No. 16-___

IN THE

Supreme Court of the United States

FRANK HARPER,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This petition concerns when evidence of a prior crime is admissible—an issue which has deeply fractured the Courts of Appeals, and on which this Court has not yet spoken. At common law, evidence that an accused had committed another crime was not admissible to prove that the defendant had a propensity for committing crimes, and therefore probably committed the charged crime. Over time, the courts developed exceptions to this rule, among them that evidence introduced to establish the "*res gestae*" (the "thing done") of the charged crime, now commonly referred to as "intrinsic evidence"—is admissible.

In 1975 Congress adopted the Federal Rules of Evidence. In contrast to the common law, Rule 404(b) takes an inclusive, rather than exclusive, approach. Specifically, while "[e]vidence 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," such evidence is generally admissible when it is offered for something other than that prohibited purpose. Fed. R. Evid. 404(b)(1) & (2).

Here, the district court admitted evidence of an uncharged shooting in Petitioner's prosecution for carjacking and conspiracy, which the government acknowledged it would use to show Petitioner's "willingness to shoot people in cars"—a clear solicitation of the propensity inference to prove specific intent. The Sixth Circuit (per Sutton, J.) affirmed, applying its conception of the intrinsic evidence doctrine.

The question presented is: Whether the intrinsic evidence doctrine survived the adoption of Federal Rule of Evidence 404(b)?

PARTIES TO PROCEEDINGS BELOW

In the United States District Court for the Eastern District of Michigan, Case No. 2:11-CR-20188, the government charged Petitioner Frank Harper with various federal criminal offenses, along with co-defendants Phillip Harper, Justin Bowman, Bernard Thomas Edmond, Omar Johnson, and Darrell Devin Young. The government's star witness, Stratford Newton, was an additional co-defendant during earlier stages of the proceedings.

The United States Court of Appeals for the Sixth Circuit consolidated the appeals of Petitioner Frank Harper (No. 14-2427), Bernard Thomas Edmond (No. 14-2426), and Phillip Harper (No. 14-2428) for argument and decision.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit (Pet. App. 1a–25a) is reported at 815 F.3d 1032. The oral decision of the United States District Court for the Eastern District of Michigan to admit the evidence in question is unreported but reproduced at Pet. App. 50a–51a. It was reduced to writing in an unpublished order dated August 21, 2013, reproduced at Pet. App. 29a–30a.

JURISDICTION

The Sixth Circuit issued its opinion affirming the district court's final judgment on March 3, 2016, and its order denying Petitioner's timely-filed Petition for Panel Rehearing or Rehearing En Banc on May 4, 2016. Pet. App. 1a; Pet. App. 26a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

PROVISION INVOLVED

Federal Rule of Evidence 404(b) provides:

(b) Crimes, Wrongs, or Other Acts.

(1) Prohibited Uses. 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.

(2) Permitted Uses; Notice in a Criminal Case. 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. On request by a defendant in a criminal case, the prosecutor must:

(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

(B) do so before trial—or during trial if the court, for good cause, excuses lack of pretrial notice.

STATEMENT OF THE CASE

A. This case arises against an important common law backdrop regarding the admissibility of evidence unrelated to the charged crime.

"The original attitude of the English courts was that any relevant evidence of the defendant's misconduct was admissible even if the only theory of relevance was to establish the defendant's character and, in turn, use character as circumstantial proof of conduct." 1 Edward J. Imwinkelreid, *Uncharged Misconduct Evidence* § 2:25 (2009). As early as the seventeenth century, however, English law grew concerned about widespread abuses of this rule and began to afford protections against the use of "other bad acts" evidence as proof of guilt. For example, with the passage of the Treason Act of 1695, individuals accused of treason gained protection, among other things, from the admission of evidence tending to prove an uncharged bad act. *See generally United States v. Green*, 617 F.3d 233, 240 (3d Cir. 2010) (citing Thomas J. Reed, *Trial by Propensity: Admission of Other Criminal Acts Evidenced in Federal Criminal Trials*, 50 U. Cin. L. Rev. 713, 716–17 (1981)).

As time progressed, the ban on propensity evidence expanded. "By 1810, it was more or less settled that 'bad acts evidence which merely demonstrate[d] the propensity of the defendant to do acts similar to those charged' was inadmissible." *Id.* (quoting Norman

Krivosha et al., *Relevancy: The Necessary Element in Using Evidence of Other Crimes, Wrongs, or Bad Acts to Convict*, 60 Neb. L. Rev. 657, 664 (1981)).

American courts followed English concerns, such that "the rule here throughout the 19th and 20th centuries mirrored that of England: evidence that the accused had committed some other crime was not admissible to prove that the defendant had a propensity for committing crimes, and therefore probably committed the charged crime." *Id.* (citing Reed, *Trial by Propensity*, *supra*, at 736, 739, and David P. Leonard, *The New Wigmore: Evidence of Other Misconduct and Similar Events* § 3.3 at 101 (2009)). American courts stressed the importance of trying and convicting defendants only for the crime charged, and not based on the notion that the defendant had a propensity for committing crimes. *See, e.g.*, *People v. Molineux*, 61 N.E. 286, 291–93 (N.Y. 1901). This rule was based on the common-sense concern that juries would overvalue "other crimes" information, and that they would be likely to make decisions based on inflamed passions rather than on appropriate considerations. *Id.* (citing *Commonwealth v. Jackson*, 132 Mass. 16, 20–21 (Mass. 1882); *Shaffner v. Commonwealth*, 72 Pa. 60, 65 (Pa. 1872)).

The general ban on propensity evidence, however, eventually spawned exceptions. Most relevant for present purposes, the "*res gestae*" exception allowed bad acts evidence "whenever a court found that the crime charged could not be proved without mention of another crime." Jason M. Brauser, *Intrinsic or Extrinsic?: The Confusing Distinction Between Inextricably Intertwined Evidence and Other Crimes Evidence Under Rule 404(b)*, 88 Nw. U. L. Rev. 1582,

1594–95 (1994) [hereinafter Brauser, *Intrinsic or Extrinsic?*]. As one important case on the issue, *Molineux*, explained, evidence of other crimes can be admissible "where two or more crimes are so connected that it is impossible to distinguish them and proof of all, in the effort to establish one, is part of the *res gestae*." 61 N.E. at 308; *see also Walker v. Commonwealth*, 28 Va. (1 Leigh) 574 (Va. 1829) (exception applies where without it, "the chain of evidence" for the crime charged would be broken because the two acts are "intimately connected and blended with the main facts adduced in evidence"); *Heath v. Commonwealth*, 40 Va. (1 Rob.) 735, 1842 WL 2475 (Va. 1842) (same); *Brown v. Commonwealth*, 76 Pa. 319, 1874 WL 13019 (Pa. 1874) (same).

Throughout much of the twentieth century, courts held to this narrow conception of the *res gestae* doctrine. *See, e.g.*, *Lynch v. United States*, 12 F.2d 193, 194 (4th Cir. 1926) (exception applies when "the subject of inquiry is so related to the main offense as to throw material light thereon"); *Gianotos v. United States*, 104 F.2d 929, 932 (9th Cir. 1939) (exception applies when "two distinct offenses are so inseparably connected that the proof of one necessarily involves proving the other"); *Bracey v. United States*, 142 F.2d 85, 88 (D.C. Cir. 1944) (exception applies when other bad acts "are so blended or connected with the one on trial as that proof of one incidentally involves the other").

But the "*res gestae*" doctrine eventually grew in scope—not to mention in terms of the number of ti-

tles it was given—over time.[1] "No longer did evidence have to be inseparable from the charged crime. If it made the charged crime more understandable to the trier of fact, it was admissible." Brauser, *Intrinsic or Extrinsic?*, at 1595–96.

The adoption of the Federal Rules of Evidence in 1975 reframed the admissibility of uncharged bad acts evidence. Instead of a broad ban on other bad acts evidence, the Rules explain that evidence of "other crimes, wrongs, or acts" is *never* admissible to prove propensity for bad acts and conduct in conformity therewith, but may be admissible for a non-exhaustive list of other purposes. *See* Fed. R. Evid. 404(b).[2]

Evidence admitted under 404(b) is unique, in that it is subject to procedural limitations intended to protect the integrity of the process and the rights of the criminal defendant. Specifically, the prosecution is required to provide notice regarding the introduction of evidence, *see Bowie*, 232 F.3d at 927; the defendant is entitled to a limiting instruction to the jury, *see id.*; and the evidence is only admissible in the proportion necessary to accomplish the non-prohibited purpose for which the evidence is introduced, *see* Fed. R. Evid.

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[1] As the Sixth Circuit noted below, "[t]his theory of admission goes by many, maybe too many, names." Pet. App. 18a. Courts now refer to this doctrine, among other things, as "*res gestae*," "inextricably intertwined," or "intrinsic evidence." *See Green*, 617 F.3d at 246. For clarity's sake, this petition most often uses the term "intrinsic evidence" to refer to this doctrinal exception.

[2] Rule 404(b) evidence remains subject to Rule 403 and the rest of the Federal Rules.

404, 1972 Advisory Committee Note (discretionary admission of evidence under Rule 404(b) should be made "in view of the availability of other means of proof"). These extra precautions reflect an attempt to protect against the risk that a jury will convict a defendant for the wrong reasons—in other words, convict a defendant for being a criminal character, rather than the individual who committed the crime charged in the indictment. Evidence admitted via the "intrinsic evidence" exception, however, is frequently not subject to these protections. *Bowie*, 232 F.3d at 927–28.

B. At trial in this case, Petitioner Frank Harper was convicted on one count of conspiracy to commit carjacking, in violation of 18 U.S.C. § 371; three counts of carjacking, in violation of 18 U.S.C. § 2119; and three counts of possession of a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c). The district court had jurisdiction under 18 U.S.C. § 3231.

To be guilty of carjacking—the predicate offense on which all of the other charges were based—a defendant must "take[] a motor vehicle" "with the intent to cause death or serious bodily harm." 21 U.S.C. § 2119. Because, in the government's words, "specific intent" is "hard to prove," and because it is "not an easy burden for the government to meet to get inside a defendant's head and say what he was or wasn't going to do," *see* Pet. App. 43a, the government sought to introduce evidence that Petitioner committed three shootings *not* related to carjackings in the years preceding 2011, the year during which all of the

carjackings in which Petitioner was alleged to have participated took place. R. 109, Page ID 444–45.[3]

The district court excluded two of the shootings, but it admitted the third. The admitted shooting occurred on December 31, 2010, about a month prior to any of the carjackings with which Petitioner was charged. According to the testimony of cooperating co-defendant Stratford Newton, the incident was a drive-by shooting motivated by a personal grudge. It had nothing to do with the charged carjacking conspiracy or its objectives, and nothing to do with a desire to obtain property of any kind, let alone to do so through the use of force. R. 166, Trial Transcript, Page ID 1602–1604.

The government offered several arguments in support of the introduction of the evidence. R. 123, Government's Response to Motion in Limine, Page ID 561. But the only point in issue for which the evidence of the shooting was truly probative, and not merely cumulative, was specific intent. Indeed, the government openly sought to use the evidence to solicit the prohibited inference of criminal dangerousness by proving Petitioner's tendency to use guns and his "willingness to shoot people in cars." R. 123, Response to Motion in Limine, Page ID 563.

The district court adopted the government's rationale, issuing a blended ruling from the bench relying alternately on the intrinsic evidence doctrine and on Rule 404(b) itself. In the court's words:

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[3] District court materials are cited according to their district court docket and page identification numbers.

> Well, first as it relates to the December 31, 2010 incident, the Court views the evidence involved in connection with that incident as intertwine[d] with the conspiracy representing essentially *res gestae* evidence that would circumstantially tend to demonstrate that—that the—that this defendant was in possession of the same gun and car that was used to commit some of the other carjackings that were named in the indictment in the midst of the period involved in this charged conduct. It does demonstrate a pattern and demonstrates relationships in connection among the co-conspirators. It is of I think compelling probative value on its face, and whether it is admitted as intrinsic evidence or as described by [the prosecutor] or as 404(b) evidence, it is clearly admissible, and given the date of the incident and the curative instruction that the Court will be in the position to give to the jury, I think the compelling probative value is not overcome by any unfair prejudice to the defendant.

Pet. App. 50a–51a.

When the evidence was introduced at trial, the district court did not provide a limiting instruction. R. 166, Trial Transcript, Page ID 1602–1604. Defense counsel did not request one, because counsel reasonably believed that he had an exculpatory witness lined up to negate the government's version of events. The government's investigative file included a 502 report—a report compiled by the investigating agent—summarizing the interview of Ronisha Banks, who was one of the occupants of the vehicle at which Petitioner allegedly fired his weapon on December

31, 2010. According to the 502 report, Banks identified the shooter as a medium dark-skinned male, but Petitioner is light-skinned. R. 140, Motion for a New Trial, Page ID 813.

After Newton testified about the December 31, 2010 shooting incident, defense counsel informed the government that he would call Ronisha Banks in his case-in-chief to testify that Petitioner was not the shooter. R. 140, Motion for a New Trial, Page ID 813. That night, however, the government e-mailed defense counsel, informing him that the Ronisha Banks 502 report had been "edited," mid-trial and apparently without consulting the witness, so that her description of the shooter was suddenly consistent with Petitioner's appearance. R. 140, Motion for a New Trial, Page ID 813. After that, defense counsel could not risk calling the witness to the stand. The jury heard the "other acts" evidence without any cautionary instruction or evidentiary rebuttal, and Petitioner was convicted on all counts.

C. The Sixth Circuit affirmed, in a published opinion, the admission of the evidence pursuant to the intrinsic evidence doctrine. In so doing, it expounded a rule quite expansive in its scope. The Court of Appeals held that courts may admit evidence pursuant to the intrinsic evidence exception if it

(1) "is a prelude to the charged offense";

(2) "is directly probative of the charged offense";

(3) "arises from the same events as the charged offense";

(4) "forms an integral part of a witness's testimony"; or

(5) "completes the story of the charged offense."

Pet. App. 18a. The court concluded that the evidence of the December 31, 2010 shooting did have "a causal, temporal or spatial connection with the charged offense[s]," and that it was therefore admissible. *Id.* at 18a. While Petitioner argued that the shooting was not inextricably intertwined with the charged crimes, and not necessary to the government's story, the court disagreed. Under the court's interpretation, those terms are sufficiently capacious to include evidence that "'provides background information, establishes a nexus between individuals, or completes the story of the charged offense.'" *Id.* at 20a. (citing *United States v. Gibbs*, 797 F.3d 416, 424 (6th Cir. 2015). The court also added (without record citation) that it thought it not "fair to say that the evidence was admitted for prohibited 'propensity' reasons." *Id.* at 19a.

Thereafter, the Sixth Circuit denied Harper's Petition for Panel Rehearing or Rehearing En Banc. Pet. App. 27a. This timely petition followed.

REASONS FOR GRANTING THE PETITION

The Court should grant this petition for a writ of certiorari for three reasons.

First, the Sixth Circuit's conclusion that the intrinsic evidence exception encompasses "bad acts" with no direct relationship to the charged offense deepens an already pervasive and persistent circuit split, and adds the Sixth Circuit to the list of jurisdictions in which the exception has effectively swallowed the general rule against proof of guilt by propensity.

Second, the Sixth Circuit's decision raises an issue of critical importance to criminal defendants, and to

the rule of law more generally, by allowing the government to rely openly on the forbidden propensity inference to prove a critical—and difficult—portion of its case, in direct contravention of the letter and spirit of the Federal Rules of Evidence, as well as hundreds of years of common-law development.

Third, and finally, this case presents an ideal vehicle for reviewing the question presented, in that it is a prime example of the sort of confusion and formulaic decision-making that the proliferation of the intrinsic evidence exception, and its various derivatives, has spawned.

I. THE SIXTH CIRCUIT'S DECISION EXACERBATES A PERVASIVE AND PERSISTENT CONFLICT AMONG THE FEDERAL COURTS OF APPEALS.

The conflict among the circuit courts regarding the intrinsic evidence doctrine is clear and entrenched. The various circuits' positions can be grouped loosely into two camps—those applying a narrow view of the intrinsic evidence doctrine (or rejecting it entirely), and those applying an expansive view—but the real problem is the lack of any meaningful consensus. As one commentator put it, the "vacuous nature" of the exception "gives courts license to employ sloppy analysis and allows them quickly to slip from a conclusory analysis to a desired conclusion." Imwinkelried, *The Second Coming of Res Gestae*, 50 Catholic U. L. Rev. 719, 729–30 (2010).

In short, the test has no uniform, or even common, application. *United States v. Green*, 617 F.3d 233, 246 (3d Cir. 2010). Until the last several years, "every circuit . . . applie[d] some formulation of the [intrinsic evidence] 'test,'" *United States v. Bowie*, 232 F.3d 923, 927 (D.C. Cir. 2000)—indeed, many used the same superficial nomenclature, *Green*, 617 F.3d at 245 (noting that "most courts of appeals today hold that acts are 'intrinsic' to the charged offense if they are 'inextricably intertwined' with that offense"). But similar language masked contrasts in substance, and, at this point, several circuits have either severely cabined the reach of the intrinsic evidence exception or abolished the doctrine entirely in favor of the exclusive application of Rule 404(b).

A. The Second, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits have all adopted an expansive view of the intrinsic evidence exception to the general ban on propensity evidence. Under this approach, other acts evidence can sometimes be judged "intrinsic" even if it was not actually a part of the transaction or occurrence, or series of transactions or occurrences, charged in the indictment.[4] For

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[4] *See, e.g.*, *United States v. Stitsky*, 536 F. App'x. 98, 103 n.3 (2d Cir. 2013) (evidence is intrinsic "if it arose out of the same transaction or series of transactions as the charged offense, if it is inextricably intertwined with the evidence regarding the charged offense, or if it is necessary to complete the story of the crime on trial" (quoting United *States v. Carboni*, 204 F.3d 39, 44 (2d Cir. 2000)); *United States v. Wilson*, 624 F.3d 640, 652 (4th Cir. 2010) (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") (quoting *United States v. Edouard*, 485 F.3d 1324, 1344 (11th

example, like the Sixth Circuit in this case, the Eleventh Circuit has found that evidence is intrinsic, and thus exempt from Rule 404(b) protections, when it "contribute[s] to the understanding of the situation as a whole," "pertain[s] to the chain of events explaining the context," or "complete[s] the story of the crime for the jury." *United States v. Wright*, 392 F.3d 1269, 1276 (11th Cir. 2004) (quoting *United States v. McLean*, 138 F.3d 1398, 1403 (11th Cir. 1998)); *see also United States v. Edouard*, 485 F.3d 1324 (11th Cir. 2007). Similarly, the Fifth Circuit has held that evidence is intrinsic, and therefore admissible apart from Rule 404(b) protections, when it helps "the jury . . . evaluate all of the circumstances under which the defendant acted." *United States v. Smith*, 930 F.2d

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Cir. 2007)); *United States v. Hall*, 604 F.3d 539, 543 (8th Cir. 2010) (evidence is intrinsic "if it is an integral part of the immediate context of the crime charged," or if its absences "might have created a gap in the jury's understanding" (internal quotation marks omitted)); *United States v. DeGeorge*, 380 F.3d 1203, 1220 (9th Cir. 2004) ("evidence of prior acts may be admitted if the evidence constitutes a part of the transaction that serves as the basis for the criminal charge," or "when it [is] necessary . . . in order to permit the prosecutor to offer a coherent and comprehensible story regarding the commission of the crime" (internal quotation marks omitted) (quoting *United States v. Vizcarra–Martinez*, 66 F.3d 1006, 1012–13 (9th Cir. 1995)); *United States v. Irving*, 665 F.3d 1184, 1212 (10th Cir. 2011) (evidence is intrinsic "when the evidence of the other act and the evidence of the crime charged are inextricably intertwined or both acts are part of a single criminal episode or the other acts were necessary preliminaries to the crime charged," or when it "is directly connected to the factual circumstances of the crime and provides contextual or background information to the jury" (internal quotation marks omitted)).

1081, 1087 (5th Cir. 1991) (quoting *United States v. Randall*, 887 F.2d 1262, 1268 (5th Cir. 1989)).

Nevertheless, to cluster these circuits together is to create an oversimplified picture of the confused state of the law. While these courts all pay lip service to the expansive "inextricably intertwined" standard, they apply that standard in a way that is inconsistent, to the point that it has become virtually impossible for a practitioner to make sound decisions regarding critical evidentiary issues in preparing for trial. For example, one of the most recent Fourth Circuit decisions on the issue suggests that, to qualify as intrinsic, evidence need only be "*relevant* to establishing an element of the offense." *United States v. Bajoghli*, 785 F.3d 957, 964 (4th Cir. 2015) (emphasis added) (quoting *United States v. Grimmond*, 137 F.3d 823, 832 (4th Cir. 1998)). That is a broad standard indeed, and it functions to green-light the use of other bad acts evidence for the purpose of soliciting the propensity inference, which, after all, can be used to prove a matter in issue. But that broad, inclusive standard is at odds with a 2010 formulation from the same court, in which a panel upheld the exclusion of evidence which was a "natural"—but not an "integral"—part of a witness's account. *See United States v. Wilson*, 624 F.3d 640, 652 (4th Cir. 2010). It also stands in hopeless conflict with decisions in other circuits, like the Eighth Circuit, where "intrinsic" means that the evidence must be "an *integral* part of the *immediate* context of the crime charged." *United States v. Hall*, 604 F.3d 539, 543 (8th Cir. 2010) (em-

phasis added).[5] Thus, even circuits that (loosely) agree on the operative intrinsic evidence standard, and that it should be expansive, have difficulty articulating what that standard actually means in practice.

Moreover, among these Circuits, even those few jurisdictions which appear to have maintained some internal consistency with respect to taking an expansive approach have signaled that confusion lies just beneath the surface. For example, the Tenth Circuit has said that evidence that completes the story or provides background information to the jury is intrinsic and inextricably intertwined, and therefore admissible. *See, e.g.*, *United States v. Irving*, 665 F.3d 1184 (10th Cir. 2011); *United States v. Johnson*, 42 F.3d 1312 (10th Cir. 1994). But judges have recently expressed discontent with the status quo. One opined that "the distinction between intrinsic and extrinsic evidence is unclear and confusing, and can lead to substituting conclusions for analysis." *Irving*, 665 F.3d at 1215 (Hartz, J., concurring).

B. In contrast with the circuits taking an expansive approach, the Third, Seventh, and D.C. Circuits have clearly acknowledged the danger that the

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[5] Notably, the Eighth Circuit itself has since shown inconsistency in the opposite direction. In a 2015 opinion, that court shifted back to the "complete the story" approach and found that "[e]vidence of other wrongful conduct is considered intrinsic when it is offered for the purpose of providing the context in which the charged crime occurred." *United States v. Ali*, 799 F.3d 1008, 1026 (8th Cir. 2015) (internal quotation marks omitted) (quoting *United States v. Johnson*, 463 F.3d 803, 808 (8th Cir. 2006)).

vague, broad, and inconsistent application of the doctrines of exception to the general rule against proof of guilt by propensity pose to the fair administration of justice. They consequently have narrowed the reach of the intrinsic evidence doctrine or (in the case of the Seventh Circuit) abandoned it altogether.

Recognizing that there is no "principled way to choose among the[] competing incarnations of the test," even though "th[e] choice could well be determinative," the Third Circuit has declared that only evidence that "directly proves" the crime charged is admissible pursuant to the intrinsic evidence exception. *United States v. Green*, 617 F.3d at 247, 249 (3d Cir. 2010).

The D.C. Circuit has applied a similarly restrictive standard in order to avoid subverting congressional intent and undermining the Federal Rules of Evidence. *See United States v. Bowie*, 232 F.3d 923, 928–29 (D.C. Cir. 2000). As that court explained, "it cannot be that all evidence tending to prove the crime is part of the crime. If that were so, Rule 404(b) would be a nullity." *Id.* at 929.

The Seventh Circuit has gone one step further, rejecting "the murky waters of the inextricable intertwinement doctrine" altogether. *United States v. Gorman*, 613 F.3d 711, 719 (7th Cir. 2010). Finding the doctrine "overused, vague, and quite unhelpful," that court explicitly declared it "unavailable when determining a theory of admissibility." *Id.*

This makes sense. As Judge Randolph explained writing for the D.C. Circuit, with Rule 404(b) on the books,

> it is hard to see what function [the intrinsic evidence] doctrine performs. If the so-called "intrinsic" act is indeed part of the crime charged, evidence of it will, by definition, always satisfy Rule 404(b). The rule bars bad acts evidence only when the evidence is offered solely to "prove the character of a person in order to show action in conformity therewith." Fed. R. Evid. 404(b). Evidence that constitutes the very crime being prosecuted is not of that sort.

Bowie, 232 F.3d at 927. By its inclusionary nature, Rule 404(b) therefore rendered the intrinsic evidence exception obsolete and unnecessary. Worse, resort to the intrinsic evidence doctrine strips away the important procedural safeguards Rule 404 puts in place surrounding the admission of other bad acts evidence, "reliev[ing] the prosecution of Rule 404(b)'s notice requirement and the court of it obligation to give an appropriate limiting instruction upon defense counsel's request." *Id.*; *see also Green*, 617 at 247 ("Stated another way, the '[intrinsic evidence] doctrine exempts evidence of wrongful acts that explain the circumstances of the crime from the rigors of Rule 404(b).").

Simply put, the doctrine has "outlived its usefulness." *Gorman*, 613 F.3d at 719.

C. The Sixth Circuit's decision in this case only exacerbates the inter-circuit (and, for that matter, intra-circuit) uncertainty. Though on this occasion "intrinsic" was held to mean anything that "provides background information, establishes a nexus between individuals, or completes the story of the charged of-

fense," *Edmond*, 815 F.3d at 1046 (quoting *United States v. Gibbs*, 797 F.3d 416, 424 (6th Cir. 2015)), the Sixth Circuit had previously expressed resistance to such an expansive interpretation. In *United States v. Clay*, 667 F.3d 689 (6th Cir. 2012), for example, it emphasized that the exception doctrines cannot be used as a backdoor to circumvent the general rule against proving guilt by propensity. *Id.* at 698. Three years later, in *United States v. Gibbs*, 797 F.3d 416 (6th Cir. 2015), the same concern led the Sixth Circuit to exclude evidence introduced for that exact purpose. And yet, in this case, the Sixth Circuit affirmed the admission of "other acts" evidence which the *government admitted* it intended to use to solicit the forbidden propensity inference to prove Petitioner's specific intent—the critical issue in Petitioner's case. R. 123, Response to Motion in Limine, Page ID 563.

* * *

The intrinsic evidence exception to the general ban on the use of propensity evidence to prove guilt swallows the rule where it is defined so broadly as to permit the introduction of evidence that is not truly a part of the immediate context of the charged crime. That cannot be squared with the requirements of Rule 404(b). Such evidence necessarily is—by common sense, and by definition—other bad acts evidence and Rule 404(b) represents a Congressional decision that such evidence is *not* to be used to prove guilt by propensity. But that is exactly what so many federal courts are currently allowing the government to do, so long as the government invokes the magic words: "intrinsic evidence," "inextricably intertwined," or "*res gestae*."

II. THE QUESTION PRESENTED IS AN ISSUE OF CRITICAL IMPORTANCE ON WHICH THIS COURT'S GUIDANCE IS NEEDED.

A. Although this issue is a recurring one, the government has opposed certiorari on it before, denying the existence of a circuit split, and instead claiming that, in practice, the various formulations of the intrinsic evidence doctrine produce the same results. *See* Brief for the United States in Opposition, *Villanueva v. United States*, No. 10-1535 (filed September 2011). That is wrong. And the Court need not take Petitioner's word for it. The Third Circuit recognized as much in *Green*.

Green examined the admissibility of certain threats by the defendant to use dynamite to kill an undercover police officer. Whether such evidence could be considered "intrinsic," the Court explained, "may well depend on which version of the test one employs." 617 F.3d at 246. For example, that evidence would qualify as "intrinsic" in the First Circuit, where the test is whether the evidence "pertains to the chain of events explaining the context" of the crime. *Id.* (quoting *Wright*, 392 F.3d at 1276. In *Green*, the evidence met this test; it pertained to "(in fact, triggered) [a witness's] decision to go to the FBI and the subsequent chain of events though which [the defendant] was caught attempting to possess cocaine." *Id.*

But evidence of the threats would not qualify as intrinsic in the Eighth Circuit, where the test is whether the threat "was 'an integral part of the immediate context of the crime charged." *Id.* (quoting *Hall*, 604 F.3d at 543. That is so because the district court "could have forced the Government to start the tale of

[defendant's] wrongdoing with the fact that [the witness] went to the FBI because [defendant] had expressed interest in buying cocaine and dynamite." *Id.* at 246. "It was not strictly necessary for the jury to know *why* [defendant] wanted dynamite in order for it to understand that he did, and that his inquiries on that point drove [the witness] to the FBI." *Id.* at 246–47. Nor would it be "intrinsic" in the Tenth Circuit, where "the relevant inquiry is whether [the witness's] testimony 'would have been confusing and incomplete without mention' of the threat[.]" *Id.* at 247 (quoting *Johnson*, 42 F.3d at 1316). And it clearly would not be admissible in the Seventh Circuit, where the intrinsic evidence doctrine has been rejected altogether. *Supra*, Part I.B.

B. Precisely because the intrinsic evidence doctrine is so unnecessary following the 1975 adoption of the Federal Rules of Evidence, its continued existence only invites confusion and creates abuse. The protection of the rights of criminal defendants and the promotion of "the development of evidence law, to the end of ascertaining the truth and securing a just determination," Fed. R. Evid. 102, are central considerations undergirding the Federal Rules of Evidence. And the delicate, inclusionary balance struck in Rule 404—with specific protections carved out for criminal propensity evidence—is vitiated by interpretations of the vestigial exception doctrines that are so broad as to render the propensity ban a nullity. *Cf. Bowie*, 232 F.3d at 929 ("[B]road [exception doctrines] have no discernible grounding in the 'other crimes, wrongs, or acts' language of the rule. Rule 404(b), and particularly its notice requirement, should not be disregarded on such a flimsy basis."). This issue requires the

Court's intervention, and clarification, for at least three reasons.

First, as evidenced by the uncertainty among the circuit courts, the intrinsic evidence doctrine has "become overused, vague, and quite unhelpful." *Gorman*, 613 F.3d at 719. With so many iterations of the doctrine, and "no principled way to choose among the[m]," *Green*, 617 F.3d at 247, defendants are left with a system that allows the rights of federal criminal defendants to be determined ad hoc, based on jurisdiction and on "which version of the test [that court on that day] applies." *Id.* at 246. In other words, the inconsistencies have snowballed, at this point, to the extent that a fair trial for a defendant like Petitioner looks very, very different depending on where that defendant happens to find himself haled into court.

Second, the uncertainty and vague language of the doctrine, which has caused some federal Courts of Appeals to apply it so expansively, is an open invitation for governmental abuse. As the Seventh Circuit has explained, "[i]f evidence is not direct evidence of the crime itself [the narrowest view of the doctrine], it is usually propensity evidence simply disguised as inextricable intertwinement evidence, and is therefore improper, at least if not admitted under the constrains of Rule 404(b)." *Gorman*, 613 F.3d at 718.[6]

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[6] Though Rule 403 still stands as some protection to admission of intrinsic evidence, it does not replace the intentional protections Congress embedded in Rule 404. Furthermore, the Seventh Circuit has noted that Rule 403 analysis is categorically skewed by the determination that evidence is intrinsic. *See United States v. Jordan*, 722 F.2d 353, 356 (7th Cir. 1983)

And, while government attorneys no doubt mean well under most circumstances, the existence, in some jurisdictions, of a backdoor to the use of propensity evidence to prove guilt is all too alluring, as evidenced by the government's open acknowledgement of its desire to prove specific intent with propensity evidence in this case. R. 123, Response to Motion in Limine, Page ID 563.

Third, experience has shown that expansive application of the intrinsic evidence exception leads to bad law. Because "*all* relevant prosecution evidence explains the crime or completes the story" of the prosecution's case, *Bowie*, 232 F.3d at 929 (emphasis added), the problem with the intrinsic evidence doctrine "is that some of its broader formulations, taken at face value, classify evidence of virtually *any* bad act as intrinsic," *Green*, 617 F.3d at 248. Needless to say, "such a regime . . . eviscerate[s] Rule 404(b)." *Id.*; *see also Bowie*, 232 F.3d at 929 ("The fact that omitting some evidence would render a story slightly less complete cannot justify circumventing Rule 404(b) altogether.").

As outlined above, in several jurisdictions such an "anything goes" approach *is* the law. Many courts—including the district court below—are therefore all too ready to simply recite the numerous ways in which the government can now drag propensity evidence before the jury, and to allow the expansiveness

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("When balancing prejudice and probative value, the courts of the various circuits have found the scale tipped in favor of admitting evidence of prior bad acts in cases where the acts [were classified as intrinsic].").

of the exception to substitute for a careful analysis.[7] These courts generally issue "either-or" opinions that admit evidence as intrinsic, or in the alternative, as admissible under 404(b).

This is doubly problematic. It means that the body of Rule 404(b) case law in jurisdictions with expansive applications of the exception doctrines is itself tainted by numerous cases in which courts have acknowledged that the evidence is or could be used to solicit the propensity inference, but admitted it anyway, in direct contravention of the rule. And it means that courts are commonly misinterpreting the Federal Rules and the original purpose of the exception doctrine, because no court with a proper understanding of the issue could rest a decision to admit on both of these mutually-exclusive legal theories. Again, the intrinsic evidence doctrine emerged as a limited exception to a fully exclusionary baseline, which made admissible evidence so closely related to the charged crime as to be a part of it. The inclusionary character of Rule 404(b), which only bans other acts tending to show bad character and conformity therewith, eliminates any need for the exception. Furthermore, when these two rationales are considered interchangeable, courts project that

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[7] Looking at the disjointed case law from the federal courts of appeal, several treatises have agreed on this point. *See, e.g.*, DAVID P. LEONARD, THE NEW WIGMORE: A TREATISE ON EVIDENCE § 5.2 (2009) (explaining that the inextricably intertwined test "invites sloppy, non-analytical decision-making"); STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL ¶ 404.02[12] (10th ed. 2012) ("The 'inextricably intertwined' exception substitutes a careful analysis with boilerplate jargon.").

whether evidence is part of a crime charged, or a different act altogether, it is admissible without limitation and free from close character propensity scrutiny. Such an understanding makes no sense, if Rule 404(b) is to retain any meaning.

III. THIS CASE PRESENTS AN IDEAL VEHICLE TO RESOLVE THE QUESTION PRESENTED.

This case highlights the underlying, systemic problem created by certain courts' expansive understanding of the vaguely articulated intrinsic evidence doctrine. Here, evidence of the unrelated earlier December 31, 2010 shooting was admitted for the purpose of proving specific intent to do harm in a series of later events, an unapologetic propensity argument. But it was admitted without any meaningful analysis of that critical point. Thus, this case provides an ideal vehicle for resolving the question presented.

First, the district court's ruling—finding that "whether it is admitted as intrinsic evidence or as described by [the prosecutor] or as 404(b) evidence, it is clearly admissible," Pet. App. 50a–51a—highlights the underlying problem with an expansive reading of the intrinsic evidence doctrine. As courts have recognized, this "either-or" approach "too easily slip[s] from analysis to mere conclusion." *Bowie*, 232 F.3d at 928. And it simply does not make sense. For Rule 404(b) to apply, the evidence *cannot* be admitted to prove propensity. On the other hand, there is no reason to invoke the exception doctrines *unless* the government intends to use the evidence to prove propensity, because any other purpose would pass muster under Rule 404(b). The bottom line is that there is

no longer any articulable reason why some other bad acts evidence receives 404(b) protection and some does not; no reason why some evidence is closely scrutinized for a non-propensity purpose and some is not. Perhaps the most troublesome part of the district court's opinion, and of the Sixth Circuit's affirmation of that opinion, is not that they inappropriately admitted propensity evidence for the purpose of proving guilt, but that they failed to appreciate fully just what they did and to address the issue in the way required by the Federal Rules of Evidence.

Second, this case highlights how conflating the intrinsic evidence exception doctrine and Rule 404(b) through a superficial, either-or analysis leads to errors in the admission of evidence to the detriment of criminal defendants. Here, an element of the crime charged was specific intent to do harm. To prove this element, the government introduced evidence of the earlier December 31, 2010 shooting involving Petitioner to show that his "plan including using guns and a willingness to shoot people in cars," R. 123 Page ID 563—a propensity argument. Yet, because the lower courts have so conflated the theories of admissibility under the intrinsic evidence doctrine and Rule 404(b), the district court merely concluded that, one way or another, the evidence would come in. That evidence doubtless had a real and substantial impact on Petitioner's trial, especially given the absence of any other comparably powerful evidence on the specific intent point, and he will spend the next several decades in federal prison as a result.

For these reasons, this case presents an ideal vehicle for the Court to resolve this question of critical importance, on which the circuit courts are so divid-

ed. The Court should grant certiorari to address this pervasive problem, to clarify the law for the various federal courts and for those who practice criminal law before them, and to make clear that the Seventh Circuit's approach—abolishing the exception doctrines entirely in favor of the global application of Federal Rules of Evidence 404(b)—is the right one.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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AUGUST 2, 2016

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	Nos. 14-
	)	2426/2427/2428
	)	
BERNARD EDMOND (14-2426);	)	
FRANK HARPER (14-2427);	)	
PHILLIP HARPER (14-2428),	)	
	)	
Defendants-Appellants.	)	

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 2:11-cr-20188—George C. Steeh,
District Judge.
Argued: January 28, 2016
Decided and Filed: March 3, 2016
Before: NORRIS, BATCHELDER, and SUTTON,
Circuit Judges.

COUNSEL

ARGUED: Sanford A. Schulman, Detroit, Michigan, for Appellant in 14-2426. Daniel V. Bradley, JONES DAY, Chicago, Illinois, for Appellant in 14-2427. Robyn B. Frankel, Huntington Woods, Michigan, for Appellant in 14-2428. Jerome Gorgon, UNITED STATES ATTORNEY'S OFFICE, Detroit, Michigan, for Appellee. **ON BRIEF:** Sanford A. Schulman, Detroit, Michigan, for Appellant in 14-2426. Daniel V. Bradley, Morgan R. Hirst, JONES DAY, Chicago, Illinois, for Appellant in 14-2427. Robyn B. Frankel, Huntington Woods, Michigan, for Appellant in 14-2428. Patricia Gaedeke, UNITED STATES ATTORNEY'S OFFICE, Detroit, Michigan, for Appellee.

OPINION

SUTTON, Circuit Judge. A jury convicted Frank Harper, Phillip Harper, and Bernard Edmond of violating an assortment of criminal laws arising from a conspiracy to carjack expensive cars and sell them. Each defendant raises a bevy of challenges to his convictions and sentence. Seeing no merit to any of these challenges, we affirm.

I.

The carjacking scheme lasted from late 2010 to early 2011. In a typical case, one of the Harpers would threaten a parking lot valet with a gun while

other cohorts would take the keys from a few high-end cars and drive them away. The carjackers delivered the vehicles to intermediaries who took them to Edmond. Edmond fabricated new titles for the vehicles, altered the appearance of the vehicles, and sold them. All told, there were five carjackings (involving twelve cars) and one attempted carjacking.

The police eventually tracked down the three men, and a grand jury indicted them for violating several laws. After an eleven day joint trial, the jury convicted them of multiple carjacking offenses: Phillip of four carjackings plus one attempt, Frank of three carjackings, and Edmond of three carjackings and one attempt. *See* 18 U.S.C. § 2119(1). The jury separately convicted the three men of conspiring to commit the carjackings. *See id.* § 371. Because the men used firearms in each offense, the jury also convicted them of numerous counts of using a firearm during a crime of violence. *See id.* § 924(c). The jury also found Edmond guilty of operating a chop shop and of various crimes related to creating false identification numbers for motor vehicles. *See id.* §§ 511, 2312, 2321, 2322.

The trio did not get off lightly. The district court sentenced the men to extensive prison terms: 93 years (or so) for Phillip, 63 years (or so) for Frank, and 75 years for Edmond.

Each of them appealed, sometimes raising the same challenges, sometimes separate ones.

II.

All three men raise sufficiency-of-the-evidence challenges. In reviewing these challenges, we examine "the evidence in the light most favorable to

the prosecution," asking whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

A. Frank and Phillip's carjackings and attendant firearms convictions. Frank and Phillip claim that the government failed to introduce sufficient evidence to sustain their carjacking convictions and their firearms convictions. As for the carjacking convictions under § 2119(1), the statute covers individuals who, "with the intent to cause death or serious bodily harm take[] a motor vehicle . . . from the person or presence of another by force and violence or by intimidation." As for the firearms convictions under § 924(c), the statute requires that, "during and in relation to" the carjacking, the defendant "use[d] or carrie[d] a firearm" or "possess[ed] a firearm" "in furtherance" of the carjacking.

1. The first carjacking and related firearms convictions. The evidence showed that, around midnight on October 14, 2010, Phillip and three cohorts stole four cars from a valet parking lot. Phillip admitted the theft to an FBI agent. In his confession, introduced without objection at trial, he acknowledged that (1) both of his associates carried weapons, (2) one of his associates held a weapon at a parking attendant's back during the carjacking, and (3) Phillip and his associates grabbed several sets of keys and drove off with multiple cars. The intent element of the carjacking offense is satisfied at a minimum if "a defendant brandishes a firearm and . . . physically touches the carjacking victim." *United States v. Washington*, 714 F.3d 962, 968 (6th

Cir. 2013). Another witness testified that Phillip carried a loaded gun. All of this suffices to support the carjacking and firearms convictions.

2. The second carjacking and related firearms convictions. On January 25, 2011, Frank stole a Mercedes-Benz. The victim testified that the carjackers pointed a gun at his face and demanded that he hand over his keys. "Pointing a gun at a person while demanding conformity with particular action clearly implies a victim will be killed or injured if [he] refuses to comply," permitting the jury to find the requisite intent for the carjacking. *United States v. Mack*, 729 F.3d 594, 604 (6th Cir. 2013). And because Frank provided the weapon that his cohort pointed at the victim during the carjacking, that evidence suffices to uphold the § 924(c) firearms conviction.

3. The third carjacking and related firearms convictions. On January 31, 2011, Frank and Phillip stole three cars from another valet service. Phillip carried a gun. He stood talking to the valet for around five minutes while holding the gun, although the valet could not see the gun at all times. Meanwhile, his cohorts stole the vehicles from the lot. In addition to showing that Phillip stood with the valet brandishing a gun on and off for five minutes, the government showed that the gun was likely loaded, providing circumstantial evidence of intent, *see Mack*, 729 F.3d at 603–04; *see also United States v. Mack*, 808 F.3d 1074, 1080 (6th Cir. 2015). As for the firearms convictions, plenty of evidence showed advance knowledge that a gun would be used: One brother brought a loaded firearm to the carjacking and by then Frank and Phillip had developed a

pattern of committing armed carjackings. "[I]f a defendant continues to participate in a crime after a gun was displayed or used by a confederate," the Supreme Court has recently explained, "the jury can permissibly infer from his failure to object or withdraw that he had such knowledge." *Rosemond v. United States*, 134 S. Ct. 1240, 1249–50 & n.9 (2014).

4. The fourth carjacking and related firearms convictions. On February 22, 2011, Frank, Phillip, and some cohorts stole three cars from still another valet service. Phillip held the attendant at gunpoint, asking him where the car keys were. After they located the keys, the men drove off with the vehicles. Like the first carjacking, this conviction stands because Phillip not only brandished a firearm but also touched the attendant with it. *Washington*, 714 F.3d at 968. Phillip's conspicuous use of the firearm, on these facts and given the brothers' developed pattern of carjacking, suffices to uphold both of their § 924(c) convictions.

5. The fifth (attempted) carjacking and related firearms convictions. On March 12, 2011, Phillip attempted, but failed, to steal a Porsche from a valet service. The valet wrestled the keys away from Phillip but not before Phillip "reach[ed] for" a firearm that was loaded. R. 166 at 78. This conviction holds up because, "[i]f a defendant brandishes a firearm and . . . there is direct proof that the firearm was loaded, § 2119's specific intent element will be satisfied." *Washington*, 714 F.3d at 968.

There is one wrinkle with this conviction. The jury did not convict Phillip of the related § 924(c) firearms count, prompting Phillip to protest that the jury must

not have believed that he brought a firearm to the attempted carjacking and thus should not have convicted him of carjacking. That is not necessarily the case. Even if Phillip did not bring a firearm to this carjacking, the jury reasonably could have viewed Phillip's physical fight with the valet as indicative of "intent to cause death or serious bodily harm." 18 U.S.C. § 2119; *see United States v. Fekete*, 535 F.3d 471, 480 (6th Cir. 2008).

6. The sixth carjacking and related firearms convictions. On March 20, 2011, Phillip helped steal one more car. An attendant testified that the carjacker "pulled a gun" on him and ran over another attendant while speeding away in the pilfered car. R. 165 at 90. That evidence suffices to convict Phillip of carjacking and the attendant firearms crime given that he admits he was present for all aspects of the carjacking.

B. Edmond's convictions. Edmond raises sufficiency challenges of his own. As with his co-conspirators, the shared objects of their conspiracy lead to shared convictions.

1. The conspiracy and carjacking convictions. The jury convicted Edmond of one count of conspiring to commit carjackings, three carjackings through a co-conspirator theory of liability, and one attempted carjacking, also through a co-conspirator theory. To prove the conspiracy charge, the government had to show: "(1) that the conspiracy was willfully formed and was existing at or about the time alleged; (2) that the defendant voluntarily became a member of the conspiracy; (3) that one of the conspirators knowingly committed an overt act; and (4) that the overt act was

knowingly done in furtherance of the conspiracy." *United States v. McGahee*, 257 F.3d 520, 530 (6th Cir. 2001).

The evidence met these requirements. As to the first two elements, the defendants intentionally formed a conspiracy, and Edmond willfully participated in it through an assortment of acts. He bought and sold cars carjacked by the Harpers and their cohorts. He falsified titles and vehicle identification numbers and paid others to do so. He knew that the cars had been carjacked. And he paid more for stolen vehicles that included the keys, a premium that encouraged carjackings, as opposed to less dangerous forms of vehicle theft. Obtaining the keys often means taking them physically from a person, as most individuals do not lightly part with the keys to expensive pieces of property.

As to the third and fourth elements, Edmond's co-conspirators knowingly committed the overt acts (carjackings and an attempted carjacking), and they did so to further the ends of the conspiracy. The same evidence that supports the brothers' carjacking convictions supports these elements. Faced with considerable evidence of Edmond's pivotal role in the conspiracy, the jury had good reason to find that the carjackings were "reasonably foresee[able]" results of the conspiracy. *Pinkerton v. United States*, 328 U.S. 640, 648 (1946).

Edmond protests that he never participated in any such conspiracy. That is wishful thinking on the law and the facts. "[A] tacit or mutual understanding among the parties is sufficient to show a conspiratorial agreement," *United States v. Bavers*,

787 F.2d 1022, 1026 (6th Cir. 1985)—and abundant evidence alluded to above shows just that.

2. The firearms convictions. Consistent with *United States v. Odom*, 13 F.3d 949, 959 (6th Cir. 1994), the district court instructed the jury that it could convict Edmond of the § 924(c) violations under a co-conspirator theory of liability. The question for the jury was this: Was the use of a firearm in connection with the carjackings reasonably foreseeable? *See United States v. Myers*, 102 F.3d 227, 237 (6th Cir. 1996). Ample evidence showed that it was. Edmond understood how the carjackings were carried out, and he created a market for cars with keys, the theft of which often requires the use of violence or firearms. Successful carjackings turn on threats, which, to succeed, turn on the possibility that the threat can be acted on.

What's more, Edmond admitted that "he knew about [the carjackings]" and that he "paid somebody to . . . tell somebody to get some cars." R. 167 at 144. True, Edmond protested that he "didn't know that they were going to [get the cars] the way . . . they were doing it." *Id.* But Edmond's actions told a different story: He continued to engage in buying, converting, and selling carjacked cars even after becoming aware of the violent nature of the carjackings. On this record, the jury readily could find that Edmond reasonably foresaw that the carjackings would be committed with the aid of firearms.

Even if that is true, Edmond points out, the jury instructions offered two paths to conviction: *Pinkerton* co-conspirator liability *or* aiding and

abetting liability. That is a problem, he says, because the district court did not correctly state the advance-knowledge requirement for aiding and abetting. *See Rosemond*, 134 S. Ct. at 1249–51. Any such mistake would not alter the conviction. As Edmond concedes, his argument faces plain error review because he did not raise the point below. Given the abundant evidence that would permit the jury to convict on the *Pinkerton* co-conspirator theory, any error in the aiding and abetting instructions did not prejudice him and thus did not affect his substantial rights. *See Puckett v. United States*, 556 U.S. 129, 135 (2009). In the aftermath of *Rosemond*, several circuits have addressed this situation—where the judge gave a correct *Pinkerton* instruction and a faulty aiding and abetting instruction—and each one upheld the convictions so long as the *Pinkerton* theory supported them. *See United States v. Young*, 561 F. App'x 85, 92 (2d Cir. 2014); *United States v. Stubbs*, 578 F. App'x 114, 118 n.6 (3d Cir. 2014); *United States v. Saunders*, 605 F. App'x 285, 288–89 (5th Cir. 2015) (per curiam); *United States v. Rodriguez*, 591 F. App'x 897, 904–05 (11th Cir. 2015) (per curiam); *see also Musacchio v. United States*, 136 S. Ct. 709, 715–16 (2016).

3. Interstate transportation of stolen motor vehicles. Edmond challenges his conviction for transporting a stolen motor vehicle between States. *See* 18 U.S.C. § 2312. To convict, the jury had to find that Edmond (or someone he was aiding and abetting) "transported the motor vehicle in interstate commerce" and knew it was stolen. *United States v. Bishop*, 434 F.2d 1284, 1287 (6th Cir. 1970). The evidence supports this conviction: (1) The car was

stolen in Detroit; (2) Edmond and a cohort traveled from Michigan to Toledo, Ohio, where they used a stolen Michigan title to obtain a clean Ohio title; and (3) the car was sold to an Ohio resident.

III.

Edmond and the Harpers raise several pretrial, trial-related, and constitutional claims. None has merit.

A. Grand jury challenge. Edmond argues that the district court should have granted his post-trial motion to dismiss his indictment because the prosecutor presented false testimony to the grand jury. Raised for the first time after trial, this motion was untimely, *see* Fed. R. Crim. P. 12(b)(3)(A)(v), and Edmond did not show the district court cause to excuse that untimeliness, *id.* 12(c)(3). Even had Edmond raised the argument when he should have, any prosecutorial misconduct before the *grand* jury was necessarily harmless given Edmond's subsequent conviction by the *petit* jury. *United States v. Brown*, 332 F.3d 363, 375 (6th Cir. 2003); Fed. R. Crim. P. 52(a).

B. Handwriting expert. Edmond claims that the district court abused its discretion when it rejected his request to obtain a handwriting expert. Invoking 18 U.S.C. § 3006A(e)(1), Edmond asked for a court-appointed handwriting expert to "cross-examine [government witness Justin Bowman] as it relates to his out of court identification of the defendant purportedly by examining a Michigan Drivers License photo that the Government maintains is the defendant and bears his signature." R. 248 at 4. This license, he argued, "had someone

else's photograph and bore his forged signature." *Id.* at 1.

A defendant may obtain a court-appointed handwriting expert if "(1) such services are necessary to mount a plausible defense, and (2) without such authorization, [his] case would be prejudiced." *United States v. Gilmore*, 282 F.3d 398, 406 (6th Cir. 2002). The court did not abuse its discretion in denying the motion, because Edmond did not meet either condition. As for the first one, Edmond did not need the services of a handwriting expert. After the government agreed to *Edmond's request* not to use the driver's license at trial, any need to analyze the license's signature disappeared. Edmond objects that, if Bowman had made "an erroneous out of court identification," that fact "would [have] be[en] helpful to the trier of fact." Edmond's Br. 24. But Edmond fails to show how this fact was "necessary to mount a plausible defense." *Gilmore*, 282 F.3d at 406. As for the second condition, no prejudice arose. Bowman had no problem identifying Edmond in court, and he testified that he had "seen" him regularly. R. 168 at 43. The defense did not raise any misidentification arguments at trial.

C. Jury challenge. Edmond and Phillip Harper claim that the district court violated their rights under the Jury Selection and Service Act (28 U.S.C. §§ 1861–1869) and the Sixth Amendment because the jury pool did not include a cross-section of Detroit residents and African Americans.

As for the statutory claims, the duo filed their challenges under the Jury Selection and Service Act late. The Act requires challenges to the jury pool to

be raised "before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered" the grounds for the challenge, whichever is earlier. 28 U.S.C. § 1867(a). Neither Edmond nor Phillip challenged the jury pool before trial. Although two defense attorneys mentioned the lack of Detroit residents during jury selection, neither of them asked the court to do anything about it. And no one said a word about a shortage of African American representation on the jury. Edmond and Phillip did not challenge the jury pool until their motion for a new trial. Because they could have discovered any possible problems with the jury pool before trial, they missed the deadline for filing these claims. *United States v. Ovalle*, 136 F.3d 1092, 1098–1100 (6th Cir. 1998). Even if the district court had the power to excuse compliance with the seven-day requirement (an issue we need not resolve today), Edmond and Phillip gave the district court no explanation for doing so, foreclosing any right to review here. *See id.; United States v. Tarnowski*, 583 F.2d 903, 904 n.1 (6th Cir. 1978).

As for the constitutional challenges, the two men face a related, but not identical, problem. Criminal Rule 12(b) requires defendants to raise constitutional challenges to a jury's composition before trial. *See* Fed. R. Crim. P. 12(b)(3); *see also Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 362–63 (1963); *Ovalle*, 136 F.3d at 1107. If defendants fail to do so, they must show cause, Fed. R. Crim. P. 12(c)(3), which "often requires developing and analyzing facts" to assess whether the defendant can justify the late filing, *United States v. Soto*, 794 F.3d 635, 655 (6th Cir. 2015), and prejudice, *Davis v. United States*, 411

U.S. 233, 244–45 (1973). We review a district court's refusal to find cause and prejudice to excuse an untimely challenge for abuse of discretion. *Soto*, 794 F.3d at 655.

As with their statutory challenge, Edmond and Phillip first raised a constitutional jury pool challenge in their motion for a new trial. The district court denied the challenge, noting that Edmond and Phillip did not show cause for raising the point after trial. Because we agree that Edmond and Phillip have failed to show (or for that matter even argue) cause and prejudice, the district court did not abuse its discretion in rejecting this post-trial motion.

To the extent Edmond and Phillip raise new constitutional arguments on appeal about the jury pool's composition, plain error review applies. *Soto*, 794 F.3d at 655; *see United States v. Olano*, 507 U.S. 725, 732–35 (1993). Before the 2014 amendment to Criminal Rule 12, some courts took the view that the term "waiver" in the prior rule meant that a failure to raise a covered argument before the district court meant that plain error review was not available under Criminal Rule 52. As *Soto* explains, the 2014 amendment to Criminal Rule 12 removed the term "waiver" and left no foothold for prohibiting plain error review of Rule 12 arguments raised for the first time on appeal. *See* 794 F.3d at 648–55. So far as we can tell, all of the courts of appeals' holdings on this point agree that the amended Rule 12 allows appellate review of such arguments. *See United States v. Soto*, 799 F.3d 68, 86–88 & n.10 (1st Cir. 2015); *United States v. Daniels*, 803 F.3d 335, 352 (7th Cir. 2015); *United States v. Anderson*, 783 F.3d 727, 740–41 (8th Cir. 2015); *United States v.*

Sperrazza, 804 F.3d 1113, 1118–19, 1126 (11th Cir. 2015); *United States v. Burroughs*, 810 F.3d 833, 838 (D.C. Cir. 2016).

That leaves one other issue that *Soto* resolved but over which disagreement lingers. What is the standard of appellate review for claims raised for the first time in the courts of appeals? Is it plain error or good cause? *Soto* ably explains why plain error review is the correct standard, especially in light of the district-court-centric nature of Criminal Rule 12 and the 2014 amendment to it. Not all courts of appeals have agreed. At this point, some have concluded that plain error review applies. *See Soto*, 794 F.3d at 652–55; *Sperrazza*, 804 F.3d at 1118–19, 1126. Some have applied good cause review alone. *See Anderson*, 783 F.3d at 740–41. Some have decisions pointing in both directions. *Compare Daniels*, 803 F.3d at 352, *and United States v. McMillian*, 786 F.3d 630, 636 & n.4 (7th Cir. 2015), *with United States v. Acox*, 595 F.3d 729, 731–32 (7th Cir. 2010). And some have noted the division of authority without taking a stand on it. *See Burroughs*, 810 F.3d at 838; *see also United States v. Soto*, 799 F.3d 68, 86 & n.10 (1st Cir. 2015); *United States v. Ibarra-Diaz*, 805 F.3d 908, 931 & n.13 (10th Cir. 2015).

We of course adhere to our court's well-reasoned approach in *Soto*, but it is worth offering two practical observations about this division of authority. The first is that the difference between the two standards is not apt to drive case outcomes frequently. Keep in mind that the "good cause" standard requires the defendant to establish cause *and* prejudice. *Davis*, 411 U.S. at 243–45. The

different standards will lead to different outcomes only in those cases where the defendant can show cause for the error and prejudice from it but, through it all, not plain error. That is not likely to be a large set of cases.

The second point narrows the set of affected defendants further, perhaps indeed to nil. The most likely explanation for failing to raise a Criminal Rule 12 objection until appeal will be ineffective assistance of counsel, which implicates an analogous cause and prejudice standard. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Criminal Rule 12 now requires only that the party raise a defense or objection before trial "if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits." Fed. R. Crim. P. 12(b)(3). Given that requirement, it is difficult to think of too many overlooked defenses and objections covered by the Rule that will not involve ineffective assistance. That will leave appellate courts in familiar territory—addressing a claim for plain error review in the direct criminal appeal (giving the defendant one chance to right the wrong) and knowing full well that an ineffective assistance claim under the cause and prejudice standard later may be in the offing (giving the defendant a second chance to right the wrong). For the same reason that appellate courts often insist that the facts and circumstances surrounding a cause-and-prejudice argument under *Strickland* be developed initially in the district court, it makes sense to do the same for a cause-and-prejudice argument related to a Criminal Rule 12 failure.

With this digression behind us, we can turn to whether the defendants have shown plain error. They have not. Indeed, no error, let alone a plain one, occurred. To show a cognizable violation of the Sixth Amendment, Edmond and Phillip initially had to establish "(1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires . . . is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." *Duren v. Missouri*, 439 U.S. 357, 364 (1979). Edmond and Phillip fall short in each respect. They did not show that citizens of Detroit are a distinct racial, religious, or other cognizable group. They did not show that representation of African Americans or residents of Detroit is unfair or unreasonable in jury pools in general. And they did not show that any underrepresentation stemmed from systematic exclusion. Given this shell of a jury pool claim, their challenge necessarily fails.

D. Admission of evidence about another shooting. Frank claims that the district court went astray when it admitted this evidence. At trial, Stratford Newton, a government witness indicted as a co-conspirator, testified that in December 2010 he picked up Frank in a carjacked vehicle and drove the vehicle as Frank fired shots into a neighboring car with a gun that was used at various carjackings throughout the conspiracy. The government did not charge Frank with this offense, but it did warn him before trial that it planned to introduce the incident as intrinsic acts evidence. *See United States v. Churn*,

800 F.3d 768, 778–79 (6th Cir. 2015). Over Frank's objection, the district court admitted the evidence because it was "intertwine[d] with the conspiracy" and would "tend to demonstrate that . . . [Frank] was in possession of the same gun and car that was used to commit some of the other carjackings." R. 242 at 27.

A district court may admit uncharged background evidence as long as it is "inextricably intertwined" with the underlying offense. *United States v. Hardy*, 228 F.3d 745, 748 (6th Cir. 2000). This theory of admission goes by many, maybe too many, names: *res gestae*, background evidence, intrinsic acts, intrinsic evidence. *See Churn*, 800 F.3d at 779. No matter the name (we prefer "intrinsic acts"), the idea is the same: Intrinsic acts "are part of a single criminal episode," *United States v. Barnes*, 49 F.3d 1144, 1149 (6th Cir. 1995), meaning they "ha[ve] a causal, temporal or spatial connection with the charged offense," *Hardy*, 228 F.3d at 748. Courts may admit evidence via this route if it (1) "is a prelude to the charged offense"; (2) "is directly probative of the charged offense"; (3) "arises from the same events as the charged offense"; (4) "forms an integral part of a witness's testimony"; or (5) "completes the story of the charged offense." *Id.*

The district court did not abuse its discretion in admitting the evidence. Although the shooting did not arise in the context of a carjacking, it still "ha[d] a causal, temporal or spatial connection with the charged offense[s]." *Id.* Frank was riding in a vehicle that had itself recently been carjacked and was used in the commission of a carjacking. He fired a weapon that a co-conspirator would use later that day to carjack a vehicle, and the incident occurred

the day after one carjacking and the day before another. The shooting was a prelude to, directly probative of, and developed the story of the carjacking conspiracy. *See id.* Nor is it fair to say that the evidence was admitted for prohibited "propensity" reasons. *See United States v. Gomez*, 763 F.3d 845, 855–56 (7th Cir. 2014) (en banc).

The district court also had a good reason for denying any Evidence Rule 403 objection to the evidence. The incident was highly probative. It established the relationship between Frank and Newton (who was part of the conspiracy), and it tied Frank to the weapon used to commit a number of carjackings. Nor was it unduly prejudicial. The testimony covered just four pages of the trial transcript in an eleven day trial and the jury already had heard considerable unchallenged evidence about Frank's involvement in other violent incidents, including the carjackings themselves. And as just shown, the government offered legitimate grounds for admitting the evidence. *See id.* at 856–57.

Frank insists that the December 2010 shooting was not intertwined with his involvement in the conspiracy because the first overt act in his indictment did not occur until January 25, 2011, nearly a month after the shooting. But Frank was also charged with participating in the carjacking conspiracy, which began in January 2009. Evidence about Frank's involvement with carjacked cars, friendship with co-conspirator Newton, and use of this particular weapon thus had a "causal, temporal [and] spatial connection" to the conspiracy. *See Hardy*, 228 F.3d at 748.

Frank adds that the shooting was not *inextricably* intertwined with the charged crimes and that it was not *necessary* to the government's story. But Frank gives these terms a construction our caselaw cannot bear. Intrinsic acts may be admitted when evidence "provides background information, establishes a nexus between individuals, or completes the story of the charged offense." *United States v. Gibbs*, 797 F.3d 416, 424 (6th Cir. 2015). The December 2010 shooting does all of that and then some.

E. Prosecutorial misconduct. Frank argues that the government presented false testimony at trial when it called FBI Agent Alan Southard, who had investigated Frank's case. During his investigation, Southard prepared a large number of pretrial reports about information that he anticipated might become testimony at trial. Frank argues that Southard's testimony at trial contradicted statements in these reports.

One problem with this argument is that Frank did not raise it below. At trial, Frank raised only a claim under *Brady v. Maryland*, 373 U.S. 83 (1963), arguing that the government improperly refused to disclose evidence about changes in Southard's pretrial reports until the middle of trial. Frank's appellate counsel abandoned that argument, and now tries to transform it into a knowing-presentation-of-false-testimony claim. The metamorphosis fails. A suppression-of-the-evidence claim under *Brady* and a knowing-presentation-of-false-testimony claim require different showings. *See Rosencrantz v. Lafler*, 568 F.3d 577, 583–84 (6th Cir. 2009). Frank did not raise this argument below; plain error review applies.

United States v. Carter, 236 F.3d 777, 783 (6th Cir. 2001).

There was no error to start. To show knowing presentation of false testimony, a defendant must prove that the statements the government elicited were "actually false." *United States v. Lochmondy*, 890 F.2d 817, 822 (6th Cir. 1989). We do not permit a defendant to point only to "mere inconsistencies in testimony by government witnesses" because these "do not establish knowing use of false testimony." *Id.* That is all Frank does, however. He argues that (1) Southard, sitting at trial and hearing testimony from government witness Stratford Newton, realized there were discrepancies between Newton's statements at trial and the statements he had previously made to Southard (memorialized in Southard's pretrial reports), and (2) to rehabilitate Newton, Southard decided to lie on the stand, saying that some statements in his pretrial reports were incorrect. But these "bare allegations" do not show that the government "knowing[ly] present[ed] [] false testimony." *See United States v. Fields*, 763 F.3d 443, 463 (6th Cir. 2014).

Southard's inconsistencies also have reasonable explanations. He may have misheard some statements while preparing his pretrial reports, and he might have realized some of his mistakes only much later while preparing for trial. With nothing more than speculation, Frank fails to carry his burden of proof to show that Southard perjured himself. *See Lochmondy*, 890 F.2d at 822.

What's more, the (supposedly) false testimony did not affect Frank's substantial rights. There is no

"reasonable probability," *United States v. Marcus*, 560 U.S. 258, 262 (2010), that Southard's statements led to a faulty conviction. Defense counsel had a full opportunity to cross-examine Southard at trial about the difference between his pretrial reports and his testimony at trial, questioning his motives and trying to undermine his credibility. And to some extent they did so. The alleged inconsistencies thus were laid bare to the jury. That too suffices to withstand plain error review.

Frank makes a separate prosecutorial-misconduct argument, claiming that the government modified another witness's statement "mid-trial in a way that substantially impaired Frank Harper's ability to support his defense." Frank's Br. 51. This argument too was not raised below, and it too does not satisfy the requisites of plain error. Frank does not offer a single citation to the record to support his claim, and it is not our job to perform the task for him by searching high and low through the record. The claim fails.

F. Use of a Pinkerton conspiracy instruction. The court instructed the jury that it could use a *Pinkerton* co-conspirator theory of liability to convict on the §924(c) firearms charges. Phillip argues that the Supreme Court's decision in *Rosemond v. United States*, 134 S. Ct. 1240 (2014), an *aiding and abetting* case, changed the requirements for finding a *conspiracy* under *Pinkerton*. He maintains that *Rosemond* created "new, and more stringent, rules for co-conspirator liability." *United States v. Adams*, 789 F.3d 713, 714 (7th Cir. 2015). But "that's not what . . . *Rosemond* . . . held." *Id.*

Rosemond dealt with the aiding and abetting theory of liability for § 924(c), not with the *Pinkerton* co-conspirator theory of liability. The two theories are distinct, and we allow the use of either theory to reach a § 924(c) conviction. *See Napier v. United States*, 159 F.3d 956, 960 (6th Cir. 1998). *Rosemond* aiding and abetting liability requires, in part, "intent [to] facilitat[e] the offense's commission" and "advance knowledge" that a firearm will be used to commit the offense. *Rosemond*, 134 S. Ct. at 1245, 1251. *Pinkerton* conspiracy liability does not have the intent or knowledge requirements; once a person has joined the conspiracy, *Pinkerton* requires only reasonable foreseeability of the crimes committed by co-conspirators. *See United States v. Swiney*, 203 F.3d 397, 401–02 (6th Cir. 2000). *Rosemond* did not alter the *Pinkerton* framework, as at least one circuit has already concluded. *See Adams*, 789 F.3d at 714.

Phillip raises a second challenge to the *Pinkerton* instruction, claiming it violated his Fifth Amendment grand jury guarantee by constructively amending the indictment. He claims that his indictment charged him only with *committing* § 924(c) crimes and did not charge him with *conspiracy* to commit them. But we have rejected this argument before, holding that "a district court may properly provide a *Pinkerton* instruction regarding a substantive offense, even when the defendant is not charged with the offense of conspiracy" with respect to that specific offense. *United States v. Budd*, 496 F.3d 517, 528 (6th Cir. 2007).

G. Double jeopardy challenge. Edmond claims that his conviction for operating a chop shop violated the Double Jeopardy Clause because Michigan had

already convicted him of a similar violation under state law. But the Double Jeopardy Clause bars only successive prosecutions by a single sovereign, federal or State. *Heath v. Alabama*, 474 U.S. 82, 88–89 (1985).

IV.

Edmond and Phillip also challenge their sentences. In calculating each sentence, the district court first imposed mandatory sentences for their firearms convictions under § 924(c): 55 years for Edmond and 80 years for Phillip. It then determined the guidelines-recommended sentences for their other convictions and did not lower their ultimate guidelines-related sentences to account for their mandatory sentences. Edmond and Phillip claim that the court abused its discretion when it refused to consider the length of their mandatory firearms sentences when calculating their guidelines sentences, which led to a 75-year sentence for Edmond and a roughly 93-year sentence for Phillip.

United States v. Franklin, 499 F.3d 578 (6th Cir. 2007), governs. It establishes that, when considering convictions under § 924(c) along with other counts, "[t]he sentencing court must determine an appropriate sentence for the underlying crimes without consideration of the § 924(c) sentence." *Id.* at 586. Nor does it matter that the district court's rationale for considering the mandatory and guidelines sentences separately was a faulty one. The district court reasoned that separate consideration was appropriate because it was possible that the mandatory sentences could be "affected by some future action by Congress or by the

Court of Appeals." R. 233 at 25. While *Franklin* was the only explanation the district court needed, it reached the right outcome anyway. Getting to the right place via the wrong road is not reversible error.

For these reasons, we affirm.

APPENDIX B

Nos. 14-2426/2427/2428

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	
	)	
BERNARD EDMOND (14-2426);	)	ORDER
FRANK HARPER (14-2427);	)	
PHILLIP HARPER (14-2428),	)	
	)	
Defendants-Appellants.	)	

FILED

May 04, 2016

DEBORAH S. HUNT, Clerk

BEFORE: NORRIS, BATCHELDER, and SUTTON, Circuit Judges.

The court received three petitions for rehearing en banc. The original panel has reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original

submission and decision of the cases. The petitions then were circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petitions are denied.

ENTERED BY ORDER OF THE COURT

s/ Deborah S. Hunt, Clerk
Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Deborah S. Hunt
Clerk

Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: May 04, 2016

Mr. Daniel Vincent Bradley

Ms. Robyn B. Frankel

Mr. Sanford A. Schulman

Re: Case No. 14-2426/14-2427/14-2428,
USA v. Bernard Edmond, et al.
Originating Case No.: 2:11-cr-20188-5

Dear Counsel,

The Court issued the enclosed Order today in these cases.

Sincerely yours,

s/Beverly L. Harris
En Banc Coordinator
Direct Dial No. 513-564-7077

cc: Ms. Patricia Gaedeke
Mr. Jerome Francis Gorgon Jr.
Mr. Morgan Reid Hirst

Enclosure

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

Case No. 11-20188

D-2 PHILLIP HARPER,
D-4 FRANK HARPER,
D-5 BERNARD THOMAS EDMOND

HON. GEORGE CARAM STEEH

Defendants.
/

ORDER REGARDING MOTION FOR BILL OF PARTICULARS [DOC. 89], MOTION IN LIMINE TO SUPPRESS PHOTOGRAPHIC IDENTIFICATION [DOC. 90], MOTION FOR BILL OF PARTICULARS, [DOC. 115], MOTION TO EXCLUDE PRIOR BAD ACTS [DOCS. 96 AND 116], AND MOTION FOR SEVERANCE [DOC. 117]

The above-captioned motions were before the Court on August 20, 2013. Counsel for defendant Phillip Harper joined in defendant Frank Harper's motion to exclude prior bad acts [Doc. 116] and motion for severance [Doc. 117].

As stated on the record and for the reasons given, defendant Edmond's motion for bill of particulars [Doc. 89] and motion in limine to suppress photographic identification [Doc. 90] are WITHDRAWN.

Defendant Harper's motion for bill of particulars [Doc. 115] is WITHDRAWN. Defendants Harpers' motion to exclude prior bad acts [Doc. 116] is GRANTED in part and DENIED in part. Defendant Frank Harper's previously filed motion to exclude prior bad acts [Doc. 96] is DENIED as MOOT due to the filing of the Third Superseding Indictment [Doc. 109]. Defendants Harpers' motion for severance [Doc. 117] is DENIED.

IT IS SO ORDERED.

Dated: August 21, 2013

s/George Caram Steeh
GEORGE CARAM STEEH
UNITED STATES
DISTRICT JUDGE

CERTIFICATE OF SERVICE

Copies of this Order were served upon attorneys of record on August 21, 2013, by electronic and/or ordinary mail.

s/Marcia Beauchemin
Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	
Government,	HONORABLE GEORGE CARAM STEEH
v.	
D-2 PHILLIP HARPER,	No. 11-20188
D-4 FRANK HARPER,	
Defendants. /	

MOTION HEARING

Tuesday, August 20, 2013

APPEARANCES:

For the Government:	JEROME GORGON, ESQ. LYNN HELLAND, ESQ. Assistant U.S. Attorneys
For the Defendants:	FREDRICK FINN, ESQ. On behalf of Phillip Harper
	ANDREW DENSEMO, ESQ. On behalf of Frank Harper

– – –

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Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 238
Detroit, Michigan 48226
(313) 962-1234

Proceedings recorded by mechanical stenography.
Transcript produced by computer-aided transcription.

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E X H B I T S

Identification	Offered	Received

N O N E

Detroit, Michigan

Tuesday, August 20, 2013

– – –

THE CLERK: Case Number 11-20188, Defendant Number two, United States of America versus versus Phillip Harper and Defendant Number 4, United States of America versus Frank Harper.

THE COURT: Good afternoon.

MR. GORGON: Good afternoon, your Honor. Jerome Gorgon and Lynn Helland for the United States.

THE COURT: Welcome.

MR. FINN: Please this Honorable Court, Frederick Finn on behalf of Mr. Phillip Harper.

MR. DENSEMO: Andrew Densemo on behalf of Mr. Frank Harper.

THE COURT: Welcome. So we have several matters. It appears that—that at least some of these have been resolved. I kind of got the impression that the motions on behalf of Bernard Edmond for a Bill of Particulars and a suppression of photographic identification has been withdrawn, is that—

MR. DENSEMO: I don't think Mr. Edmond or his lawyer is here.

THE COURT: That is your impression Mr. Gorgon?

MR. GORGON: Yes, your Honor. Those were addressed at an earlier hearing, and the Bill of Particulars was absolutely resolved. I don't know if he formally withdrew it. I thought he said that at the last hearing, but I don't think there's been a formal motion.

The other issue, the Court said we'll deal with it if it comes up at trial, but we didn't anticipate at that point needing to use a driver's license to identify who he is in court, but it may be possible that as the case goes on, we may need to use a driver's license that he has used in the course of the conspiracy. So I mean that issue may need to be addressed later.

THE COURT: All right. And Mr. Phillip Harper has a motion for Bill of Particulars. Is that still a motion that you want heard?

MR. FINN: May it please the Court, as to the Bill of Particulars as far as Phillip Harper goes, I believe

based on some communication with the Assistant U.S. Attorney, more information I believe is forthcoming, but I believe at this point with that additional information that should be resolved.

THE COURT: Okay.

MR. HELLAND: That's my understanding also, your Honor.

THE COURT: Thanks, Mr. Helland.

So we have two matters to address today. Mr.— and these are both motions filed by Mr. Frank Harper, and those are the motions to exclude prior bad acts, and a motion for severance.

Does Mr. Phillip Harper join in the motion for severance or not?

MR. FINN: Your Honor based on that, we would be joining in on that one, and also to exclude bad acts as it would affect, I believe, Mr. Phillip Harper during the case.

THE COURT: All right. Well, I guess I'll call Mr. Densemo to address his motion to exclude prior bad acts.

MR. DENSEMO: Thanks, Judge.

As the Court knows from my brief, I misstated something in the brief. There was a jury acquittal of one of the offenses I think from 2009. The other was dismissed on the motion of the presiding judge pursuant to a motion to quash. So that act didn't make it to the jury. The judge determined there's nothing here to charge Mr. Harper with, and so that didn't even make it past a motion to quash, and again, the jury acquitted Mr. Harper of the other conduct

that I still have not seen. We have not gotten any reports from 2009.

As you know Judge—

THE COURT: You agree as it relates to the acquittal at least, that the standard here is whether a rational juror could find that he committed the act, right?

MR. DENSEMO: Before you even get there Judge, you have to find it is being presented for a legitimate purpose.

THE COURT: Right.

MR. DENSEMO: And—

THE COURT: But going to the second leg of that standard, you agree that the standard is whether a rational juror could conclude that he committed the act?

MR. DENSEMO: I believe so.

THE COURT: And so—go ahead.

MR. DENSEMO: Here's the problem that I have with—with the government's attempt here to introduce this evidence. It's not necessary to show any purposes. It is not necessary to show knowledge, intent, motive, opportunity, plan, scheme, and I disagree with the factual representations made by the government in as far as how this relates to the present charges.

Based upon what I've seen, if you look at Page 5 of the government's brief, it says that dispute over a gun around April 2009, after the dispute over a gun, the defendant shot into a car seriously wounding at least one person. That has nothing to do with carjacking or taking by force and violence.

One, I don't know any of the facts regarding this one line statement; and two, just on its face, it does not appear to be reasonably related to carjacking. It doesn't show any kind of motive, plan opportunity, absence of mistake, identity or anything else.

The same can be said for the other alleged 2009 offense. It doesn't relate to anything that the government would need to show on 404(b).

To my mind, it is being offered to poison the well. It is being offered to paint Mr. Harper in a bad light. You can't help but think oh, this is a horrible person. He's been involved—at least charged or around or accused of two shootings where people have been shot or injured. It does nothing more than poison the well in this case. It creates a hostile environment, an inflammatory conduct of this nature. It can do nothing but prejudice the jury's mind against Frank Harper, because in the back of their mind they will be thinking about this, even though cautionary instructions may be given. No reasonable person is going to leave this out of any calculus in determining the guilt or innocence.

The bad man rule applies in court at all times.

If you paint the defendant as a bad man, that is going to be thrown into the calculus in the jury's determination, and I think ultimately that's what going to happen here.

The last part of the analysis that the Court is asked to undertake in this case is just that, is this—even if this may be admissible, is it so inflammatory that it denies the defendant of a fair trial? It's so inflammatory, that it pushes up against due process.

Can we reasonably expect Frank Harper to receive a fair trial if this kind of evidence is going to come in, and I think if you look at those different layers, Judge, one the inflammatory nature of it, the prejudice against the defendant, it's acquitted conduct. To me that's the most offensive out all of this, that a judge made a determination that this kid—this guy should not be charged with this, and a jury made a determination he's not guilty of it.

So with no deference to those decisions whatsoever, with no respect to those decisions whatsoever, the government says we want to introduce it anyway, and we want to proffer that he did do it, despite the determination, judicial determinations that he is not guilty, that he didn't do it, that he should not even be charged with it, that these things should not go forward, and despite the imflammatory nature of it, despite how it affects his ability to receive a fair trial, we still want to introduce this kind of evidence.

I don't believe that the government has maintained a proper basis for the introduction of these alleged—they have not alleged a proper introduction of evidence for which my client has been acquitted for the case that has been dismissed. I don't see how it goes to identity.

Stratford Newton and the two other proposed cooperating witnesses are going to say that's Frank Harper. He was involved in carjacking with me. I know Frank Harper. They have a videotape of Frank Harper going into the Auto Zone. Unfortunately, that's Frank Harper's face it appears to be in the videotape.

So the question of identity, knowledge, purpose, scheme, they have all of that already, and that's why in my soul I know that this is just meant to prejudice the jury, because they already have enough evidence that 404(b) covers in terms of discovery that we have been provided. They have everything that we need in terms of establishing identity, knowledge, motive, scheme, purpose, all of those things, and have not laid out legitimate reasons why this Court should allow this kind of evidence in its case in chief.

THE COURT: Okay. Thanks, Mr. Densemo. Mr. Gorgon?

MR. GORGON: Your Honor, there are a couple of important things.

The first one is Mr. Densemo expresses a lot of common concerns. Those things happen every single time that a court like this one has to make that 404(b) and then the 403 calculus, and I appreciate that he has those concerns, and I think of the circuits that I've looked at, I think the Sixth Circuit is very cautious about 404(b), and I understand that and I respect that, but what Mr. Densemo didn't do, he didn't do two really important things.

He didn't talk about the 2010—the December 2010 shooting, because what he is saying has nothing to do with that. He doesn't have a response for that, and the first approach to that is this extrinsic act analysis, and I don't blame him for making the arguments that he made. I might make the same ones, but they are not the right ones.

THE COURT: I'm not concerned about the 2010. Two things that he said about the 2009 convictions, one, is that the marginal probative value is

outweighed by the inflammatory nature of the evidence which would unfairly prejudice his client. That actually is two things, and I would like you to address the facts that you would propose to introduce to establish these prior acts, and then why that is something more than marginal, a marginal probative value.

MR. GORGON: Absolutely. So if I'm understanding the Court correctly, the Court does not need me to address the 2010 shooting?

THE COURT: Correct.

MR. GORGON: Then I want to take the 2009 shootings separately.

The way that they are going to be established, your Honor, is two fold; one, for him to be indicted on those shootings, there had to be finding of probable cause at the state level.

THE COURT: Okay. And I buy that.

MR. GORGON: That's above the threshold that we would need here.

In addition to that we have a cooperating witness who's going to—

THE COURT: Well, when you say indicted, these are state court offenses, right? So they were probably subject of a complaint.

MR. GORGON: Possibly, but I know there has to be a finding of probable cause before—especially before it can go to trial.

THE COURT: That's the preliminary exam stage, but—so the motion to quash which resulted in a dismissal, may well render the initial probable cause determination negatory, but—

MR. GORGON: My understanding was that both those shootings ended up going to trial. That's my understanding. I did contact the Wayne County Prosecutors. I looked at the court records myself. I could be misinterpreting what they are saying. Mr. Densemo could be right. I'm not going to quibble over that, but let me take them separately.

The first shooting that concerns—and I think this is the most important one. That's why I'm going to start with this. I don't know if it is the first in time or not—but one of the shootings is where Frank Harper tries to steal—this is during the course—we're not necessarily saying it is part of the conspiracy here. We're not saying it isn't. I don't know if we know that definitively, but we know that during the same period that everybody is alleged to be out stealing cars, carjacking vehicles, doing all of these different things through violence and for money, Frank Harper went to try to steal parts off a car. When he was resisted trying to get that property, he came back and shot that person.

So why is that important? How does that relate? Well, it is the same type of activity that we have here. It's stealing a car or parts from a car. It's using a gun, and because of that I think it's arguably a pattern of the same criminal activity, because when courts are talking about res gestae and these extrinsic acts, your Honor, they're saying, don't come talking to us about something from 10 years ago that's completely unrelated. That will just make this guy look like a bad human.

That's not what this is. It's the same period type of activity, and it's interconnected because of those reasons.

THE COURT: You don't have a connection with the gun as you do in the 2010?

MR. GORGON: No.

THE COURT: And you don't have a connection even with the type of gun?

MR. GORGON: It is the same type of gun, and there's some evidence that would connect Frank Harper using his own gun in the January 25, 2011 carjacking of the black S550. The cooperators who have talked about that, it may have been all—three of the cooperators who have provided statements said that Frank Harper was the one that provided the gun for the carjacking of the black S550.

Can I tell the Court right now definitively that that's the same gun that he used in the 2009 shootings? No, I cannot. Is it the same type of gun? I believe yes, it's still a black semi-automatic, but I don't—and I'm not going to tell the Court—

THE COURT: Pistol or rifle?

MR. GORGON: Handgun—but I'm not going to tell the Court that I can put a witness on right now, and I know that they are going to tell me that. It may be and may not be, but that is an important difference, and I think—

THE COURT: Is that the case, Mr. Gorgon, that resulted of an acquittal or that was dismissed by the judge?

MR. GORGON: I thought—it's hard for me to say because I thought both were acquittals. I did not

think that it was quashed. I thought what happened was that he was brought on one. He was brought on the second one. They dismissed that and combined them and went to trial. I could be wrong, but I acknowledge that it is different potentially because of that reason, but the 404(b) analysis is a different question, because I think when we're just talking about extrinsic acts, we didn't allege that the other shooting over the gun where he went back and wanted his gun and shot the person in the car, we didn't allege that was extrinsic because that's different, and it may be a property crime. It may show his willingness to kill over property, but I think it is a different kind of property, and I think the connection because of that is more tenuous. So that's why I didn't argue it as an extrinsic act, but when we get to the 404(b) analysis—did I answer all the Court's questions on the extrinsic acts on the 2009?

THE COURT: Yes.

MR. GORGON: When we get to the 404(b) analysis, I agree. This has concerns that are not really present in the extrinsic analysis, and again, I remember when I saw the Clay case I thought, man. That's not good for our position, but then I read it more carefully, and I may not agree with everything that Judge Marbaly wrote in the opinion, but I certainly respect the analysis, and I read Judge Kethledge's dissent very carefully, but I didn't use a lot of that in this brief. I went back and I said to myself, what does the court in the majority decision want to let this kind of stuff in, and all the stuff that Clay was talking about, the kind of case they're talking about the court said, there's going to be

circumstances where this kind of thing can come in. That's this case, your Honor.

That 2009 shooting, it has so many of the things that Clay was talking about, and because of that the strongest reason—and that's why I led with Clay—is specific intent. That's hard to prove. That's not an easy burden for the government to meet to get inside a defendant's head and say what he was or wasn't going to do. You have to prove that beyond a reasonable doubt, and I think because of that, when you have definitive evidence that a man, not because he is a bad person, but a man is willing to shoot somebody over property if they resist to cause great bodily harm, we should be able to use that. It is highly probative.

Arguably going to shoot someone over not getting your gun back, that might not be the same thing, but over car parts, I mean I don't think it's a meaningful difference to say he'll shoot somebody over rims, but he won't shoot them over a Mercedes.

THE COURT: The qualitative difference is if the description of the event is as I heard it from Mr. Densemo that he was at the scene attempting to steal parts, left and returned to shoot the victim, I don't know if that—unless he shot the victim in the course of then stealing the parts on his return—

MR. GORGON: I think that's fair, your Honor, but I would say it's actually more powerful, because if a man is willing to walk away from that situation to retrieve a gun and come back and do that, there's no doubt that if he had the gun with him initially, he would have used it.

So I think it is understandable that the Court says it is a slightly different situation, but the real cause here is that he wanted that property. Somebody resisted. So he went and got a gun, came back and shot. To me that's a very strong probative, almost compelling evidence that if he had that gun on him, he would have used it then. So I understand what the Court is saying.

That's definitely the strongest argument for the 2009 shootings, but it isn't the only one. I think it could be used to show plan, identity, and knowledge, and lack of mistake. These arguments are weaker, but I don't think they are weak.

There are of six things—at least five arguably from these shootings. He targets victims who are in vulnerable spots in vehicles. They are all in the same places in Detroit. You don't know if he was using the same gun in the 2009 shootings, but there is a strong likelihood that he may have been using the same gun from at least one of the carjackings. So I think there are some things tying it together.

The other ones I've kind of outline in the brief, your Honor, but I agree with the Court. The 2010—December 2010 shooting is kind of—that's in a different category. That's a much cleaner call than these other two, and then among these two, I think the 2009 shooting over the rims is a close call on the extrinsic question. It's probably a close call on 404(b), but I think it's in.

The third 2009 shooting is the weakest, but all of Mr. Densemo's concerns—and this is what I started with and I just want to end with it—the Sixth Circuit is aware of them. They know about that. They know

all of these dangers exist. They've considered it every single time, and I laid out a dozen cases to try to provide some guidance. The Sixth Circuit knew all of that, and they still went this way, and then I tried to show how this case is so much stronger.

Did the Court have any other questionings for me?

THE COURT: No, not at this point at least. Thanks, Mr. Gorgon.

MR. GORGON: Thank you, sir.

THE COURT: Mr. Densemo, I'm not sure I've heard from you as it relates to these 09 incidents other than the nature of the evidence is imflammatory, and will unfairly prejudice my client because it involves shootings and the carjackings that he is charged with here did not.

Other than that, I'm not sure I heard you articulate what the unfair prejudice is. How is it—I mean, this evidence obviously always prejudices the defendant by introducing additional generally bad acts, other acts as I think the statute reads, but the question is how is it unfair? If it is relevant to the permissible elements, how is it unfair to introduce it?

MR. DENSEMO: He was acquitted of it.

THE COURT: We know that doesn't do it because—

MR. DENSEMO: Why not?

THE COURT: —the United States Supreme Court in the context of an acquittal said that evidence is still admissible—

MR. DENSEMO: May be admissible if you allow it, if you determine—if you determine that it's not unduly prejudice, and that's what we're looking at.

Yes, all evidence against the defendant tends to have prejudice against the defendant, but we don't let in all evidence against the defendant, because some evidence is unduly prejudicial. Some evidence is inadmissible, and a judge sometimes makes a determination, I don't think it is relevant, or may be relevant, but again, it impinges too closely upon the defendant's due process rights to a fair trial, and I think—

THE COURT: That's what I'm trying to get you to do though, tell me why it is unduly prejudicial. Why is it unfair?

MR. DENSEMO: Because the standard is –

THE COURT: How is the jury going to be confused by it?

MR. DENSEMO: The jury may not be confused. They may very well get from it what the government intends, and that is Frank Harper is a bad guy, that he's a shooter, and that's really what they are trying to get at, and if we look at it in any different way, we're being naive.

THE COURT: So you're arguing that the jury is more likely going to—

MR. DENSEMO: Use it for an improper purpose—

THE COURT: —take this as evidence of his propensities?

MR. DENSEMO: That's correct. That's exactly what they are going to use. They are going to use that propensity evidence to show that is he is a bad person.

The other thing is the burden that is placed upon defense counsel. That's two more trials within a trial that I'm going to have to defend within a day or two, because I have not gotten one stitch of information about 2009 shootings. Not one piece of evidence, and I suspect that I probably won't get it given that we're four, five day away from trial, I'm not going to get it in enough time to effectively defend Frank Harper.

So I'm going to have to prepare for—to defend Frank Harper yet again against two assaults with intent to murder charges in the midst of the carjacking trial. If that's not unfair, if that's not a violation of his due process by denying him effective assistance of counsel, I don't know what is, and as brilliant as I am, as great a lawyer that I am, I can't do that. I cannot prepare for two murder—assault with intent to murder trials in the midst of another trial without any evidence, without looking at any discovery whatsoever. I'm going to be handed something two days or a day before trial, and I'm going to be told have at it.

That, your Honor, is unfair. That you shouldn't do to Hitler. If you're going to do this, give Frank Harper notice, give me notice, give me an opportunity to prepare and properly defend.

The other issue, your Honor, that I'm having a great deal of difficulty with is that Stratford Newton pled guilty in this courtroom before this Court and so did Justin Bowman to carjacking, and 924(c) charges I imagine. If I'm not mistaken, they had to make out a factual basis. Part of the factual basis was we intended to do serious bodily harm to some individual or hurt them badly if need be, because that's one of

the elements that would be presented to the jury. That's what the government would have to prove at trial. That's one of the elements and the factual basis that this Court took.

Why can't those two cooperating witnesses, and the third cooperating witness, say that on the witness stand? We had guns. We were going to hurt them if they didn't turn over their vehicles, and I imagine, unless I missed my guess, that's what these cooperators are going to say.

So you don't need all of this Frank Harper is a shooter information coming in. You have a plethora of individuals willing to say—so again, that's why I know they're not using this. They don't want to get into the elements because they have other individuals that will make out those elements. They are out to poison the well and that's unfair, and it's a violation of his due process, especially because I'm not going to be prepared to handle it effectively.

THE COURT: Okay. Thanks.

Mr. Gorgon?

MR. GORGON: I think Mr. Densemo articulated some serious concerns that he has.

MR. DENSEMO: Thank you.

MR. GORGON: Absolutely, and I think it's fair to him to express those concerns, but one of the things that I try to do when I responded to the Court was to understand these concerns exist, and present how the Sixth Circuit has actually ruled on. So let me start with one of the last concerns.

Mr. Densemo said what if these guys get up here and say they had specific intent? Maybe they will say

that. Maybe they won't say that, but there are Sixth Circuit cases, including Zalman, which is in our brief at Page 12, and Love, which is in our brief at Page 12 in a footnote, and it says, even if the defendant is willing to acknowledge his intent to commit carjackings, we still—the government is still entitled to introduce prior acts to establish his intent.

So even if Mr. Densemo got up in his opening and said yeah, we're stipulating to his intent, that doesn't stop us—me from introducing this evidence. So having someone, based on Mr. Densemo's speculation, had said something at a plea hearing, that certainly is not going to preclude us. Same thing about United States versus Love.

So that isn't the standard, and I think when you got to the core question what's the unfair prejudice here, Mr. Densemo isn't going to have to prepare for two murder trials. We are not planning to prove that he committed those shootings beyond a reasonable doubt. That's not what our intent is. He's not charged with those shootings.

The evidentiary decision that the Court has to make is that one, can any reasonable juror, you know, believe that this happened, and then that evidence gets to come in.

Our evidence is going to come through cooperators and maybe there'll be a witness or two, but our intent is not to make this a trial over those two things. It's to use them for the discreet purposes that we've outlined in our brief. So that prejudice is the wrong kind of prejudice for this Court to concern itself with.

You know, it may not have been the kind of notice that Mr. Densemo wanted, but we gave notice of

these more than a month before trial. Presumably he was aware of them much sooner than that. Frank Harper has been his client for probably close to two years now. He's had his criminal history. He knows about all of these things.

We're not the one who is in the best position to know what everyone of his acts were. It takes time to discover those, and we gave him as much notice as we could on these acts, because we—I don't want to say we discovered all of them at this point, but we did not have an opportunity to talk and find certain information out until recently, and we provided him notices as soon as hot on the hills of that.

So I understand he is in a tough position. We all are. We have to prepare for trial. So that's tough, but I don't see anywhere in the case law where it says that's an unfair prejudice, and I didn't see Mr. Densemo articulate any reason why the jury is going to confuse any of that evidence. Thank you.

THE COURT: Well, first as it relates to the December 31, 2010 incident, the Court views the evidence involved in connection with that incident as intertwine with the conspiracy representing essentially res gestae evidence that would circumstantially tend to demonstrate that—that the—that this defendant was in possession of the same gun and car that was used to commit some of the other carjackings that were named in the indictment in the midst of the period involved in this charged conduct. It does demonstrate a pattern and demonstrates relationships in connection among the co-conspirators. It is of I think compelling probative value on its face, and whether it is admitted as

intrinsic evidence or as described by Mr. Gorgon or as 404(b) evidence, it is clearly admissible, and given the date of the incident and the curative instruction that the Court will be in the position to give to the jury, I think the compelling probative value is not overcome by any unfair prejudice to the defendant.

The 09 incidents are much more problematic, and I believe ultimately Mr. Gorgon first argues that well, probable cause determination was made, and that more than satisfies the burden for the Court to determine whether a rational juror could conclude that he committed those acts.

I think there's something to be said for that argument. I don't know that I have ever seen it in the case law surrounding the admissibility of 404(b) evidence, but the—but I think that especially in the connection with the incident that got to trial, it would be highly likely that the—that the Court could conclude after a more full proffer of the available evidence that the —that the—that a rational juror could conclude that Mr. Harper committed the acts that are described in the incidents, and I think there's some marginal probative value.

Mr. Gorgon argues the principal value is to establish his intent at the time that he acted a year or two later in connection with the charged conduct here, and the intent is an element of the offense that it can be difficult, and it need not be the only evidence of intent that the government has available. It doesn't matter as long as it's not overly accumulative. I don't think it matters that there are other circumstances from which intent can be inferred and concluded by the jury.

So I think that if one is only looking at 404(b), the Court would find that evidence admissible, but the Court is required to go further, and the Court is directed to consider the unfair prejudice that is represented by the introduction of that evidence as against the probative value of that same evidence, and here the—Mr. Densemo points to the fact that at least one of those incidents resulted in an acquittal, if not both, and that the other may have resulted in a dismissal on a motion to quash as an indication that the—I'm not sure—just that it strikes him as being unfair, and I don't think that would—that would affect the Court's determination that it is admissible conduct under 404(b), but it does create the strong potential for a distraction in the case by the need to conduct on his part a mini-trial surrounding the circumstances of each incident.

So that—it may not be Mr. Gorgon's intention to create that distraction with this evidence of potential criminal conduct, but obviously there was a significant amount of evidence in relation to both incidents that gave—that provided fodder for the defense attorney, and ultimately resulted in an acquittal by a jury, where 12 individuals concluded unanimously that the defendant was not guilty of that conduct, and for me that distraction is a problem in affording the defendant a fair trial, and it—and it is part of my difficulty in assessing whether there's anymore probative value than I can estimate based on what I've heard, is that we have very little information about the actual occurrences in both incidents.

We have somewhat vary ideas about what that incident involved as evidence, but neither side seems

to know a whole lot about the available evidence of conduct on his part that would be available at trial, and of course, propensity is always a problem in dealing with 404(b) evidence; that is, it's the tendency for a person and juror's role to conclude that he must be guilty because he's engaged in a lot other criminal activity, but I think the little bit that we know about the incident involving the car parts, which is the case that appears to have potentially more probative value is still dissimilar from what we're dealing with here to suggest that the acting out that he's accused of committing in that case is not going to demonstrate specific intent to use that gun to consummate a robbery. It sounds like he used a gun in that incident to hurt someone who resisted him, and after abandoning the attempt to consummate his theft.

So I don't think the incident in O9 sufficiently relate—I think the probative value is somewhat marginal, and the—and the potential for unfair prejudice is more severe in many of the acts that have been found admissible, and undertaking that balancing between the probative value and the prejudicial effect, the Court is persuaded that the evidence should not be admitted, at least based on the information that I have so far.

So I'm going to permit admission of the 2010 and deny admission of the 2009.

MR. GORGON: Thank you.

THE COURT: Okay. All right. Is there a renewal of the motion for sever also? The severance motion is gone?

MR. DENSEMO: No, I refiled it. Mr. Harper asked that I bring the motion back before the Court, and just emphasize the unfair spillover effect that will arise—at least what we anticipate will arise being tried with his brother and with the Mr. Edmond, and that is essentially the argument that we raised in the renewed—in the first motion, but I don't think we emphasized at least to the point where Mr. Harper wanted the Court at the very least focus in on that issue.

Whether he should be tried given the wealth of evidence against his brother, given the wealth of evidence against Mr. Edmond, we believe that there will be a substantial spillover effect in terms again of the jury imputing guilt to Frank Harper based upon the volume of evidence that the government is prepared to present against the co-defendants in this case.

That is our renewed basis. We believe there is a substantial basis for a spillover in this case, and I think the wisest course would be to separate the trials.

I don't mean to argue something that I didn't raise in my motion, but I would like the Court to consider that there may very well be antagonistic defenses in this case, and given that these are brothers, it would be unfortunate if my defense in this case somehow damaged Phillip Harper. I know that's not his brother's desire, but I'll do what I have to do to defend Frank Harper, and that may involve damaging Phil Harper.

I think the best thing that we can do in this case in terms of avoiding spillover, avoiding antagonistic

defenses, and I think the wisest course is to have a separate trial.

THE COURT: Thanks. Mr. Gorgon?

MR. GORGON: It is okay to address the first argument?

THE COURT: Sure.

MR. GORGON: The best way to frame Mr. Densemo's first argument is by looking at just one example in this case, and I put it in the brief in a couple of different places.

Let's just take one carjacking, the January 25, 2011 carjacking. He carjacked—

THE COURT: When you say "he"—

MR. GORGON: Frank Harper carjacked it with two others. They sold it to Bernard Edmond. Bernard Edmond and his people retagged it, and traded it back to Phillip Harper. The search warrant hits in March of 2011, March 20, 2011. He's caught there. He's—

THE COURT: He being—

MR. GORGON: Phillip Harper is caught there with the car, retagged. All the paperwork has Bernard Edmond's fingers all over it. That's just one example, and we have 13 carjackings here. Numerous other cars, you know, 50, 7O—I don't even know the total. They all intertwine.

The idea of separating that out is incredibly insufficient and unfair, and this idea that Frank Harper may well have an antagonistic defense towards Phillip Harper is not a reason for Frank Harper to get a separate trial or to ask for one. If what Mr. Densemo is saying his concern is Frank

Harper as far as his motion goes, who cares what that means for Phillip Harper. That argument does not make any sense to me.

I understand it, and then more than that, again, I cited Sixth Circuit cases that layout what kind of circumstances those would be, and it is nothing like this case. So I just don't see why after the two prior denials of a separate trial and severance there is any new reason to overcome the Court's position.

If I might, is it okay if I say one comment about the 404(b) determination?

THE COURT: Yes.

MR. GORGON: I would like the Court to keep in mind that I absolutely respect, and I think it's a fair decision, very well reasoned. I struggled with the same things when looking through the case law, looking at how it would work in trial, but just if the Court would keep in mind that it may be possible through cross examination of witnesses, I can think of many scenarios that defense counsel, whether it's Mr. Densemo, or one of the other two attorneys, they may open up that area and that evidence to come in, and at that point we would request that the Court reexamine the basis for keeping it in or out.

THE COURT: Absolutely. As with all evidence rulings, they are subject to modification during the course of the trial.

MR. GORGON: Okay. Thank you very much.

THE COURT: Thanks. All right.

Well Mr. Finn, did you have anything additional?

MR. FINN: If it please the Court, the only thing that I would add to what Mr. Densemo said is the

potential of antagonistic defenses here. I understand that I made it clear with Mr. Phillip Harper that when I came into this case, I know some people you may know, one who you are related to. I'm representing only Phillip Harper.

The same with Mr. Densemo, only representing Frank Harper, but I think Mr. Densemo's argument about antagonistic defenses is one of the considerations for the Court must consider in whether to grant a motion for severance, but basically that would be all that I would have, Judge, for that reason.

THE COURT: Mr. Gorgon?

MR. GORGON: Your Honor, I don't have the Supreme Court cite case readily available, because as Mr. Densemo said, it had not been brought up in the motions, but the Supreme Court has already addressed this and said that the possibility of antagonistic defenses is not a reason for separate trial or severance.

If the Court wants, I can provide him with the cite. I don't know if it is necessary, but—

THE COURT: I'm satisfied, and familiar.

MR. GORGON: Thank you.

THE COURT: All right. Thanks. The Court has previously denied the severance motion, and I think most of the grounds for severance has been advanced. I think this motion does have a slightly different focus, but the reasons for conducting a joint trial, especially in a conspiracy case, are fairly obvious and appropriate, and the fact that the defendants may end up in their argument, if nothing else pointing

fingers at each other, is a natural outcome of conducting joint trials, and probably aids the jury in ultimately determining the truth of the proposition at issue.

I don't—I don't think I've heard anything this afternoon that changes the Court's opinion about the appropriateness of the conducting the trial jointly, and accordingly, I will deny the motion to sever.

Does that cover everything that we've got to cover today?

MR. GORGON: Yes, sir.

THE COURT: Do you expect anything else? I know that I got a submission of proposed jury instructions. Have you had a chance to go through those on defense side yet?

MR. DENSEMO: I have a number of objections that will be—I'll talk it over with the U.S. Attorney's Office.

THE COURT: Some proposed on your own?

MR. DENSEMO: Yes, sir.

THE COURT: Okay. All right. Anything else that you think I should be addressing before we reassemble for jury selection?

MR. DENSEMO: Pardon me?

THE COURT: Anything else I should address before we reassemble for jury selection?

MR. DENSEMO: I don't think so.

THE COURT: Mr. Finn?

MR. FINN: No, sir.

MR. DENSEMO: Judge, full days or half days?

THE COURT: The length of this trial was once estimated at two weeks. I notice 55 witnesses have been identified by the government to call.

MR. DENSEMO: Fifty-five? I have not got that notice.

THE COURT: Isn't that about right?

MR. GORGON: Pretty close.

THE COURT: So what's your estimation of time to present?

MR. GORGON: Going full days?

THE COURT: Let's start with that assumption, but generally my practice is if a case is going longer than two weeks, I'll do nine to one so that I can keep the rest of my docket going, but if it is within that two week period, I will go full days.

MR. GORGON: A lot of the witnesses are going to be pretty short. I think like even a typical carjacking witness will be 30 minutes. So maybe two and a half weeks, depending on what level of cross examination is going to occur, but I also think that defense counsel is going to put some witnesses on as well, and that's going—

THE COURT: You're thinking two and a half weeks to get in your presentation?

MR. GORGON: I think so.

THE COURT: We're talking at least three weeks?

MR. GORGON: Yes.

THE COURT: Do you all have preferences? Would you like to voice your preferences for full or half days?

MR. DENSEMO: No.

THE COURT: No, you don't want to voice your preference? That's a first Mr. Densemo.

MR. DENSEMO: Yes, it is.

THE COURT: Mr. Finn?

MR. FINN: Full.

THE COURT: What's your feeling?

MR. GORGON: I think we should start off as full. If it gets exhausting for the jury, parties or the Court, I would be happy to go half days.

THE COURT: Okay.

MR. GORGON: There were two minor issues, your Honor.

One is I plan this afternoon to go with Mr. Densemo over Phillip Harper's statements and redact them and make sure we're both happy and satisfied. So that's the only other potential thing that I see before trial that we have to bring to the Court's attention. I think we'll be fine on that.

The other thing is when we were at the final plea cutoff, I think everything was accurately—everything that was put on the record was accurate, but I think—I don't want to say a misperception, but I think a piece of the discussions, which is not decisive, but I think it is important was not really put on the record, and if the Court okay with it, I would like to mention one thing.

In our plea discussions with Phillip Harper, we never reached a point where we said this is the offer that you have. We also never foreclosed the possibility that he could plea and even continue to cooperate, if, in fact, he was willing to testify truthfully against everybody involved in the case,

and come forward with all the information, and all of it truthful. If that were to happen, that opportunity still exists for him, and that's been communicated multiple times to his attorney.

My understanding it's been rejected, but that possibility still exists and does exist. I just wanted to put that on the record.

THE COURT: Okay. Mr. Finn, is that your—has that been your understanding?

MR. FINN: As of the last time that we were here, and the Court was essentially asking if there were any offers at that time, the Assistant U.S. Attorney is correct that there was not a formal Rule 11, but there was a number if he were to plead under these circumstances.

Mr. Harper, as I said the last time, was willing to plead under those new guidelines. The guidelines were approximately 18 to 20 years. It didn't involve cooperation. The plea offer was based on a package deal where Mr. Frank Harper had to plead before anything of a Rule 11 would be offered to Mr. Phillip Harper.

Mr. Phillip Harper rejected I guess the possibility that was put forth frankly because he was not wishing—let me back up.

The plea that he was originally offered did not involve cooperation. He did not wish to cooperate, but he would have taken—entered a plea if it was formalized.

The only thing that was different is that Phillip Harper would have to testify against one person, Mr.

Frank Harper. Mr. Phillip Harper rejected that. That's where we are right now.

THE COURT: Okay. So the short answer to my question is yes, you've heard from Mr. Gorgon. You understand that even as of today, the government would be willing to discuss an offer that would necessarily, however, include his agreement to cooperate?

MR. FINN: Yes, sir.

THE COURT: And it's because he doesn't want to agree to cooperate, that you believe your client is rejecting the possibility of a plea agreement now?

MR. FINN: That would be correct?

DEFENDANT PHILLIP HARPER: Correct.

THE COURT: Okay. Mr. Harper says correct. So that's all I wanted to know.

MR. FINN: Yes, sir.

THE COURT: Thanks. Given the length of the trial, we would normally pick 14 jurors, and given the length, we could consider trying to go with 16, but does anybody have an opinion on that?

MR. GORGON: The government is happy to have 16.

MR. DENSEMO: I have no problems.

THE COURT: Okay. And then is it agreed among you that whatever the number, if we're left with more than 12 at the end, we would excuse the alternates at random, or would you prefer pursuant to the rule to excuse the last four seated?

MR. DENSEMO: I don't know what Mr. Schulman's preference would be, but I would like to talk to him.

MR. FINN: The same, your Honor.

THE COURT: Okay. So you'll let me know before we get started?

MR. DENSEMO: Yes.

THE COURT: Okay. Thanks.

MR. DENSEMO: Thank you, Judge.

(Proceedings concluded.)

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C E R T I F I C A T I O N

I, Ronald A. DiBartolomeo, official court reporter for the United States District Court, Eastern District of Michigan, Southern Division, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a correct transcript of the proceedings in the above-entitled cause on the date hereinbefore set forth.

I do further certify that the foregoing transcript has been prepared by me or under my direction.

Ronald A. DiBartolomeo, CSR
Official Court Reporter

Date

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