No. 10-1535

In the Supreme Court of the United States

JOHN D. VILLANUEVA, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
WILLIAM C. BROWN
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the district court abused its discretion in determining that Federal Rule of Evidence 404(b) did not require a limiting instruction barring the jury from considering certain evidence as proof of petitioner's guilt, on the ground that the evidence was intrinsic to the charged offense.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and rule:

Statutes and rule—Continued: Page

In the Supreme Court of the United States

No. 10-1535

JOHN D. VILLANUEVA, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 15a-20a) is not published in the Federal Reporter but is reprinted in 410 Fed. Appx. 638.

JURISDICTION

The judgment of the court of appeals was entered on February 11, 2011. A petition for rehearing was denied on March 22, 2011 (Pet. App. 21a). The petition for a writ of certiorari was filed on June 20, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted on one count of aiding and abetting a gov-

ernment employee's knowing participation in a matter affecting the employee's personal financial interest, in violation of 18 U.S.C. 208(a) and 216(a)(2), and one count of conspiring for a government employee to participate in such a matter, in violation of 18 U.S.C. 371. Pet. App 16a; Judgment 1. The district court sentenced petitioner to concurrent six-month sentences of imprisonment on each count, to be followed by two years of supervised release. Pet. App 16a; Judgment 2-3. The court of appeals affirmed. Pet. App. 15a-20a.

1. In December 2003, petitioner, James Wright, and Luis Mercado decided to form a company, VMW and Associates, Inc. (VMW). Gov't C.A. Br. 3. The company's business plan was to seek government-contract work from the United States Department of Defense, where Wright and Mercado were employed. *Id.* at 3-4. The three men agreed that they essentially would have equivalent ownership interests and would share equally in any profits. *Id.* at 3.

In the summer of 2004, Wright identified an upcoming opportunity for VMW at the Defense Threat Reduction Agency (DTRA), where Wright worked as the director of the agency's Security and Counterintelligence Directorate. Gov't C.A. Br. 4. DTRA was going to award a one-year contract worth approximately $450,000 for intelligence analysis and other work. *Ibid.* The VMW collaborators believed that situating VMW as a subcontractor on that contract would not only be valuable in its own right but would also put VMW in a better position with respect to an upcoming DTRA contract for similar services anticipated to be worth approximately $9.1 million. *Id.* at 5; see, *e.g.*, C.A. App. A186 (testimony of Luis Mercado that the principals discussed that the smaller contract "would have been a good lead-in

and also give us experience because the big contract, the 9.1 or 9.2 commonly known, was coming up, and that would have been a great opportunity"). The VMW collaborators pursued the smaller contract and began to make arrangements to pursue the larger contract as well. Gov't C.A. Br. 11; C.A. App. A198-A203, A213, A217.

With Wright's inside assistance (which included personally signing the document selecting the contractor), VMW secured a subcontracting position on the $450,000 contract. Gov't C.A. Br. 6-10. VMW performed work on that contract from December 2004 to December 2005. *Id.* at 12. The procurement for the $9.1 million contract was ultimately postponed, however, and VMW ran out of work after completing the smaller contract. *Ibid.* The company disbanded. *Ibid.*

2. A federal grand jury returned a two-count indictment against petitioner and Wright. Pet. App. 22a-30a. The indictment charged petitioner with conspiracy to violate, and aiding and abetting a violation of, federal criminal conflict-of-interest statutes. *Id.* at 25a-30a; see 18 U.S.C. 208(a), 216(a)(2); see also 18 U.S.C. 2, 371. Both counts included allegations focused on the $450,000 contract, but the indictment also alleged that, at the time of the competition for that contract, "DTRA officials anticipated awarding at a later date a larger contract for the same type of services with an expected value of about $9.1 million." Pet. App. 23a.

At trial, the government introduced evidence about the anticipated $9.1 million contract and VMW's efforts to position itself with respect to that contract. See, *e.g.*, C.A. App. A186, A198-A203, A213, A217. Petitioner, citing Federal Rule of Evidence 404(b), requested that this evidence be accompanied by a limiting instruction.

Pet. App. 7a-10a; C.A. App. A607-A608. Rule 404(b) provides in relevant part that "[e]vidence of other crimes, wrongs, or acts is not admissible * * * in order to show action in conformity therewith," but "may * * * be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

Petitioner's requested instruction would have told the jury that "[t]he indictment in this case only alleges that the illegal acts concerned the awarding of" the $450,000 contract. C.A. App. A607. It would have instructed the jury not to consider "evidence introduced by the government concerning the awarding of" the $9.1 million contract as "evidence or proof whatever" that petitioner committed "the offense charge [sic] in this indictment." *Id.* at A607-A608. The instruction would have allowed consideration of the $9.1 million contract only if the jury were to "find beyond a reasonable doubt from other evidence in the case that the Defendants did the act or acts alleged in the particular count under consideration," in which case the jury could "then consider evidence as to an alleged subsequent act of a like nature in determining the state of mind or intent with which the Defendants actually did the act or acts charged in the particular count." *Id.* at A608.

The district court declined to give the requested instruction, reasoning that evidence about the $9.1 million contract was not "[e]vidence of other crimes, wrongs, or acts" as to which Rule 404(b) would apply. Pet. App. 10a-11a; see Fed. R. Evid. 404(b). The district court observed that the indictment alleged that VMW was formed "to obtain contracts and subcontracts to perform work for the United States government" and that the indictment went "on to mention the $9.1 million con-

tract." Pet. App. 10a. "The entire corporate structure," the district court reasoned, "is this corporation working to get a $450,000 contract plus the later $9.1 million contract." *Id.* at 8a. The court concluded that evidence about the $9.1 million contract was "intimately intertwined in the indictment itself as well as the evidence that has been put before the jury" and that no limitation on the jury's consideration of that evidence was necessary. *Id.* at 10a-11a.

3. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 15a-20a. Applying abuse-of-discretion review, it concluded that Rule 404(b) had not required the district court to give petitioner's requested limiting instruction. *Id.* at 19a-20a. The court reasoned that Rule 404(b) does not apply to evidence of acts "intrinsic to the crime charged," defined as acts that are either "part of a single criminal episode," "preliminaries to the crime charged," or "inextricably intertwined" with the indicted offenses. *Ibid.* (citations omitted). "Evidence is inextricably intertwined with the evidence regarding the charged offense," the court explained, "if it forms an integral and natural part of the witness's accounts of the circumstances surrounding the offenses for which the defendant was indicted." *Ibid.* (citation omitted). The court proceeded to conclude that "the district court did not err in determining that the evidence was inextricably intertwined with the charged offenses." *Id.* at 20a.

ARGUMENT

Petitioner asks this Court (Pet. 5-14) to address the standard for determining whether particular evidence is "intrinsic" to the crime charged for purposes of Rule 404(b). This Court has recently denied certiorari in a case presenting that issue, see *Siegel* v. *United States*,

131 S. Ct. 899 (2011), and should do the same here. There is no conflict in the circuits that warrants this Court's review, and even if there were, this case would not be a suitable vehicle for resolving it. The jury's consideration of evidence about the $9.1 million contract would not be limited by Rule 404(b) even under the standard that petitioner himself advances, and petitioner's proposed instruction was in any event legally flawed. Certiorari should be denied.

1. Rule 404(b) addresses the use at trial of "[e]vidence of other crimes, wrongs, or acts." Fed. R. Evid. 404(b). Such evidence is "not admissible to prove the character of a person in order to show action in conformity therewith," but is admissible "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Ibid.* When the prosecution seeks to introduce such evidence, a defendant is entitled, on request, to advance notice that the prosecution will introduce it, and to a jury instruction describing the purposes for which it may be considered. *Ibid.*

Because Rule 404(b) addresses only evidence of "*other* crimes, wrongs, or acts" (emphasis added), petitioner correctly acknowledges (Pet. 5) that it does not apply to "evidence intrinsic to the charged crime." See Fed. R. Evid. 404(b) advisory committee note (citing with approval case that recognized a "distinction between 404(b) evidence and intrinsic offense evidence"). The prosecution is therefore free to introduce such intrinsic evidence without notice and without a limiting instruction.

Petitioner correctly points out (Pet. 5-8 & n.2) that different courts of appeals have used different linguistic formulations to describe what constitutes intrinsic evi-

dence. Some courts of appeals, like the court of appeals here, have stated that evidence is intrinsic if it is "inextricably intertwined" with or "completes the story of" the charged crime. See Pet. 5-6 & n.2 (citing cases); see also, *e.g.*, *United States* v. *Basham*, 561 F.3d 302, 326 (4th Cir. 2009), cert. denied, 130 S. Ct. 3353 (2010); *United States* v. *Kaiser*, 609 F.3d 556, 570 (2d Cir. 2010); *United States* v. *Sumlin*, 489 F.3d 683, 689 (5th Cir. 2007). The Third and D.C. Circuits, however, have described evidence as intrinsic only if it "directly proves" the charged offense or relates to "uncharged acts performed contemporaneously with the charged crime" that "facilitate the commission of the charged crime." *United States* v. *Green*, 617 F.3d 233, 248-249 (3d Cir.), cert. denied, 131 S. Ct. 363 (2010) (internal quotation marks and citations omitted); see *United States* v. *Bowie*, 232 F.3d 923, 927, 929 & n.3 (D.C. Cir. 2000) (similar). Similarly, the Seventh Circuit has recently indicated that it will focus on whether evidence is "direct evidence of a charged crime" in determining whether it is intrinsic. *United States* v. *Gorman*, 613 F.3d 711, 719 (2010).

Petitioner urges this Court to standardize the courts of appeals' formulations of what constitutes intrinsic evidence falling beyond the reach of Rule 404(b). That issue does not warrant the Court's review. First, the issue will rarely, if ever, affect the threshold admissibility of evidence. See *Green*, 617 F.3d at 249 ("As a practical matter, it is unlikely that our holding will exclude much, if any, evidence that is currently admissible as background or 'completes the story' evidence under the inextricably intertwined test."). So long as the evidence is not being introduced *solely* for the purpose of proving a defendant's propensity to commit the charged offense—which is highly unlikely to be the case for evi-

dence that a court would consider "intrinsic" to the offense under any definition of that term—the question whether Rule 404(b) applies merely determines the procedures under which the evidence is admitted. Second, it is unclear how often the precise definition of "intrinsic" evidence actually matters in practice. As the Seventh Circuit observed with respect to its own precedent, the distinctions between different formulations are "subtle," and "the inextricable intertwinement doctrine often serves as the basis for admission even when it is unnecessary." *Gorman*, 613 F.3d at 719. Courts therefore likely reach generally consistent conclusions about the application of Rule 404(b) in a high percentage of cases regardless of the particular linguistic formulation they use for the intrinsic-evidence test. Third, a district court's determination of whether or not evidence falls within Rule 404(b) is highly fact-specific and is reviewed under a deferential abuse-of-discretion standard. See, *e.g.*, *Sprint/United Mgmt. Co.* v. *Mendelsohn*, 552 U.S. 379, 384 (2008) ("In deference to a district court's familiarity with the details of the case and its greater experience in evidentiary matters, courts of appeals afford broad discretion to a district court's evidentiary rulings."). Factual differences between cases are, in practice, likely to be far more significant than any "fine distinctions," *Gorman*, 613 F.3d at 719, between different linguistic formulations of the definition of intrinsic evidence.

In support of his contention (Pet. 8-10) that the precise definition of intrinsic evidence has significant practical consequences, petitioner identifies only a single pair of cases in which he claims that courts of appeals have reached divergent conclusions on similar facts. Even those two cases are not materially identical, as

each involved a different type of evidence and a different substantive offense. And, in any event, neither was decided by the court of appeals that decided this case. Petitioner cites no out-of-circuit case that clearly indicates that the evidence presented here would be regarded as Rule 404(b) evidence. In the absence of a clearer indication that the question presented is outcome-determinative in a significant number of cases, this Court's intervention is not warranted.

2. In any event, this case would not be an appropriate vehicle for clarifying the scope of Rule 404(b). For two independent reasons, the proper formulation of the intrinsic-evidence test would not affect the outcome here.

a. First, the evidence at issue here would be outside the scope of Rule 404(b) even under the "direct proof" standard that petitioner advocates. The existence of the $9.1 million contract and the efforts to obtain it were part-and-parcel of the conflict-of-interest crimes with which petitioner was charged.

The indictment alleged that petitioner's company was formed "to obtain contracts and subcontracts to perform work for the United States Government." Pet. App. 23a. The next paragraph alleged that DTRA, a government agency, had completed the specification for a $450,000 contract "to provide counterintelligence support services" and "anticipated awarding at a later date a larger contract for the same type of services with an expected value of about $9.1 million." *Ibid.* Those allegations were expressly incorporated into both counts of the indictment, which charged petitioner with participating in, and conspiring to participate in, a conflict of interest in "the award of a contract for counterintelligence support services at DTRA." *Id.* at 24a, 25a, 30a. At trial, the

prosecution introduced evidence that petitioner and the others wanted to work on the $450,000 contract as a foothold to working on the $9.1 million contract and had made efforts to implement a scheme to work on both contracts. C.A. App. A186, A198-A203, A213, A217.

As the district court recognized, the $9.1 million contract was "part of the conflict of interest conspiracy and substantive charge" relating to the period when Wright was able to leverage his government position for financial gain. Pet. App. 8a. The larger contract, the district court observed, "was part of the purpose of the conspiracy according to testimony that we heard. It was not only the $450,000, but that was going to give them the participation they needed to get a bigger contract." *Id.* at 9a; see also *id.* at 8a ("The entire corporate structure is this corporation working to get a $450,000 contract plus the later $9.1 million contract.").

Even courts applying the "direct proof" standard advocated by petitioner recognize that "acts are intrinsic when they directly prove the charged conspiracy." *Green*, 617 F.3d at 248 (citing *United States* v. *Cross*, 308 F.3d 308, 320 (3d Cir. 2002)). As the Third Circuit, quoting a "prominent commentator," has recognized, "[i]n cases where the incident offered is a part of the conspiracy alleged in the indictment, the evidence is admissible under Rule 404(b) because it is not an 'other' crime. The evidence is offered as direct evidence of the fact in issue, not as circumstantial evidence requiring an inference as to the character of the accused." *United States* v. *Gibbs*, 190 F.3d 188, 217-218 (1999) (quoting 22 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5239, at 450 (1978)), cert. denied, 528 U.S. 1131 (2000) and 529 U.S. 1030 (2000). This rule holds even when the acts that are the subject

of the evidence "were not charged in the indictment," so long as the evidence "show[s] the existence and nature of the conspiracy." *Id.* at 218.

The evidence at issue here meets that bar, and petitioner does not meaningfully argue otherwise. His only discussion of whether he would prevail under the standard he advocates consists of the assertion (Pet. 12) that the government "essentially conceded" the issue in its brief to the court of appeals. That assertion is incorrect. The government's appellate brief simply noted that petitioner had cited out-of-circuit authority applying a "narrower" or "more restrictive" definition of intrinsic evidence and urged the court of appeals to apply its own precedent instead. Pet. App. 67a-68a. The government did not concede that petitioner would have prevailed under the out-of-circuit authority that he cited, and, for reasons just discussed, it is apparent that he would not have.

b. Furthermore, even if petitioner were correct that the evidence here was not intrinsic, and that Rule 404(b) would therefore apply, he still would not have been entitled to the limiting instruction he requested. He wanted to instruct the jury that evidence about the $9.1 million contract constituted no "evidence or proof whatever" that petitioner committed the charged crimes and could be considered only if "other evidence" proved his guilt beyond a reasonable doubt (in which case the evidence could be considered in determining his *mens rea* for sentencing purposes). C.A. App. A607-A608; see 18 U.S.C. 216(a) (punishment for conflict-of-interest depends on defendant's state of mind).

Petitioner's proposal to bar the jury from considering the $9.1 million contract as proof of guilt finds no support in Rule 404(b). That rule precludes the jury

only from considering "other acts" evidence to the extent that such evidence would be offered as proof of "character * * * in order to show action in conformity therewith." Fed. R. Evid. 404(b). It does not bar the jury altogether from considering such evidence as evidence of guilt, so long as the evidence is introduced for some reason other than to prove the defendant's criminal propensity. In particular, the Rule permits "other acts" evidence to be introduced as "proof of motive." *Ibid.* And evidence of the $9.1 million contract (in particular, petitioner's hope of securing that contract) directly demonstrated petitioner's motive for participating in the conflict-of-interest scheme with which he was charged.

The government acknowledged in its appellate brief that, if the evidence were admissible only under Rule 404(b), petitioner "would have been entitled to *a* limiting instruction." Pet. App. 63a (emphasis added) (citing *Huddleston* v. *United States*, 485 U.S. 681, 691-692 (1988)). But petitioner errs in suggesting (Pet. 12) that the government has conceded that petitioner "would have been entitled to *the requested* instruction" (emphasis added). The district court correctly declined to give that instruction, which improperly stated the law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

LANNY A. BREUER
Assistant Attorney General

WILLIAM C. BROWN
Attorney

SEPTEMBER 2011