . . A defendant's bad act may be only tangentially related to the charged crime, but it nevertheless could "complete the story" or "incidentally involve" the charged offense or "explain the circumstances." If the prosecution's evidence did not "explain" or "incidentally involve" the charged crime, it is difficult to see how it could pass the minimal requirement for admissibility that evidence be relevant.

Bowie, 232 F.3d at 928. The circularity of the doctrine is apparent in the reasoning of the trial court below; it found that the evidence of the $9.1 million contract was intrinsic because it was "intimately in-

tertwined in the indictment itself as well as the evidence that has been put before the jury." (App. A at 10a.) This analysis validates the Third Circuit's criticisms that the doctrine leads lower courts to "substitute[] a careful analysis with boilerplate jargon," *Green*, 617 F.3d at 246 (quoting 1-404 Stephen A. Saltzburg et al., Federal Rules of Evidence Manual § 404.02[12] (9th ed.), and otherwise "invites sloppy, non-analytical decision-making," *id.* (quoting David P. Leonard, *The New Wigmore: Evidence of Other Misconduct and Similar Events* § 5.2 at 327 (2009)).

Second, given its expansiveness, the inextricably intertwined doctrine "threatens to override" Rule 404(b). *Bowie*, 232 F.3d at 929. Because evidence is admissible under the doctrine if it merely "completes the story" of the charged crime, there is substantial overlap between the doctrine and the "exceptions" listed in Rule 404(b). *See, e.g., Taylor*, 522 F.3d at 735 ("intent and absence of mistake are express exceptions to Rule 404(b)" and, thus, there is "no need to spread the fog of 'inextricably intertwined'" to justify the admissibility of evidence on these grounds). In the court of appeals below, the government argued, in part, that the "efforts to try to position [themselves] to obtain a subcontract on the $9.1 million contract also provided proof about why" the conspirators chose to do certain things. (App. E at 65a.) The government's justification speaks directly to "motive," "intent," "preparation" and "plan," purposes that are explicitly enumerated in Rule 404(b). *Cf. United States v. Klebig*, 600 F.3d 700, 712-13 (7th Cir. 2009) (disapproving the government's justification for admitting evidence as intrinsic on this basis). But this is precisely the type

of justification the inextricably intertwined doctrine permits – it "invites prosecutors to expand the exceptions to [Rule 404(b)] beyond the proper boundaries of the exceptions [listed in Rule 404(b)]," *Taylor*, 522 F.3d at 735, and thus, use the doctrine as a "technique[] to evade the strictures of Rule 404(b)," Charles Alan Wright and Kenneth W. Graham Jr., *Federal Practice and Procedure: Evidence* § 5239 at 555 (2011 supp.).

IV. THIS CASE IS A GOOD VEHICLE TO RESOLVE THE CIRCUIT SPLIT

This case presents a good vehicle to review the standard for admitting intrinsic evidence. Defense counsel requested a jury instruction under Federal Rule of Evidence 105. (App. A at 9a-10a.) The trial found that no instruction was warranted only because the evidence of the $9.1 million contract was "intimately intertwined" with the charged crime, (*Id.*) Indeed, the government essentially conceded on appeal that Mr. Villanueva would have been entitled to the requested instruction under the direct proof test. (App. E at 63a.) In the Third, Seventh, or D.C. Circuits, the district court would have been required to give the limiting instruction that Petitioner timely requested.

Moreover, Mr. Villanueva was prejudiced by the trial court's refusal to provide the requested instruction. Under 18 U.S.C. § 208, the government had to prove that Mr. Villanueva's business partner, Mr. Wright, "participated personally and substantially" as a government official in DTRA's award of the $450,000 contract. The government's evidence of Mr. Wright's participation in the award of the $450,000 contract was largely circumstantial or irrelevant.

For example, the "most important" evidence the government introduced was a comparison between the first proposal and the second proposal their company indirectly submitted – the government argued, in large part, that the vast improvement between the first and second proposals created the "inference" that someone with inside knowledge of DTRA's procurement decision had to be using this knowledge to draft the second proposal. (*Id.* at 47a-48a.) This evidence was completely circumstantial. In contrast, the government introduced evidence of an internal memorandum Mr. Wright drafted after the award of $450,000 contract in which he gave a favorable review of a briefing Mr. Villanueva provided to DTRA in anticipation of the anticipated (but never tendered) $9.1 million contract. While that evidence may have been admissible under Rule 404(b) to show *modus operandi*, there was considerable risk that the jury, without being instructed on the limited relevance of the future and unbid contract, would consider Mr. Wright's memorandum as direct evidence that he participated personally and substantially in award of the $450,000 contract. This was especially problematic given the government's apparent theory that even if no one act by Mr. Wright was sufficient, several separate acts, when taken together, satisfied the "participates personally and substantially" requirement: without an instruction, the jury may have considered this as direct evidence in deciding whether the standard was met. *See* Edward J. Iminkelreid, *The Second Coming of* Res Gestae*: A Procedural Approach to Untangling the 'Inextricably Intertwined' Theory For Admitting Evidence of an Accussed's Uncharged Misconduct*, 59 Cath. U. L. Rev. 719, 743 (2010) ("Many jurors are unaccustomed to refined circumstantial reasoning, and if they are

to use the references properly, they need guidance from the trial judge."); *United States v. Jobson,* 102 F.3d 214, 222 (6th Cir. 1996) (quoting *United States v. Merriweather*, 78 F.3d 1070, 1076 (6th Cir. 1996)) ("Given the court's failure to provide an effective limiting instruction, the jurors 'could not have had the vaguest notion of the limited proper purpose for which they might have considered the evidence.').

Similarly, the government argued that testimony of a co-conspirator confirmed Mr. Wright's involvement in DTRA's decision to award the $450,000 contract. (App. E at 54a-55a.) The government, however, bases this admission on a question that failed to differentiate between the contracts: "Did [Wright] say anything about what he would do with respect to [their] interests in this *or other contracts*." (App. A at 3a-4a (emphasis added).) Without an instruction, the jury was left without the ability to determine if the evidence of relevant to the *charged* crime was sufficient to warrant a conviction for *that* offense. Certainly, given the nature of the evidence, the jury might have reached a different result if it had been properly instructed.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

PHILIP UROFSKY
Counsel of Record
STEPHEN MARZEN
BRYAN DAYTON
SHEARMAN & STERLING LLP
801 Pennsylvania Ave. NW
Suite 900
Washington, DC 20004
(202) 508-8000
philip.urofsky@shearman.com

Attorneys for Petitioner

JUNE 20, 2011

Blank Page