Case No. 23-5027

In the United States Court of Appeals
for the Tenth Circuit

United States of America,
Plaintiff-Appellee,

v.

Craig Wallace Wood,
Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Oklahoma
The Honorable John F. Heil, III, Chief District Judge
D.C. Case No. 4:21-cr-00484-JFH-1

Appellant Craig Wallace Wood's Reply Brief

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Oral argument is requested.

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Table of Contents

Page

Table of Authorities

Cases

Statutes

Other Authorities

Rules

Reply Argument

In his opening brief, Appellant Craig Wallace Wood raises several issues that—individually or cumulatively—mean that he should receive a new trial. The government's responses to his arguments are unpersuasive.

I. It was reversible error to permit the government to use a late-disclosed and incomplete certificate to authenticate critical proof of Indian status.

Foremost among the district court's errors was its countenancing of the government's reliance on a late-disclosed and incomplete certificate to authenticate its only proof of Mr. Wood's blood quantum and recognition as an Indian. The government agrees (at 43–44) that this issue is preserved, but it argues (at 22) that "[t]he certificate of authenticity satisfied both Rule 803(6) and 902(11)," and it asserts (at 49) that any error was harmless. But the government's arguments are underdeveloped, confused about the law, and mistaken on the facts.

A. The government's Rule 902(11) disclosure was inexcusably late.

In his opening brief (at 26–29), Mr. Wood demonstrates that the government failed to comply with its Rule 902(11) notice obligation, which (1) requires disclosure of intent to use a certificate and of the certificate itself, and not simply of the record it is being used to authenticate; (2) must be met sufficiently before trial to allow the opposing party time to investigate the actual certificate; and (3) has no exceptions, or at least none that would apply in this case. Because the government disclosed its intent to use a certificate to authenticate the tribal record—and the

certificate itself—only after jury selection was over, the district court erred when it relied on the certificate over Mr. Wood's objection.

In its terse response, the government does not ground any argument in the text, purpose, or history of the Rule—or in any caselaw interpreting it. It does not say what notice the rule requires, never claims to have complied with the rule, and does not argue that any failure to comply could or should be forgiven. Instead, it treats Rule 902(11) more like a suggestion than a rule, and it makes claims about equities that are legally, factually, and logically flawed.

First, the government says (at 44) that Mr. "Wood could not have been surprised" that it "pursued" authentication via "certificate," since that was one of two available "avenues for authentication" of the tribal records. *See United States v. Walker*, 85 F.4th 973, 982 (10th Cir. 2023) (holding that tribal records cannot be automatically self-authenticating). One purpose of pretrial notice requirements generally, of course, is to avoid unfair surprise at trial. This is why legislators create such rules and courts should be vigilant about enforcing them. But once rules are formulated to "capture[] . . . background principle or policy," they then "operate[] independently" and "decisionmakers [must] follow [them], even when direct application of the background principle or policy to the facts would produce a different result." Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 Harv. L. Rev. 22, 58 (1992). Mr. Wood need not prove that he was actually surprised *in this*

instance in order to show that the district court erred, because Rule 902(11) required pretrial notice regardless.

Put another way, the opponent of evidence is not required to show prejudice in order to enforce Rule 902(11); but even if he were, he would not be required to show surprise. The purpose of Rule 902(11) is to ensure that the opponent of evidence has "a fair opportunity" before trial "to challenge" any "certificate" being used to authenticate that evidence. Fed. R. Evid. 902(11); Fed. R. Evid. 902, Committee Notes on Rules—2000 Amendment ("full opportunity to test the adequacy of the foundation set forth in the declaration"). Even if a defendant were unsurprised that the government broke the rules, he would still be prejudiced if, like Mr. Wood, he lacked the requisite opportunity to test the certificate's adequacy before trial because he did not actually have a copy of it.

In any event, the premise of the government's shouldn't-have-been-surprised argument is false, as it no longer had two available avenues for authentication when it disclosed the certificate. Rule 902(11) only allows a party to authenticate a record of regularly conducted activity via certificate if it gives proper notice "[b]efore the trial." Here, the government gave no hint that it would use Rule 902(11) until lunch on the first day of trial, R3:100, after consistently maintaining throughout the morning that it would be calling a live authentication witness, R2:13–14, R3:25–26. By then, it was too late to give proper notice, and Mr. Wood certainly would have been

surprised that the government was pursuing authentication-by-certificate nonetheless.

Second, the government asserts (at 44) that "a live witness or a certificate of authenticity would have offered the same evidence: that the tribal status record was a record of a regularly conducted activity pursuant to Federal Rule [of Evidence] 803(6)." The question before the district court, however, was whether the government gave the reasonable pretrial notice that Rule 902(11) requires. Possible parallels between an undisclosed certificate and the hypothetical testimony of a witness aren't—and can't substitute for—reasonable pretrial notice of the actual contents of the certificate. If they could, the notice requirement would be obliterated, since by definition a Rule 902(11) certificate substitutes for calling a live witness to authenticate a record of regularly conducted activity. Essentially, the government is arguing that Rule 902(11)'s notice requirement shouldn't exist—or shouldn't be enforced—because it is completely superfluous. But Rule 902(11)'s notice requirement exists—and is enforceable—whether or not the government thinks its a good idea.

In any event, the government is incorrect as a factual matter for two reasons. One, a witness would not have offered the same *evidence* as the certificate, because the certificate was not evidence at all: it was neither admitted as an exhibit nor shown to the jury, but instead was used to render the tribal record self-authenticating. And two, a witness could have provided significantly more information than the bare-

bones certificate. The certificate just tracked the language of Rule 803(6)(A)–(C) without so much as saying what record it purported to authenticate, as discussed in detail below. But a live witness might have explained what the tribal record actually was; when and how it was created given the three different dates on its face; and why crucial information was handwritten onto an otherwise-typewritten document.[1]

The government's same-evidence argument appears to be another assertion that Rule 902(11)'s notice requirement is merely a suggestion that it may ignore with impunity, so long as the defendant is unable to show that he was actually prejudiced by the government's unnoticed use of the certificate. But the whole point of the notice requirement is to place the burden on the proponent to provide his opponent with sufficient time to find problems with the certificate. *See* Fed. R. Evid. 902(11). It would make no sense to shift the burden to Mr. Wood, as the government suggests, since it is generally impossible for a party to prove that it could have found a problem with a certificate if only it had been disclosed in time. Certainly no court has ever rewritten Rule 902(11) to require that.

Third, the government asserts (at 45) that the certificate "was produced before the venire was sworn," which is when "a jury trial begins." If the government intended this as an argument that it provided the requisite pretrial notice, it should have

[1] By comparison, the government's medical records authentication witness described her specific duties regarding those records, R2:57; examined them immediately before authenticating them, R2:58; and was available for cross-examination, R2:60.

responded to Mr. Wood's preemptive discussion of this issue in his opening brief (at 30–32), where he explained that the swearing of the venire only marks the beginning of trial for double jeopardy purposes. *See, e.g.*, *Martinez v. Illinois*, 572 U.S. 833, 840 (2014) ("Jeopardy attaches when . . . a jury is empaneled and sworn.") (quotation marks omitted). For all other purposes—and particularly questions of timeliness—voir dire is part of the criminal trial. *See, e.g., Gomez v. United States*, 490 U.S. 858, 876 (1989) ("jury selection" is a "critical stage[] of a criminal trial"); *United States v. Arnold*, 113 F.3d 1146, 1149 (10th Cir. 1997) ("For purposes of the [Speedy Trial Act], a jury trial commences with the voir dire."), *abrogated on other grounds by State v. Gould*, 23 P.3d 801 (Kan. 2001). But even if trial had not technically begun, the notice was still too late to give him "a fair opportunity to challenge" the "record and certification." Fed. R. Evid. 902(11). It was still untimely.

Fourth, the government posits (at 45) that this "Court cannot reverse simply because a district court failed to make an entirely permissible choice." The district court's decision here is, of course, reviewed for abuse of discretion. But the government does not and cannot explain how excusing its blatant failure to comply with Rule 902(11)'s notice requirement was a permissible choice for the district court.

Fifth, the government claims (at 45) that Mr. Wood "presents no authority stating that it was error as a matter of law for the district court to allow the government to present the certificate of authenticity." Not so. Mr. Wood's argument relies

on the history and language of the relatively new rule; explications of its notice requirement in Committee Notes and treatises; and caselaw from around the country discussing the use of late-disclosed certificates to authenticate records of regularly conducted activity. Specifically, he cites *United States v. Weiland*, which holds that it is error to admit records under Rule 902(11) where—as here—the government "never provide[s] written notice . . . of its intention to offer the records . . . as self-authenticating under Rule 902(11) and . . . [does] not make [the] declaration available for inspection" before trial. 420 F.3d 1062, 1072 (9th Cir. 2005).

Finally, the government claims (at 48) that Mr. Wood should have "requested time to question Ms. McCoy . . . out of court, or called her as a witness" if he was concerned about "the foundation of the tribal status record." But "[t]he notice requirements of Rule 902(11) are in place precisely to ensure that evidence to be accompanied by an affidavit can be vetted for objection or impeachment *in advance*." *United States v. Brown*, 553 F.3d 768, 793 (5th Cir. 2008) (emphasis added). There is no support for the idea that the government is relieved of its burden to provide timely notice under the rule by blaming the defendant for objecting entirely rather than making attempts to accommodate.

Rule 902(11) is a rule, not a suggestion. The government cannot "be excused from [a] nearly complete failure to comply with [its] plain language." *Weiland*, 420 F.3d at 1072 n.7.

B. The government's Rule 902(11) certificate was troublingly incomplete.

In his opening brief (at 33–35), Mr. Wood demonstrates that the government's Rule 902(11) certificate was not merely disclosed too late, it was also incomplete. "A record of regularly conducted activity is authenticated by proof that it is, in fact, a record of regularly conducted activity and so Rule 803(6) is applicable." Robert P. Mosteller, 2 McCormick On Evid. § 229.1 (8th ed., updated July 2022). Thus, the certificate must demonstrate that the record "meets the requirements of Fed. R. Evid. 803(6)(A)–(C)." Fed. R. Evid. 902(11). Because the certificate here fell short in three ways, it failed to render the tribal record self-authenticating. Taken separately or together, the notice's tardiness and the certificate's incompleteness mean the district court erred when it admitted the tribal record as self-authenticating.

First, the certificate was incomplete because it did not say what it was authenticating: while it referred generically to the "records attached," SR2:11, it left the space for listing those records blank. The government claims (at 45–46) that it is enough that the certificate said "records attached." As with a contract, however, it is not enough to know that an authentication certificate incorporates *some* document by reference; "a court must ensure that the document the party relies on . . . is in fact the document mentioned." *Sierra Frac Sand, LLC v. CDE Global Limited*, 960 F.3d 200, 204 (5th Cir. 2020). Certainly the tribal record was attached to the certificate *in*

court, but that does not matter. What matters—and what the certificate fails to identify—is what record was attached when the certificate *was signed*.

Like the certificate itself, the record as a whole fails to show what was actually attached to the certificate when it was signed. It is clear that the government grasped for a plan to authenticate the tribal record on the Saturday before the Monday trial; appended an authentication witness to its witness list the morning of trial; identified Leslie McCoy to the court by name as one of three possible witnesses just after 10:20 a.m.; and announced that it had just "been handed" the signed certificate by someone shortly before 12:00 p.m. R2:17–18, R2:26, R2:100, SR2:11. But the record is silent about whether Leslie McCoy actually came to Tulsa at the start of Christmas week to sign the certificate in person or merely transmitted it via email or courier—not to mention what records might have been attached at the time. Thus, even if a district court could rely on extrinsic evidence to interpret the contents of an authentication certificate—a dubious proposition at best—that would not help the government.

Second, the certificate was incomplete because, while it tracks the *language* of Rule 803(6)(A), it does not actually "show[]" that the "record . . . meets the *requirements* of Rule 803(6)(A)[]," as mandated by Rule 902(11) (emphasis added). Specifically, it says that the tribal record was made "by (or from information transmitted by) someone with knowledge." SR2:10. But that is not enough to satisfy Rule 803(6)(A)—and thus Rule 902(11)—since it leaves open the possibility that the

information in the certificate originated with a person who did not "have a business duty to transmit the information to the entrant." *United States v. Ary*, 518 F.3d 775, 786 (10th Cir. 2008).

The government accepts (at 47) that Rule 803(6)(A) incorporates *Ary*'s business-duty requirement for transmitted information. But it falsely represents (at 47) that the "certificate . . . stated that . . . the records attached were made by a person with knowledge of those matters," rather than transmitted. If true, that would mean that *Ary*'s business-duty requirement would be inapplicable. But it is not true. The certificate explicitly allowed for the record to have been created based on "information transmitted by" a person with knowledge of—but without a business duty to transmit—that information, in violation of the rule stated in *Ary*.

> 7) **The records attached were made by (or from information transmitted by) a person with knowledge of those matters.**

SR2:10. In other words, the certificate didn't meet the requirements of Rule 902(11).

Third, the certificate was incomplete because its conclusory statement that the record was "made at or near the time of the occurrence of the matters set forth," SR1:53, was inadequate (at least in this case) to show that "the record was made at or near the time" of the "event" it records, Fed. R. Evid. 803(6)(A), as required by Rule 902(11). Because the tribal record is date-stamped in 2021, but the relevant events it records include a 1989 birthdate and a 1995 tribal enrollment date, SR1:53, something more was required.

The government contends (at 48) that it is per se sufficient for an authentication certificate to state, under penalty of perjury, that a record was made at or near the time of the occurrence of the matters set forth. "But recent cases have required proof that [Rule 803(6)(A)–(C)'s] terms have actually been satisfied by the proffered records" rather than a simple "verbatim recitation of the required terms of the business records exception." 2 McCormick On Evid. at § 229.1. Even if the government is correct in some cases, it is wrong here, because the certificate makes no sense in context. A record created in 2021 cannot possibly have been made at or near the time of a 1989 birth or 1995 tribal enrollment. And the record cannot be a 1995 record that was simply reprinted in 2021, given that the 1995 tribal enrollment date was handwritten onto an otherwise typewritten form.

The government also claims (at 48) that Mr. Wood should have "requested time to question Ms. McCoy . . . out of court, or called her as a witness" if he was concerned about "the foundation of the tribal status record." Once again, the government seems to be asserting that it may violate Rule 902(11)'s notice requirement with impunity, so long as the defendant has tools available to mitigate harm. But a defendant's ability to mitigate harm—for example, by subpoenaing a witness that the government itself should have called—is no cure for the government's violation. *Cf. Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 325 (2009) (defendant's "ability to subpoena" witness "is no substitute for the right of confrontation"). Mr. Wood

was "under no obligation to affirmatively *disprove* the applicability of the business records exception." *United States v. Irvin*, 682 F.3d 1254, 1262 (10th Cir. 2012) (emphasis original). Rather, "[t]he burden . . . to lay the foundation necessary under Rule 803(6)" was "on the government alone." *Id.*

* * *

"The government, no less than any other litigant, is required to ensure that evidence it intends to offer is admissible, to anticipate objections from opposing parties, and to comply with the Federal Rules of Evidence." *Weiland*, 420 F.3d at 1072 n.7. The government did none of these things here. The district court erred when it relied on the government's late-disclosed and incomplete certificate to admit the tribal record as self-authenticating.

C. The erroneous admission of crucial evidence of blood quantum and recognition as an Indian was not harmless.

This Court should remand for a new trial, because the government cannot meet its "burden . . . to establish the harmlessness of any error." *United States v. Chavez*, 976 F.3d 1178, 1204 (10th Cir. 2020). "A non-constitutional error, such as a decision whether to admit or exclude evidence, is [only] harmless" if it did not have "a substantial influence on the outcome or leave[] one in grave doubt as to whether it had such effect." *Id.* (quotation marks omitted). This non-constitutional harmless error test "requires a reviewing court to examine the entire record, focusing particularly on the erroneously admitted [evidence]." *United States v. Tome*, 61 F.3d

1446, 1455 (10th Cir. 1995). Here, the government fails to meet its burden because the tribal record was its only evidence of Mr. Wood's alleged blood quantum and recognition as an Indian, and it could not—or at least may well not—have proved Indian status without them.

Both offenses in this case were charged under 18 U.S.C. § 1153, the Major Crimes Act. R1:13–14. "[T]he defendant's Indian status is an essential element of a § 1153 offense which the government must allege in the indictment and prove beyond a reasonable doubt." *United States v. Bruce*, 394 F.3d 1215, 1229 (9th Cir. 2005) (en banc) (citations omitted); *cf. United States v. Prentiss*, 256 F.3d 971, 974 (10th Cir. 2001) (en banc) (discussing 18 U.S.C. § 1152). "To find that a person is an Indian the jury must . . . make factual findings that the person has some Indian blood and . . . that the person is recognized as an Indian by a tribe or by the federal government." *Walker*, 85 F.4th at 982 (alteration and quotation marks omitted).

Here, the hearsay statements in the inadmissible tribal record were the only evidence establishing Mr. Wood's alleged blood quantum and recognition as an Indian—and, thus, the element of his Indian status. Specifically, the record's statement that Mr. Wood has a 1/32 blood quantum was the government's only evidence of Indian blood. SR1:53. And its statement that he became an enrolled member of the Seneca-Cayuga Nation in 1995 was the government's only evidence that Mr. Wood had ever been recognized as an Indian by a tribe or the federal government—at the

time of the offense or otherwise. *Id.* Thus, the erroneous admission of the tribal record was not harmless.

The government argues that the error was harmless because "M.M. testified that Wood is Native American and is a member of the Quapaw and Seneca Cayuga tribes." Answer Br. at 17, 49 (citing R2:183). This is inaccurate in one critical respect: although MM identified Mr. Wood *as* Quapaw and Seneca-Cayuga, she did not testify that Mr. Wood was a *member* of those tribes.

> Q. (BY MS. TODD) M.M., do you know if Mr. Wood is Native American?
> A. Yes.
> Q. Do you know what tribe?
> A. Quapaw and Seneca.
> Q. Is that Seneca-Cayuga?
> A. Yes.

That one word might seem like a small thing. But where the question is whether Mr. Wood is recognized as an Indian by a tribe or the federal government—as opposed to by himself or his girlfriend—actual membership matters a whole lot. *See* K. Huyser, *Data & Native American Identity*, 19 Contexts 10 (Sept. 18, 2020), *at* https://doi.org/10.1177/1536504220950395 (explaining that 1960 census change allowing people to self-identify "without providing verification and documentation . . . resulted in a 46.5 percent increase in American Indian and Alaska Native peoples"); *see also* A. Sánchez-Rivera et al., "A Look at the Largest American Indian and Alaska Native Tribes and Villages in the Nation, Tribal Areas and States,"

U.S. Census Bureau (Oct. 3, 2023), at https://www.census.gov/library/stories/2023/10/2020-census-dhc-a-aian-population.html ("From 2010 to 2020 . . . [t]he American Indian . . . alone or in any combination population nearly doubled[.]"). MM's testimony was insufficient to prove that Mr. Wood was recognized as an Indian.

Even if MM's testimony could somehow be read to mean that Mr. Wood was a member of the Quapaw and Seneca-Cayuga tribes, it would still have been insufficient to prove Indian status because it would not have proved that he had any blood quantum "[a]bsent any evidence that Indian blood was one of the requirements for membership" in those tribes. *United States v. Prentiss*, 273 F.3d 1277, 1283 (10th Cir. 2001); *see also Alberty v. United States*, 162 U.S. 499, 500-01 (1896) (freedman lacking Indian blood who becomes Cherokee citizen is not Indian); *cf. United States v. Ortner*, No. 21-5075, 2023 WL 382932, *3 (10th Cir. Jan. 25, 2023) (unpublished) (unsubstantiated testimony of childhood friend that defendant "did have Indian blood" was "insufficient evidence to demonstrate [that he] possessed some quantum of Indian blood") (quotation marks omitted).

In any event, even MM's testimony could be considered some evidence of blood quantum *and* recognition as an Indian, this Court should still reverse, as a reasonable jury may well have decided that was not conclusive enough to constitute proof beyond a reasonable doubt. An error can have a substantial influence on the

outcome of a case even if "there was enough to support the result, apart from the phase affected by the error." *Tome*, 61 F.3d at 1455 (citation omitted). In *United States v. Alvirez*, the district court's error in admitting an improperly authenticated tribal record regarding Indian status was "not harmless"—even though a government agent testified that the defendant lived "on the Hualapai reservation" and the alleged victim testified that he was "a member of the Hualapai reservation"—because it was "questionable whether the government would have established [his] Indian status to the satisfaction of the jury" without the tribal record. 831 F.3d 1115, 1120–24 (9th Cir. 2016).[2] Here, too, the error was not harmless even though MM testified that Mr. Wood "is . . . Quapaw and Seneca," R1:183.

The government makes one or two other unpersuasive harmless-error arguments. First, it claims (at 22, 49) that, "if the certificate had been excluded, the government stood ready to call the individual responsible for the certification" and "would have proceeded" to do so. But there is no inevitable alternate-proof exception to the rules of evidence. The harmless error analysis centers on the impact that the erroneous admission had on *this* trial, *Tome*, 61 F.3d at 1455, not what hypothetical trial might have occurred if the evidence had been properly excluded. In any event, nothing in the record shows that the government stood ready to call Leslie

[2] The Ninth Circuit also noted that the unauthenticated tribal record actually said that the defendant was a member of a different tribe, not the Hualapai; but it is unclear why that mattered to its harmless error analysis.

McCoy or any other authentication witness to testify, or that any such witness was actually available on almost no notice less than a week before Christmas.

Second, although not technically presented as a harmless-error argument, the government claims (at 22) that "Wood received additional time to review the certificate and did not request a continuance or additional time to challenge the certificate and has not provided any mechanism that he could have used to challenge the certificate had he been given additional time." As discussed above, this burden-shifting argument is no reason to hold that the district court had discretion to admit the tribal record. Nor is it a reason to hold that its decision to do so was harmless. The harmless error analysis is not concerned with whether Mr. Wood was prejudiced by the *government's* error in providing late notice of an incomplete certificate, but whether he was prejudiced by the *district court's* error in admitting the improperly authenticated tribal record. That question must be answered by looking to the evidence that was actually presented at trial. Mr. Wood's convictions should be reversed.

II. It was plain reversible error to admit unnoticed and highly prejudicial evidence that Mr. Wood had previously and repeatedly assaulted MM.

The district court's second error (*see* Opening Br. at 36–46) was allowing the government to present unnoticed evidence that Mr. Wood had assaulted MM on prior occasions—in incidents that had "gotten worse" or "scarier" or "[m]ore often," SR1:43; *accord* R2:63-64, R2:67—leaving her with multiple healing rib fractures that, the government argued, meant that Mr. Wood had done the same thing on this

occasion, R2:228 ("They're trying to play hide the ball here, but there is no . . . hiding the fact . . . that she had three newly broken ribs and three healing broken ribs"). Because the government failed to give pretrial notice that it intended to present evidence of these prior uncharged assaults as required by Fed. R. Evid. 404(b), the district court's admission of the evidence was plain, reversible error.

The government's arguments otherwise are unconvincing.

A. The prior-assault evidence may have been relevant to the question of guilt, but it plainly was not intrinsic to the charges.

In its answer brief, the government does not deny presenting evidence of prior uncharged assaults. It does not claim to have given notice of this evidence. It does not argue that it is ever proper to admit unnoticed other-wrongs evidence that is subject to Rule 404(b)'s pretrial notice requirement. Rather, the government argues (at 21, 25) that "general statements M.M. made to medical providers about her prior history of abuse . . . is res gestae to the offense" —intrinsic evidence that is not subject to Rule 404(b)'s notice requirement at all—because it is part of the "story" that the government wished to tell "to explain the parties' history, the victim's lack of cooperation, and the cycle of violence." Significantly, the government offers no defense of its presentation of evidence of healing rib fractures—which MM's doctors learned of from a physical examination—or its accompanying propensity argument.

The argument that the government does make—about telling its "story" at trial—is flawed because it mistakes *relevant* evidence for *intrinsic* evidence. Well-

settled law establishes that peripheral information like the challenged bad-acts evidence in this case may be relevant but is not intrinsic, because intrinsic evidence must be "intimately connected or blended with the factual circumstances of the charged offense" itself. *United States v. Irving*, 665 F.3d 1184, 1212 (10th Cir. 2011). In *United States v. Kimball*, for example, the government presented evidence revealing that the defendant had been incarcerated right before committing the charged robbery. 73 F.3d 269, 272 (10th Cir. 1995). This Court explained that some such evidence—e.g., that the "defendant's clothing . . . at the time of his release from prison [was] identical to the clothing of the robber"—was "part and parcel of the proof of the offense . . . charged in the indictment" and so it was intrinsic. *Id.* But other evidence that may have helped the government tell its story but was not "linked to the robbery itself"—e.g. "[e]vidence of . . . defendant's available cash" upon his release from prison—was extrinsic. *Id.* Likewise, in *United States v. Parker*, this Court held that acts similar to and contemporaneous with the overt acts listed in the indictment were "intrinsic to the crime and substantiate[d] the criminal conspiracy," but "similar" acts predating "the charged conspiracy time-frame," although relevant, were extrinsic and not intrinsic. 553 F.3d 1309, 1314–16 (10th Cir. 2009). Here, evidence of prior assaults plainly was not intrinsic evidence because it was not part and parcel of the charged assault, and it was not intimately connected or blended with the factual circumstances of the charges.

The government argues otherwise, insisting (at 24–25) that its evidence was actually intrinsic because it allowed "the government to tell a clear and comprehensible story" at trial. This is an argument that the prior-abuse evidence was relevant, not that it was intrinsic, as is clear from the cases the government cites in support. In *United States v. Edwards*, this Court held that "evidence that completes the story of the crime" can be admissible under Rule 404(b); it did not hold that such evidence is intrinsic and so not governed by Rule 404(b) at all. 159 F.3d 1117, 1129 (10th Cir. 1998). Similarly, in *United States v. Cook*, the Court merely held that evidence "necessary to complete the story of the crime" can be "relevant" and so "properly admitted under Federal Rule of Evidence 404(b)." 745 F.3d 1311, 1317 (10th Cir. 1984).

Most of the other cases that the government cites do involve intrinsic evidence[3]; but the evidence in those cases did not merely "provide[] contextual or background information to the jury"; it was *also* "directly connected to the factual circumstances of the crime" itself. *United States v. Kupfer*, 797 F.3d 1233, 1238 (10th Cir. 2015) (citation omitted). In *Kupfer*, for example, improperly obtaining funds on an uncharged contract was intrinsic to the charged kickback conspiracy because the

[3] The government cites *Lopez-Umanzor v. Gonzales*, which is an immigration case that does not speak to the distinction between intrinsic and extrinsic evidence at all. 405 F.3d 1049, 1058 (9th Cir. 2005). It also cites some Congressional findings dating to the original passage of the Violence Against Women Act, which, in context, merely urge state courts to accept expert testimony regarding battered women syndrome when offered as a defense at trial. *See* H.R. Rep. 103-395, at 24 (1993).

government's theory was that those funds were later used to make improper payments on the contract that was the subject of the indictment. *Id.* In *United States v. Ford*, the defendant's escape from prison was intrinsic to his fugitive-in-possession-of-a-firearm charge because "the government needed evidence of the escape to show that Mr. Ford was a fugitive." 613 F.3d 1263, 1268 (10th Cir. 2010). And in *United States v. Durham*, inculpatory statements about uncharged acts were part of the defendant's "actions when confronted with the allegations against him and his confession," and so they were "directly connected to the factual circumstances of the crime." 902 F.3d 1180, 1224–25 (10th Cir. 2018) (citation omitted); *see also United States v. Cushing*, 10 F.4th 1055, 1078 (10th Cir. 2021) (defendant's call to coconspirator about assaulting "snitch" was intrinsic to drug conspiracy charge because it was contemporaneous evidence of interdependence regarding criminal matters); *United States v. Johnson*, 42 F.3d 1312, 1315–16 (10th Cir. 1994) (testimony from co-defendant's sister about drug transactions and drug-related conversations with defendant during timeframe of charged drug conspiracy intrinsic because they "could be considered part of the scheme for which [the] defendant was being prosecuted," or at the very least were an "integral and natural part of the witness'[s] accounts of the circumstances surrounding the offense for which the defendant was indicted") (quotation and alteration marks omitted).

The government bases its argument (at 25–27) on the idea that MM's statements about prior abuse "were necessary to her care and treatment" and provided "context to her later claims that she did not remember the abuse." A statement made for medical diagnosis or treatment may not be hearsay, Fed. R. Evid. 803(4), but it is not necessarily even relevant at trial. And while the government may wish to explain why its alleged victim is not cooperating at trial, that does not render the explanation intimately connected or blended with the factual circumstances of the charged offense itself.

The "'background circumstances exception' to the general exclusion of other act evidence is not an open ended basis to admit any and all other act evidence the proponent wishes to introduce." *United States v. Brown*, 888 F.3d 829, 837 (6th Cir. 2018) (citation omitted). Here, the government can't connect the dots between its evidence of prior abuse and the charged assault. It is not even arguably intrinsic. Without the required 404(b) notice, it plainly should not have been admitted.

B. This plain error prejudiced Mr. Wood and compels reversal.

In his opening brief (at 41–46), Mr. Wood explains why this error merits reversal. The government's arguments in opposition are unavailing.

On prong three, the government claims (at 29–32) that introduction of evidence of prior acts of domestic violence was not sufficiently prejudicial to reverse. The government claims in passing (at 21) that "other unchallenged evidence

addressed the history of abuse," but this is false. It then asserts (at 29–31) that it presented overwhelming proof of guilt—an argument Mr. Wood already refuted in his opening brief (at 42–43). Finally, the government quibbles that it wasn't "'re-hashing evidence of uncharged abuse'" but "merely reiterat[ing] the evidence [of uncharged abuse] that the jury had heard," Answer Br. at 31–32 (quoting Opening Br. at 26) (alteration marks removed), which is a meaningless distinction at best.

On prong four, the government claims (at 33) that "[t]he record reveals no risk that the jury convicted Wood for his past crimes instead of the offenses at issue," because it "heard no specific information about the prior assaults, just generalized statements that there had been prior abuse." This is really a prong-three prejudice argument, and it isn't a good one. The jury heard that MM had three healing rib fractures, and it heard the government blame Mr. Wood for them. Moreover, as Mr. Wood argues in his opening brief (at 43–44), "the improperly admitted evidence of prior abuse dovetailed perfectly with the government's fear-of-death theme to send the jury a truly improper message: even if the government did not prove every element of the charged offenses beyond a reasonable doubt, the jury needed to convict Mr. Wood lest MM die." The government asserts (at 39, 42) that it neither "suggested" or "implied that M.M. would die if the jury did not intervene," but its words speak for themselves.

* * *

On appeal, the government makes no colorable claim that the prior assaults were intrinsic evidence, just that they were relevant. That is too little, too late. Rule 404(b) plainly required the government to explain why the prior-assaults evidence was relevant and admissible *before trial*—and plainly prohibited admission when it failed to do so. Because its evidence was prejudicial and affected the fairness, integrity, and public reputation of judicial proceedings, this Court should reverse.

III. It was plain reversible error to admit irrelevant and undisclosed testimony about the lethality of domestic abuse.

The district court's third error has to do with Lori Gonzalez, whom the government called to explain why a domestic violence victim might not cooperate in the prosecution of her abuser. R1:123. As Mr. Wood argues in his opening brief (at 46–49), Ms. Gonzalez's testimony about when and why domestic violence turns lethal was irrelevant and undisclosed, and the district court plainly erred admitting it.

The government responds (at 34–41) that Ms. Gonzalez's testimony was relevant overall, and that her lethality testimony was sufficiently disclosed, such that Mr. Wood "could reasonably anticipate the line of questioning" because he "had ample notice that the government would present testimony regarding the escalation of domestic violence." But Ms. Gonzalez's testimony about the escalation of domestic violence was relevant only inasmuch as it concerned the impact of domestic violence on *living* victims. To the extent that her testimony turned to concerns about death, it was irrelevant to this case, and Mr. Wood had no reason to expect it.

On the question of prejudice, the government argues (at 41) that Mr. "Wood cannot establish that a more specific notice of the scope of Ms. Gonzalez's testimony would have so changed his ability to cross examine her that it would have changed the outcome of the trial." Once again, this is the wrong question. This Court does not ask whether Mr. Wood was prejudiced by the *government's* disclosure error, but rather whether he was prejudiced by the *district court's* error in admitting the undisclosed testimony. As Mr. Wood explains in his opening brief (at 48–49), he was.

Mr. Wood's convictions should be reversed.

IV. Certainly the cumulative error in this case requires reversal.

If the Court does not reverse because of the harm from one particular error, it should reverse because of the cumulative effects of the three errors in this case. Opening Br. at 49–50.

Respectfully submitted,

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Certificate of Compliance

As required by Fed. R. App. P. 32(g)(1), I certify that this **Appellant Craig Wallace Wood's Reply Brief** is proportionally spaced and contains 6298 words. I relied on my word processor to obtain the count, and the information is true and correct to the best of my knowledge.

I also certify that I caused a copy to be sent, via U.S. Mail, to Craig Wallace Wood, Reg. No. 69228-509, c/o USP Marion.

/s/ Shira Kieval
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