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Intrinsic Evidence: Do Utah Prosecutors Too Often Neglect This Avenue of Admissibility?

*Blake R. Hills**

I. INTRODUCTION

In a domestic violence case in which a defendant has previously committed violent acts against the victim, the prosecutor will generally seek to introduce evidence of those prior violent acts in the trial for the new offenses. Likewise, a prosecutor would usually seek to introduce evidence that a defendant had previously distributed narcotics into that defendant's trial for possession of narcotics with intent to distribute. In both cases, the prosecutor would attempt to introduce the evidence under Rule 404(b) of the Utah Rules of Evidence, which states:

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 conformity with the character. 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: provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and do so before trial, or during trial if the court excuses lack of pretrial notice on good cause shown.¹

However, is this automatic turning to Rule 404(b) the right choice? In automatically turning to Rule 404(b), do prosecutors ignore another avenue for the introduction of the evidence?

Part II of this article examines the Utah case law that addresses the interplay between intrinsic evidence and Rule 404(b). Part III discusses the specific categories of intrinsic evidence that other courts have found are not subject to Rule 404(b) analysis. Part IV suggests that in automatically turning to Rule 404(b), prosecutors miss another avenue

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1. UTAH R. EVID. 404(b).

for seeking the introduction of evidence. Specifically, prosecutors should first consider arguing that the evidence is admissible because it is intrinsic to the crime charged, rather than simply turning to Rule 404(b). Finally, Part V outlines the procedure for seeking admission of intrinsic evidence.

II. UTAH CASE LAW

Utah appellate courts first engaged in meaningful analysis of this issue in *State v. Burke*.² In *Burke*, the State charged the defendant with sexually abusing a child and her aunt.³ The State introduced evidence that a few hours before sexually assaulting the victims, the defendant asked another woman for her phone number and stroked and caressed her arm against her wishes in order to show that the crimes were part of a pattern of behavior involving increasingly aggressive and opportunistic transgressions of sexual boundaries.⁴ The State also introduced evidence that the defendant had used the homeowner's computer to access pornography on the night of the offenses.⁵

The Court of Appeals found that a "direct relationship" between the uncharged conduct with the woman and the charged crimes was "readily discernable: when considered together, the events illustrate a distinct behavioral arc of increasingly aggressive and opportunistic transgressions of sexual boundaries, apparently fueled by mounting frustration"⁶ The court held that the behavioral arc showed the defendant's purpose or motivation, which was a central element of the charged offenses.⁷

The defendant argued that the trial court abused its discretion in admitting evidence of his conduct with the woman and evidence that he accessed pornography on the computer because the State failed to give notice under Rule 404(b) that it intended to introduce the evidence.⁸ The court noted that under the Federal Rules of Evidence, "Rule 404(b) does not apply where the challenged evidence is 'inextricably intertwined' with evidence of the crime charged."⁹ The court

2. 256 P.3d 1102 (Utah Ct. App. 2011).

3. *Id.* at 1108.

4. *Id.* at 1112–13.

5. *Id.* at 1110.

6. *Id.* at 1113.

7. *Id.*

8. *Id.* at 1124.

9. *Id.*

further noted that “[o]ther act 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 acts were necessary preliminaries to the crime charged” or the other acts are “part of a continuing pattern of illegal activity.”¹⁰

Because the defendant failed to address the issue on appeal, the court did not ultimately decide whether Utah’s Rule 404(b) has the same distinction between extrinsic and intrinsic evidence.¹¹ However, the court did note that Utah’s Rule 404(b) is verbatim to its Federal counterpart.¹²

The Utah Supreme Court addressed *Burke’s* unanswered question in *State v. Lucero*.¹³ In *Lucero*, the defendant was charged with the murder and child abuse of her two-year-old son.¹⁴ The State sought to introduce evidence of a prior incident of child abuse in order to prove the identity of the perpetrator of the charged offenses.¹⁵ The trial court ruled that the evidence was admissible, and the defendant appealed her subsequent conviction.¹⁶

The State argued on appeal that the trial court’s decision should be upheld because the evidence was admissible under Rule 404(b) to prove identity and, alternatively, that it was admissible as part of the continuing narrative.¹⁷ The Supreme Court stated:

Since rule 404(b) applies only “to evidence that is *extrinsic* to the crime charged,” this would preclude applicability of the rule altogether. This is because rule 404(b) applies only to “other” acts— if the evidence of prior acts is “inextricably intertwined” with the crime that is charged, or if both the charged crime and the prior act are considered “part of a single criminal episode,” then rule 404(b) would not apply. Rather, the act would be considered part of the case

10. *Id.*

11. *Id.* at 1125 n.18.

12. *Id.* at 1124.

13. 328 P.3d 841 (Utah 2014), *abrogated on other grounds by* State v. Thornton, 391 P.3d 1016 (Utah 2017). The abrogated part of *Lucero* and other cases was the requirement that the trial court perform a “scrupulous examination” when determining whether evidence is admissible under Rule 404(b). *Id.* at 1025–26.

14. *Lucero*, 328 P.3d at 847.

15. *Id.* at 851.

16. *Id.* at 849–50.

17. *Id.* at 850 n.7.

narrative and have important probative value that bears directly on the crime charged.¹⁸

This statement by the Supreme Court—that Rule 404(b) does not apply to evidence that is intrinsic to the crime charged—answered *Burke's* question in the affirmative.¹⁹

Burke and *Lucero* demonstrate that Utah's Rule 404(b) is not applicable to evidence that is intrinsic to the crime charged. The fact that there is little Utah case law on this legal principle²⁰ demonstrates that it is little understood and generally overlooked. A better understanding of this principle can be gained by looking at examples from other state and federal courts.

III. OTHER CASE LAW

Under American law, intrinsic evidence has traditionally been admitted under specified circumstances.²¹ It is important to remember that there is a profound distinction between intrinsic and extrinsic evidence when determining whether Rule 404(b) applies.

Generally speaking, [i]ntrinsic evidence is directly connected to the factual circumstances of the crime and provides contextual or background information to the jury. Extrinsic evidence, on the other hand, is extraneous and is not intimately connected or blended with the factual circumstances of the charged offense. Because Rule 404(b) only limits evidence of 'other' crimes—those extrinsic to the charged crime—evidence of acts or events that are part of the crime itself, or evidence essential to the context of the crime, does not fall under the other crimes limitations of Rule 404(b).²²

18. *Id.* (citing *United States v. Mower*, 351 F. Supp. 2d 1225, 1230 (D. Utah 2005)).

19. Ultimately, the Supreme Court held that the prior incident of child abuse was not intrinsic to the crime charged because it was "disconnected" from the charged offenses and was used only to prove identity. *Id.*

20. For instance, the Utah Court of Appeals rejected an argument that the defendant's gang activity was not subject to Rule 404(b) analysis in *State v. High*, 282 P.3d 1046 (Utah Ct. App. 2012). The court offered little analysis other than stating that the evidence of gang activity was not "inextricably intertwined" with the charged crime because there was no evidence that the victims were members of a rival gang. *Id.* at 1054.

21. See Thomas M. DiBiagio, *Intrinsic and Extrinsic Evidence in Federal Criminal Trials: Is the Admission of Collateral Other-Crimes Evidence Disconnected to the Fundamental Right to a Fair Trial?*, 47 SYRACUSE L. REV. 1229, 1231–33 (1997).

22. *United States v. Parker*, 553 F.3d 1309, 1314–15 (10th Cir. 2009) (citations and internal quotations omitted). See also, MCCORMICK ON EVIDENCE, § 190 (7th ed. 2016) ("[T]here is no rule against admitting evidence of other crimes per se—the rule excluding proof of other crimes is confined to evidence of extrinsic crimes that are probative only through propensity

When determining whether evidence is intrinsic to the crime charged, Utah courts can look to examples from other courts. Other courts have determined that evidence was intrinsic when it: (1) was inextricably intertwined with the charged crime; (2) provided direct proof of the defendant's involvement in the charged crime; (3) occurred during the same criminal episode as the charged crime; (4) was a necessary preliminary to the charged crime; (5) was background information directly connected to the factual circumstance of the charged crime; (6) was necessary to provide the jury with the context in which the charged crime was committed; or (7) explained relationships between co-defendants. It should be noted that these categories may overlap in certain cases and there may be more than one basis for a court to find that evidence is intrinsic.

A. Inextricably Intertwined

Courts treat evidence that is inextricably intertwined with the crime charged as being outside the scope of Rule 404(b). This category applies when the uncharged misconduct "is an inseparable part of the crime charged, or is otherwise not wholly independent from the crime charged, even though the conduct is not referred to explicitly in the charging document."²³

In *United States v. Warren*, the defendant was charged with murder.²⁴ At trial, the court allowed the prosecution to introduce evidence that the defendant stabbed a second victim immediately after stabbing the first, even though the defendant faced no charges for stabbing the second victim.²⁵ The defendant claimed on appeal that the admission

reasoning.”).

23. Jennifer Y. Schuster, *Uncharged Misconduct Under Rule 404(b): The Admissibility of Inextricably Intertwined Evidence*, 42 U. MIAMI L. REV. 947, 961 (1988). See also Edward J. Imwinkelried, *The Second Coming of Res Gestae: A Procedural Approach to Untangling the “Inextricably Intertwined” Theory for Admitting Evidence of an Accused’s Uncharged Misconduct*, 59 CATH. U. L. REV. 719, 725 (2010) (stating that when the prosecution argues that evidence of uncharged misconduct is “inextricably intertwined” with the crime charged, the prosecution is arguing that the evidence is so closely related that the court should admit evidence of the uncharged misconduct); 1 UTAH PRAC., MANGRUM & BENSON ON UTAH EVIDENCE RULE 404, [D](8)(c)(ix)(e) (October 2017 Update) (“Crimes that ‘are so linked with the crime charged in point of time and circumstances that one cannot be shown without proving the other’ are admissible irrespective of Rule 404(b).”) (citations omitted).

24. 25 F.3d 890, 895 (9th Cir. 1995).

25. *Id.* The defendant had previously been convicted of murder and attempted murder for stabbing both victims, but the murder conviction was vacated while the attempted murder conviction was upheld, leaving only the murder charge to be retried. *Id.* at 894.

of evidence about the stabbing of the second victim violated Rule 404(b).²⁶ The Ninth Circuit Court of Appeals held that Rule 404(b) was not applicable because the evidence of stabbing the second victim was “inextricably intertwined” with evidence of the murder, stating:

Evidence should not be treated as “other crimes” evidence when the evidence concerning the [“other”] act and the evidence concerning the crime charged are inextricably intertwined. The stabbing of [the second victim] is inextricably intertwined with the stabbing of [the first]. Both were part of a single course of action and occurred within moments of each other. Offenses committed in a single criminal episode do not become inadmissible because the defendant is being tried for only some of his acts.²⁷

In *United States v. Kupfer*, the defendant was charged with conspiring with a media consultant to steal funds under a government contract.²⁸ The prosecution was allowed to introduce evidence at trial of a separate uncharged conspiracy involving a second government contract to show that the consultant used funds from the second contract to pay the defendant for his involvement in the charged conspiracy.²⁹ On appeal, the Tenth Circuit Court of Appeals held that Rule 404(b) was not applicable and the evidence was admissible because it “was inextricably intertwined with the charged conduct.”³⁰

B. Proof of the Defendant’s Involvement in the Charged Crime

Courts consider evidence of uncharged misconduct to be intrinsic and not subject to Rule 404(b) if it specifically ties the defendant to the charged offense.

In *United States v. Parker*, the defendant was charged with conspiracy and other crimes for a scheme involving false representations in the sale of small aircraft engines.³¹ The government was allowed to introduce evidence that the defendant had made other fraudulent sales during the same period of time as the sales for which he was charged with conspiracy and other crimes.³² The defendant argued on appeal

26. *Id.* at 895.

27. *Id.* (citations and internal quotations omitted).

28. 797 F.3d 1233, 1235–36 (10th Cir. 2015).

29. *Id.* at 1237–38.

30. *Id.* at 1238.

31. 553 F.3d 1309, 1312 (10th Cir. 2009).

32. *Id.* at 1314.

that the admission of the evidence of the uncharged fraudulent sales violated Rule 404(b), but the Tenth Circuit Court of Appeals disagreed.³³ The court held that evidence of the uncharged fraudulent sales was “intrinsic to the crime” because it substantiated the conspiracy that was charged and provided direct proof that the defendant was a part of the conspiracy.³⁴ The court stated: “The sales were not merely contextual, they supported elements of the charged crimes. Rule 404(b) only applies to evidence of ‘other’ crimes—the transactions were part of the crimes charged, not some other crime.”³⁵

In the West Virginia case of *State v. Harris*, the defendant was charged with two counts of sexually abusing a child during a several-year time period.³⁶ At trial, the victim testified that the defendant had committed other, uncharged sexual assaults against her.³⁷ The defendant argued on appeal that this evidence was inadmissible because it violated Rule 404(b).³⁸ The West Virginia Supreme Court held that this evidence was intrinsic to the crimes that were charged.³⁹ The court held that the evidence was intrinsic because it helped to refute the defendant’s assertions that he was not present during the time period of the charged offenses and that someone other than him abused the victim.⁴⁰

C. Same Criminal Episode

Under this category, courts hold that evidence of uncharged misconduct is intrinsic to the crime charged and not subject to Rule 404(b) if it is part of the same criminal episode. This category encompasses misconduct that took place contemporaneously with the charged crime or was part of the same transactions as the charged crime.⁴¹

In *United States v. Cancelliere*, the defendant was charged with bank fraud, false statements, and money laundering.⁴² The prosecution

33. *Id.*

34. *Id.* at 1315.

35. *Id.*

36. 742 S.E.2d 133, 135 (W. Va. 2013).

37. *Id.* at 136.

38. *Id.* at 137.

39. *Id.* at 139.

40. *Id.*

41. See Schuster, *supra* note 23, at 964.

42. 69 F.3d 1116, 1118 (11th Cir. 1995).

introduced evidence at trial that the defendant engaged in similar uncharged activities and had made false statements.⁴³ The Eleventh Circuit Court of Appeals held that the evidence was intrinsic and not subject to Rule 404(b) because the uncharged misconduct was “part of the manner and means by which [the defendant] carried out his scheme to defraud.”⁴⁴

In *United States v. Derring*, the defendant was charged with interstate transportation of stolen motor vehicles.⁴⁵ At trial, the prosecution presented evidence that the defendant had murdered the owner of one of the vehicles in another state and had tried to dispose of the vehicle because it was “hot”.⁴⁶ The Eighth Circuit Court of Appeals held that this evidence was admissible and was not governed by Rule 404(b) because the murder of the vehicle owner, and the theft of and attempt to dispose of the vehicle were part of a single criminal transaction that occurred together with the charged interstate transportation over a four-day period.⁴⁷ The court stated:

If several crimes are intermixed, or blended with one another, or connected so that they form an indivisible criminal transaction, and full proof by testimony, whether direct or circumstantial, of any one of them cannot be given without showing the others, evidence of any or all of them is admissible against a defendant on trial for an offense which is itself a detail of the whole criminal scheme.⁴⁸

D. Necessary Preliminary Step

Under this category, evidence of uncharged misconduct is intrinsic and exempt from Rule 404(b) when the evidence was a prelude to or was a necessary preliminary step to the charged crime.

In *United States v. Lambert*, the defendant was charged with robbing a bank with an accomplice in early January.⁴⁹ The accomplice testified that he and the defendant began discussions about robbing a bank just after Christmas, and while they were in a supermarket with a bank located inside on January 3, the defendant stated that he had seen

43. *Id.* at 1123–24.

44. *Id.* at 1124.

45. 592 F.2d 1003, 1004 (8th Cir. 1979).

46. *Id.* at 1006.

47. *Id.* at 1007.

48. *Id.* (citation omitted).

49. 995 F.2d 1006, 1007 (10th Cir. 1993).

a man in the supermarket with lots of money in a bag and he could “slam the guy and take the bag.”⁵⁰ The Tenth Circuit Court of Appeals held that this testimony was properly admitted, and it was not subject to 404(b) analysis because the discussion in the one- to two-week period before the robbery was intrinsic to the charged crime since it “occurred in the preliminary planning of the bank robbery.”⁵¹ The fact that the discussion did not focus on the bank that was ultimately robbed was not dispositive, because it was part of deciding how and when to undertake a robbery.⁵²

In *United States v. Torres*, the defendants were charged with conspiracy and selling a kilogram of cocaine.⁵³ At trial, the prosecution introduced evidence that the defendants had been involved in two earlier sales of smaller amounts of cocaine.⁵⁴ The Fifth Circuit Court of Appeals held that the earlier transactions were intrinsic to the charged crimes and not subject to Rule 404(b) because they were “necessary preliminaries” during which the plans for the charged sale were laid.⁵⁵

E. Background

Courts have found that evidence is intrinsic, and not subject to Rule 404(b) when the evidence constitutes background information directly connected to the factual circumstance of the charged crime.

In *United States v. Irving*, the defendant was charged with both possession of crack cocaine with intent to distribute and with witness tampering for seeking the death of a police lieutenant.⁵⁶ At trial, the prosecution introduced evidence that the lieutenant had been involved in a prior drug-related investigation of the defendant.⁵⁷ The defendant argued that the evidence was inadmissible under Rule 404(b) because it did not establish any element of the crimes for which he was charged.⁵⁸ The Tenth Circuit Court of Appeals disagreed, and held

50. *Id.*

51. *Id.* at 1008.

52. *Id.*

53. 685 F.2d 921 (5th Cir. 1982).

54. *Id.* at 923.

55. *Id.* at 924.

56. 665 F.3d 1184, 1187–88 (10th Cir. 2011).

57. *Id.* at 1210.

58. *Id.* at 1211.

that Rule 404(b) was not applicable because the evidence was intrinsic.⁵⁹ The court stated:

We have never required that the other-act evidence establish an element of the charged offense. Rather, intrinsic evidence is that which is “directly connected to the factual circumstances of the crime and provides contextual or background information to the jury. Extrinsic evidence, on the other hand, is extraneous and is not intimately connected or blended with the factual circumstances of the charged offense.”⁶⁰

The court also held that the evidence of the prior drug-related investigation was important background information for the jury:

In this case, Mr. Irving was charged with a drug offense arising from a 2008 transaction, and yet two witnesses testified that Mr. Irving had sought the death of Lt. Stark as early as 2006. Without the proper context, this could have created understandable confusion with the jury. The government sought to avoid this by using Lt. Stark’s testimony to both explain why Mr. Irving would have wanted him killed in 2006 and to further illuminate Mr. Irving’s ongoing motivation . . . to retaliate against Lt. Stark. Lt. Stark’s testimony formed an “integral and natural part of the witness[es]” accounts of the circumstances surrounding the offense for which the defendant was indicted. It is entirely germane background information, which is directly connected to the factual circumstances of the crime, and thus is intrinsic to the crime at issue. Thus, Rule 404(b) is inapplicable.⁶¹

In *United States v. Weeks*, the defendant was charged with “assaulting a federal officer with a deadly weapon.”⁶² The prosecution introduced evidence “that the [federal] agent was investigating stolen motor vehicles at the time of the assault.”⁶³ The Eleventh Circuit Court of Appeals held that the evidence was not extrinsic evidence governed by Rule 404(b):

In this case, the investigation into stolen vehicles explained the agent’s presence with Weeks and his associates, and their animosity towards the agent. The investigation was inextricably linked to the charged offense of assault, was reasonably necessary to complete the

59. *Id.* at 1212–13.

60. *Id.* at 1212 (citation and internal quotations omitted).

61. *Id.* at 1212–13 (citations and internal quotations omitted).

62. 716 F.2d 830, 831 (11th Cir. 1983).

63. *Id.* at 832.

story of the crime, and therefore was not extrinsic under Rule 404(b).⁶⁴

F. Context

Under this category, uncharged misconduct evidence is intrinsic, and not subject to Rule 404(b), when it explains the context of the crime to the jury.⁶⁵ “Without the admission of this evidence, the prosecution would be unable to present a coherent and comprehensive story regarding the commission of the crime to the jury.”⁶⁶

In the West Virginia case of *State v. McKinley*, the defendant was charged with the murder of his girlfriend, who was the mother of his child.⁶⁷ At trial, the prosecution introduced evidence of two prior incidents of domestic violence committed by the defendant against the victim.⁶⁸ The first incident involved the defendant strangling the victim two months before the murder, and the second involved the defendant pushing the victim down a hill one month before the murder.⁶⁹ The West Virginia Supreme Court held that this evidence was intrinsic evidence, which was not subject to Rule 404(b). The court stated:

Although the two domestic violence incidents in this case were not a “single criminal episode,” we believe this evidence was necessary to place [the victim]’s death in context with her relationship with Mr. McKinley, and to complete the story of the violence Mr. McKinley inflicted on her.⁷⁰

In *United States v Hall*, the defendant and co-defendant, Woods, were charged with possession of cocaine with intent to distribute after they were caught transporting four kilograms of cocaine in the spare

64. *Id.* (citations omitted).

65. *See* DiBiagio, *supra* note 21, at 1246.

66. *Id.* *See also*, MCCORMICK ON EVIDENCE, *supra* note 22, at § 190 (“But the question remains—Is there any other background information that shows a defendant’s involvement in other crimes and that serves a nonpropensity purpose? We think there is. Other-crime evidence should be admissible to complete the story if it satisfies ‘the offering party’s need for evidentiary richness and narrative integrity in presenting a case.’ This rationale applies: ‘(1) when reference to the other crimes is essential to a coherent and intelligible description of the offense at bar, (2) when the incomplete story that the defendant would prefer leaves a gap that would frustrate ‘the jurors’ expectations about what proper proof should be,’ or (3) when the material in question is necessary to a fair understanding of the behavior of individuals involved in the criminal enterprise or the events immediately leading up to them.”).

67. 764 S.E.2d 303, 307 (W. Va. 2014).

68. *Id.* at 314.

69. *Id.*

70. *Id.* at 316.

tire of a Ford Explorer.⁷¹ At trial, Woods testified that he had purchased cocaine from the defendant about a year before the charged offense, and the defendant had told him that he would be willing to transport drugs in the future if the need arose.⁷² The Tenth Circuit Court of Appeals held that this testimony was intrinsic evidence which was not subject to Rule 404(b).⁷³ The court stated, “Generally speaking, intrinsic evidence is that which is directly connected to the factual circumstances of the crime and provides contextual background information to the jury.”⁷⁴ The court held that the testimony of co-defendant Woods met this definition:

[A]t the time of the charged crime, Hall was traveling with Woods in Woods’ . . . vehicle transporting four kilograms of cocaine. Less than a year prior to this, Hall and Woods had met for the purpose of conducting a drug deal. During this initial encounter, Woods asked Hall if he could “make some runs for [Woods] to pick up some cocaine.” . . . This initial interaction and drug deal is directly connected to the factual circumstances of the charged crime and provides contextual or background information as to how it came to be that Woods contacted Hall to make the drug run in November of 2010. . . . Evidence of this prior interaction was necessary to provide the jury with the background and context of how Hall was involved with Woods, the nature of their relationship, and why he was riding . . . with Woods on November 3, 2010.⁷⁵

G. Relationships Between Co-Defendants

Courts have found that evidence is intrinsic and not subject to Rule 404(b) when it is used to explain relationships between those who have committed crimes with each other. This category of intrinsic evidence “plays a particularly compelling role in conspiracy and racketeering prosecutions,” because “it is essential that the prosecution be permitted to inform the jury of the background, existence and structure of the enterprise” by showing uncharged misconduct committed by co-defendants.⁷⁶

71. 508 F. App’x 776, 777 (10th Cir. 2013).

72. *Id.*

73. *Id.* at 779.

74. *Id.* (citation omitted).

75. *Id.* at 779–80 (citations omitted).

76. DiBiagio, *supra* note 21, at 1250. *See also id.* at 1251 (“Intrinsic evidence is particularly appropriate in conspiracy prosecutions where the government’s case is typically dominated by

In *United States v. Krout*, multiple co-defendants, who were members of the Texas Mexican Mafia, were charged with racketeering offenses.⁷⁷ The co-defendants argued on appeal that the admission of evidence about several uncharged murders and an uncharged attempted murder violated Rule 404(b) because it was offered to prove bad character.⁷⁸ The Fifth Circuit Court of Appeals disagreed.⁷⁹ The court held that the evidence of the murders and attempted murder was not introduced as character evidence, but as acts committed in furtherance of the racketeering offenses.⁸⁰

The government is not limited in its proof of a conspiracy or racketeering enterprise to the overt or racketeering acts alleged in the indictment. [The co-defendants] had all served as “generals” in the Texas Mexican Mafia, commanding the members outside of prison in San Antonio. Evidence of how disputes were settled with these members or how they were treated if believed to be cooperating with law enforcement was properly admitted to prove the allegation in the indictment that murder and extreme violence were part of the organization’s pattern of racketeering activities.⁸¹

In *United States v. Gibbs*, the defendant was charged with several conspiracy, drug, and weapons charges.⁸² The prosecution presented evidence at trial from three individuals who testified that they had assisted the defendant in illegal transactions which involved large quantities of cocaine.⁸³ On appeal, the defendant argued that this evidence violated Rule 404(b) because the transactions all occurred before “the date the government had alleged that the cocaine conspiracy began.”⁸⁴ The Fourth Circuit Court of Appeals disagreed, noting that “evidence of activities occurring before the charged time frame of the conspiracy

accomplice testimony. The existence of a trust relationship is typically relevant in a conspiracy prosecution because of the government’s use of accomplice/co-conspirator witnesses. Therefore, intrinsic evidence often serves to corroborate accomplice testimony by showing the nature of the relationship between the defendant and his cooperating accomplices/co-conspirators, explaining why the defendant would ask his cooperating accomplices/co-conspirators to commit a crime with him and explaining why a defendant would trust these individuals with knowledge of his involvement in criminal conduct.”)

77. 66 F.3d 1420, 1424 (5th Cir. 1995).

78. *Id.* at 1425.

79. *Id.*

80. *Id.*

81. *Id.*

82. 547 F. App’x. 174, 177 (4th Cir. 2013).

83. *Id.* at 180–81.

84. *Id.* at 181.

does not automatically transform that evidence into other crimes evidence” subject to Rule 404(b).⁸⁵ The court held that the challenged evidence was admissible, because it “allowed the jury to understand the background of the conspiracy and the extent of the relationship and dealings between Gibbs and other relevant players in the conspiracy.”⁸⁶

In short, there is a wide variety of evidence that can properly be classified as intrinsic evidence that is not subject to Rule 404(b). Prosecutors should consider each category of intrinsic evidence discussed above as a potential basis for admitting evidence at trial.

IV. WHY INTRINSIC, RATHER THAN 404(B)

There are several reasons why prosecutors should seek to introduce intrinsic evidence under one of the categories discussed above, rather than seeking introduction under Rule 404(b). First, the 1991 advisory committee note to Federal Rule 404(b) specifically states that the rule “does not extend to evidence of acts which are ‘intrinsic’ to the charged offense.”⁸⁷ Since Utah’s Rule 404(b) is almost identical to the Federal rule,⁸⁸ and the Utah Supreme Court stated in *Lucero* that Utah’s Rule 404(b) “applies only ‘to evidence that is *extrinsic* to the crime charged,’”⁸⁹ it is clear that the category of evidence that is not subject to Rule 404(b) is much more expansive than has traditionally been recognized.

Second, this approach is consistent with the approach taken by Utah courts before Rule 404(b) existed. For instance, although the Utah Supreme Court did not use the term “intrinsic evidence,” it applied the principle in the 1947 case *State v. Scott*.⁹⁰ In that case, multiple defendants were charged with unlawfully obtaining money from a victim in a confidence game in which two defendants made contact with the victim on the street and the others acted as lookouts.⁹¹ The

85. *Id.* (citation and internal quotations omitted).

86. *Id.*

87. FED. R. EVID. 404(b) advisory committee’s note to 1991 amendments.

88. There are only two minor stylistic differences between the rules. Utah’s rule uses the word “conformity” rather than “accordance” in (b)(1) and reads “if the court excuses lack of pre-trial notice on good cause shown,” UTAH R. EVID. 404(b), rather than “if the court, for good cause, excuses lack of pre-trial notice” in (b)(2)(B), FED. R. EVID. 404(b).

89. *State v. Lucero*, 328 P.3d 841, 850 n.7 (Utah 2014) (citing *United States v. Mower*, 351 F. Supp. 2d 1225, 1230 (D. Utah 2005)), *abrogated on other grounds by* *State v. Thornton*, 391 P.3d 1016 (Utah 2017).

90. 175 P.2d 1016 (Utah 1947).

91. *Id.* at 1017–18.

prosecution introduced evidence that during the five days prior to the charged offense, the defendants went through the same activities with many other individuals as they did with the victim, with the defendants playing varying roles.⁹² The defendants challenged the introduction of this evidence on appeal, claiming that it was unrelated to the charged offense and was introduced solely to show bad character and a propensity to commit similar crimes.⁹³ The court disagreed, and held that the evidence was admissible because:

[t]he evidence in this case as to prior acts of the defendants was relevant to the issues of the case for other purposes than merely to show the defendants' disposition to commit crime. The evidence shows that all the defendants were acquainted with each other and that together they had gone thru the same performance with many other persons as they went [through with the victim]. Such evidence tends to establish that in the [charged offense] the defendants were acting according to a predetermined plan and that [the lookout defendants] were playing set rules of the scheme though they were some distance from [the defendants who made contact with the victim].⁹⁴

Third, proceeding under Rule 404(b) is anything but a sure bet when it comes to admitting evidence. Indeed, the nearly identical Federal "Rule 404(b) has generated more reported decisions than any other provision of the Federal Rules."⁹⁵ There is little difference in state courts. "In many jurisdictions, the admissibility of uncharged-misconduct evidence is not only the most frequently litigated issue on appeal, but also the most common ground for reversal."⁹⁶ Utah's own

92. *Id.* at 1021.

93. *Id.*

94. *Id.* at 1023. The court also stated that in regard to other bad acts evidence, "[t]he basic rule of admissibility of evidence is that all evidence having probative value—that is, that tends to prove an issue, is admissible." *Id.* at 1021. The court added that other bad acts evidence "is admissible not because it comes under an exception to the rule of exclusion but that the rule of exclusion is sufficiently narrow that it does not apply to such evidence and the evidence is therefore admissible under the basic rule that all evidence having probative value is admissible." *Id.* at 1022. *See also* State v. Neal, 254 P.2d 1053, 1056–57 (Utah 1953) (stating that other bad acts evidence "which rationally tends to prove any material issue . . . should be received if offered for an admissible purpose" and "is excluded only where the sole purpose is to show defendant's propensity for the commission of crime . . ."); State v. Harries, 221 P.2d 605, 617 (Utah 1950) ("Any pertinent fact which throws light upon the subject under judicial consideration, the accused's guilt or innocence of the crime for which he is charged, is admissible" and "is not to be excluded merely because it may also prove or tend to prove that the accused has committed another similar crime.").

95. Imwinkelried, *supra* note 23, at 721.

96. *Id.* (citations omitted).

history with Rule 404(b) has been tortured, to say the least. When Utah adopted Rule 55,⁹⁷ the predecessor to Rule 404(b), the Utah Supreme Court held in *State v. Forsyth* that it was an inclusionary rule.⁹⁸ But by the time the Utah Supreme Court decided *State v. Shickles*, Rule 404(b) was viewed as an exclusionary rule.⁹⁹ The tide shifted again, as shown by the Utah Supreme Court's view in *State v. Thornton* that Rule 404(b) is an inclusionary rule.¹⁰⁰ The takeaway is that relying solely on Rule 404(b) carries inherent risk.

V. INTRODUCING INTRINSIC EVIDENCE

Because Rule 404(b) does not apply to intrinsic evidence, prosecutors are not bound by its notice requirement¹⁰¹ when they seek to introduce this evidence. However, giving notice to the defense is clearly the better practice. Prosecutors who fail to alert the defense and the court that they will be seeking to introduce intrinsic evidence risk an adverse ruling when the issue arises mid-trial and the judge is forced

97. Rule 55 of the Utah Rules of Evidence stated as follows:

Subject to Rule 47 evidence that a person committed a crime or civil wrong on a specified occasion, is inadmissible to prove his disposition to commit crime or civil wrong as the basis for an inference that he committed another crime or civil wrong on another specified occasion but, subject to Rules 45 and 48, such evidence is absence admissible when relevant to prove some other material fact including of mistake or accident, motive, opportunity, intent, preparation, plan, knowledge or identity.

UTAH R. EVID. 55 (1971). Rules 47 and 48 were concerned with the admission of evidence related to an individual's character trait in ways not relevant here. See *id.* 47, 48. Rule 45, similar to current Rule 403, provided that a trial court had "discretion [to] exclude evidence if [the court] finds that its probative value is substantially outweighed by the risk that its admission will (a) necessitate undue consumption of time, or (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury, or (c) unfairly and harmfully surprise a party . . ." *Id.* at 45.

98. 641 P.2d 1172, 1175–76 (Utah 1982) (citing *State v. Scott*, 175 P.2d 1016, 1021–22 (Utah 1947)).

99. 760 P.2d 291, 295 (Utah 1988), *abrogated by* *State v. Doporto*, 935 P.2d 484, 497 (Utah 1997) (stating that under rule 404(b), evidence of other crimes is generally inadmissible unless it tends to have a special relevance to a controverted issue and is introduced for a purpose other than to show the defendant's predisposition to criminality).

100. 391 P.3d 1016, 1027 (Utah 2017) ("The threshold 404(b) question is whether the evidence has a plausible, avowed purpose beyond the *propensity* purpose that the rule deems improper. If it does then the evidence is presumptively admissible (subject to rule 402 and 403 analysis).").

101. See UTAH R. EVID. 404(b)(2)(A)–(B) ("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 excuses lack of pretrial notice on good cause shown.").

to make a ruling without adequate time or preparation.¹⁰² At the very least, raising the issue for the first time mid-trial can be disruptive to the proceedings.¹⁰³ Therefore, prosecutors should file a pre-trial notice of intent when they seek to introduce intrinsic evidence.¹⁰⁴ The notice should provide a synopsis of the evidence of uncharged misconduct and should indicate that the prosecution will be relying on the intrinsic evidence doctrine of admissibility.¹⁰⁵

If the defense intends to object to introduction of the evidence described in the pre-trial notice, it should file a motion *in limine* indicating that it objects. This motion by the defense should contain more than just a cursory objection and should provide argument about why the evidence is not intrinsic to the crime charged and how the evidence can be omitted without rendering associated testimony less credible or less understandable.¹⁰⁶ A pre-trial evidentiary hearing may be necessary in certain cases.

If the issue is raised and examined in this manner before trial, the judge will be able to make a better decision. The judge must begin by determining whether the evidence is intrinsic to the crime charged. If it is, the judge must still perform the analysis under Rule 403 of the

102. See Imwinkelried, *supra* note 23, at 734 (“At trial, the judge may have to resolve a difficult editorial question: if the government witness proposes to give his or her account of the relevant events, would the deletion of references to the defendant’s uncharged misconduct impair the narrative integrity of the account as a whole? . . . Time constraints and the presence of a jury understandably generate pressure for relatively quick decisions at trial. In the ‘hurly burly’ of that setting, the judge may find it extremely difficult to engage in deliberate, careful editing. In particular, if he or she attempted the necessary editing at sidebar with a jury impatiently waiting, the doctrine is far more likely to be misapplied.”).

103. See *id.* at 731 (“When the issue does arise [mid-trial], the judge’s options are limited by the jury’s presence and time constraints. The following, then, become the only possibilities: (1) discussing the issue in the jury’s hearing, thereby exposing the jury to the challenged evidence; (2) conducting a whispered sidebar debate; or (3) excusing the jurors and sending them to the deliberation room.”).

104. See DiBiagio, *supra* note 21, at 1243.

105. See Imwinkelried, *supra* note 23, at 731–32. In appropriate cases, a wise prosecutor will give notice and argue that evidence is admissible because it is intrinsic to the crime charged, and even if it is not, it is admissible under Rule 404(b) anyway. See, e.g., *State v. McKinley* 764 S.E.2d 303, 314–15 (W. Va. 2014) (noting that the prosecution filed pre-trial notice in a murder case that it would seek to introduce prior acts of domestic violence perpetrated by the defendant against the victim, arguing that the evidence was admissible because it was intrinsic to the murder, and even if it was not, the evidence was admissible under Rule 404(b)).

106. See Imwinkelried, *supra* note 23, at 732 (“The defense may not merely assert that the references [to intrinsic evidence] are readily severable; the defense must actually show the judge, through [a] synopsis, how the severance can be effected.”).

Utah Rules of Evidence¹⁰⁷ to determine whether the evidence is admissible.¹⁰⁸ If the judge rules that the evidence is admissible as intrinsic evidence, the judge should provide a limiting instruction forbidding the jury from convicting the defendant based on the defendant's character.¹⁰⁹ The instruction would also "explain why the jury is allowed to hear references to the uncharged misconduct."¹¹⁰

VI. CONCLUSION

It is apparent that many Utah prosecutors overlook the intrinsic evidence doctrine when they seek to introduce evidence of other misconduct committed by the defendant. Although Utah courts have recognized that Rule 404(b) does not apply to intrinsic evidence, it is apparent that the intrinsic evidence doctrine is much more expansive than has been recognized thus far in Utah case law.¹¹¹ Prosecutors should use the doctrine to its full extent to help jurors have a better and fuller understanding of the testimony they hear during trial. As the United States Supreme Court recognized in *Old Chief v. United States*, jurors have certain expectations concerning a party's case, and "[i]f [jurors'] expectations are not satisfied, triers of fact may penalize the party who disappoints them by drawing a negative inference against that party."¹¹² Indeed,

107. Rule 403 provides, "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." UTAH R. EVID. 403.

108. See *United States v. Hall*, 508 F. App'x 776, 779 (10th Cir. 2013) ("[I]ntrinsic evidence remains subject to analysis under Rule 403 and may not be admitted if its probative value is substantially outweighed by the danger of unfair prejudice."); *United States v. Irving*, 665 F.3d 1184, 1212 (10th Cir. 2011) ("If the contested evidence is intrinsic to the charged crime, then Rule 404(b) is not even applicable. Of course, such evidence remains 'subject to the requirement of Rule 403 that its probative value is not substantially outweighed by the danger of unfair prejudice.'" (citations omitted). But see *State v. Harris*, 724 S.E.2d 133, 139 (W. Va. 2013) ("[H]istorical evidence of uncharged prior acts which is inextricably intertwined with the charged crime is admissible over a Rule 403 objection.") (citation omitted).

109. See *Imwinkelried*, *supra* note 23, at 732–33.

110. *Id.* at 733 ("By way of example, suppose that the prosecution's evidence was an audiotape recording on which the accused both described the charged offense and boasted about the uncharged misconduct. The references to the uncharged misconduct might be so closely commingled with the statements about the charged crime that the redaction of the references would garble the tape to the point of incomprehensibility. If that was the only reason for the judge's ruling permitting the jury to hear the references, the jury would be told precisely that.")

111. See *supra* notes 23–86 and accompanying text.

112. 519 U.S. 172, 188–89 (1997) (citation and internal quotations omitted).

[t]he “fair and legitimate weight” of conventional evidence showing individual thoughts and acts amounting to a crime reflects the fact that making a case with testimony and tangible things not only satisfies the formal definition of an offense, but tells a colorful story with descriptive richness. . . . Evidence thus has force beyond any linear scheme of reasoning, and as its pieces come together a narrative gains momentum, with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict. . . . Thus, the prosecution may fairly seek to place its evidence before the jurors, as much to tell a story of guiltiness as to support an inference of guilt, to convince the jurors that a guilty verdict would be morally reasonable as much as to point to the discrete elements of a defendant’s legal fault.¹¹³

Prosecutors and courts should recognize that intrinsic evidence is necessary for jurors to have a complete understanding of the cases they are asked to hear, so they can decide those cases fairly. As the Supreme Court stated in *Old Chief*,

People who hear a story interrupted by gaps of abstraction may be puzzled at the missing chapters, and jurors asked to rest a momentous decision on the story’s truth can feel put upon at being asked to take responsibility knowing that more could be said than they have heard. A convincing tale can be told with economy, but when economy becomes a break in the natural sequence of narrative evidence, an assurance that the missing link is really there is never more than second best.¹¹⁴

Prosecutors have a heavy burden in establishing a defendant’s guilt, and they should endeavor to present the jury with a complete evidentiary story. This effort should include advocating for all avenues of admissibility of evidence, including the intrinsic evidence doctrine. The time for neglecting this doctrine has passed.

113. *Id.* at 187–88 (citations omitted).

114. *Id.* at 189.