
NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

Kenny Eugene Smart,

Petitioner,

-vs.-

United States of America,

Respondent.

**On Petition for Writ of Certiorari to
the Eighth Circuit Court of Appeals**

Petition for Writ of Certiorari

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QUESTIONS PRESENTED FOR REVIEW

- 1. WHAT IS THE PROPER STANDARD OF REVIEW OF EVIDENTIARY RULINGS UNDER FEDERAL RULE OF EVIDENCE 404(b) AND IS RULE 404(b) A RULE OF INCLUSION WHICH ALWAYS ALLOWS THE NATURE OF PRIOR CONVICTIONS IN TRIALS FOR ALLEGED VIOLATIONS OF 18 USC §922(g)?**
- 2. WHAT IS THE CORRECT STANDARD OF REVIEW FOR DENIALS OF MOTIONS FOR NEW TRIAL BASED ON *BRADY v. MARYLAND* VIOLATIONS?**

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED PROCEEDINGS

There are no related proceedings.

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OPINION BELOW

The petitioner, Kenny Eugene Smart, respectfully prays that a writ of certiorari issue to review the judgment of the Eighth Circuit Court of Appeals in Case Nos. 22-1129 and 22-1131 entered on February 21, 2023, and made final with the denial of rehearing and rehearing en banc on March 29, 2023. *United States v. Smart*, 60 F.4th 1084 (8th Cir. 2023).

JURISDICTION

The panel of the Eighth Circuit Court of Appeals entered its judgment on February 21, 2023. The petitioner's petition for rehearing and rehearing en banc was denied on March 29, 2023. (App. p. 21a). Jurisdiction of this court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution amendment XIV, sec. 1 states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Federal Rule of Evidence 404(b) states:

(b) Other Crimes, Wrongs, or Acts.

(1) Prohibited Uses. Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

- (2) Permitted Uses. 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.
- (3) Notice in a Criminal Case. In a criminal case, the prosecutor must:
 - (A) provide reasonable notice of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it;
 - (B) articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and
 - (C) do so in writing before trial—or in any form during trial if the court, for good cause, excuses lack of pretrial notice.

STATEMENT OF THE CASE

Smart was arrested on November 18, 2020, after law enforcement agents executed a warrant at a residence at 1121 Clark Street in Des Moines, Iowa. (App. 4a). An indictment, and amended indictment to correct Smart's name, were both filed on December 16, 2020, in case number 4:20-CR-00219 charging Smart with one count of felon in possession of a firearm in violation of 18 U.S.C. 922(g)(1), 924(a)(2), 924(d), and 28 U.S.C. 2461(c). A superseding indictment was filed January 21, 2021, which added a second count for possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. §924(c). At the time he was charged with these indictments, Smart was on federal supervised release in case number 4:03-CR-295, and the charges in 4:20-CR-00219 caused the government to also file a motion to revoke his supervised release in 4:03-CR-295. (App. p. 4a).

Law enforcement had been surveilling 1121 Clark Street with a pole camera, and turned some of the footage of that surveillance over to the defendant, but did not turn over the pole camera footage from November 18, 2020, the day law enforcement found the gun they charged Smart with possessing. (App. 15a).

The government filed a notice it intended to offer prior bad act evidence from 2003, including two of Smart's prior convictions and the underlying conduct from those convictions. The government argued these convictions "shows Defendant's motive, opportunity, intent, preparation, plan, knowledge, identify, absence of mistake, and/or lack of accident in possessing a firearm as a felon and possessing a firearm in furtherance of a drug trafficking crime."

The matter proceeded to trial. The government filed a motion in limine, which included in relevant part that Smart's 2006 federal conviction for felon in possession and 2004 conviction for possession with intent to deliver and conspiracy to deliver crack cocaine and the 2003 conduct underlying the convictions were admissible under Federal Rule of Evidence 404(b). The defendant objected, claiming that the prior convictions being offered as a pretext for propensity evidence, and noting they were 17 years old.

The district court not only allowed the government to offer Smart's 2004 and 2006 convictions at trial, but also allowed testimony about Smart's 2003 conduct underlying the convictions. Trial commenced on June 7, 2021. The government called seventeen witnesses.

Several of the government's witnesses testified about law enforcement's early morning search at 1121 Clark Street, where they found three people inside the residence at the time of the search: Smart, Richard Brown, and Dionne Dibble. Smart and Dibble were in a romantic relationship at the time, but Smart did not live at 1121 Clark Street. Law enforcement found a Ruger 9mm pistol in the middle of the floor of one of the rooms in the house during the search. Law enforcement found cash on Smart, but no drugs. They did locate drugs belonging to Richard Brown, and charged Brown with those drugs. Civilian cooperating witnesses testified about purported drug activity by Smart prior to the warrant being executed, and their view of the gun. None of the civilian witnesses' statements about the gun were consistent with the gun found, or with each other. A search warrant executed at Smart's residence turned up no guns, ammunition, or drugs.

Officer Chad Nicolino testified, over objection, that he was the officer who had been performed a traffic stop of Smart on October 1, 2003. Nicolino testified he stopped the car for not having a front license plate, searched the car, and located eight rocks of crack cocaine and a gun in the car. Nicolino testified this quantity of crack he found in 2003 was packaged in a way that indicated it was for distribution. Nicolino testified when he found the gun in 2003, Smart said, "That is mine." Nicolino testified in 2003 Smart was a felon, and he had \$1000 cash on him during the stop. Through Nicolino, the government then offered Exhibit 14, a sentencing order for Smart's state drug conviction resulting from his traffic stop. Nicolino testified the gun he found was subsequently prosecuted federally.

Daniel Velasco testified as Smart's probation officer. Velasco testified, over objection, that Smart was in prison for being a felon in possession of a firearm, released from prison to supervised release on July 19, 2019. Through Velasco, the government offered Exhibit 13, the judgment in the felon in possession case for Smart. Velasco also testified to the terms and conditions of Smart's supervised release.

There were no fingerprints found on the firearm at 1121 Clark Street. So, Matthew Jenkins, the ATF case agent went to the jail and took a buccal swab for DNA testing from Smart. Jenkins did not take buccal swabs from anyone else at 1121 Clark Street to test their DNA. Jenkins pretended not to know Smart would have already had his DNA taken in connection with his other convictions, or from CODIS. The DNA swabs of the firearm were temporarily "lost" by law enforcement, and then located. A criminalist testified that a partial profile was developed from the swabs of the gun, and 19 of 21 of the loci matched Smart's DNA from the buccal swabs. There were three individuals' DNA in the mixture, but law enforcement did not develop profiles from the other two contributors. The criminalist verified inmates' DNA are stored in CODIS and his agency has access to that information. He did not know why Smart's known DNA wasn't pulled from CODIS system, rather than from a new buccal sample. The criminalist was unable to identify whether the partial profile was from a primary, or secondary transfer of DNA, or whether cross-contamination could have occurred. No one other than Smart's DNA was provided to test against the firearm.

Jenkins testified about the surveillance of 1121 Clark Street prior to law enforcement executing the warrant, and claimed they did not see any specific individuals come and go. He did not mention that surveillance was done by a pole camera, the footage had not been turned over prior to trial, or that the pole camera footage did in fact show people coming and going before the warrant was executed.

Lometa Welch testified for the government as a civilian witness who had admitted extensive involvement with drugs, but who (like the other civilian witnesses) was never charged with a crime. Welch testified she tried to buy crack from Smart at Harper's house at 1121 Clark the morning of the search, and "shortly after I left that day that place was raided by the police." She said she went inside Harper's house and saw Smart "in a back room asleep." She claimed she stood outside the room, with the lights off, looked into the dark room and saw a "glimpse of him laying there asleep" and "a glimpse of the firearm." She said the gun was "within his reach" and "beside him." She claimed it was a "handgun, revolver."

On cross, she was asked more details about her interaction at the house. She said she never did buy drugs from Smart, but instead got it from Richard Brown and "it was handed to me from Lisa Harper." She admitted to being paid \$20 for writing a letter for Richard Brown, the person she actually purchased her drugs from, for his drug case.

Smart was convicted of both counts. Before sentencing, newly appointed counsel identified missing discovery in the government's discovery file, specifically the pole camera footage of the front of 1121 Clark Street before, and during, the

raid, which would have demonstrated the government's witness, Welch, had not testified truthfully during trial. Counsel filed a motion for new trial arguing the withholding of pole camera discovery violated *Brady v. Maryland*, 373 U.S. 83 (1963).

After Smart's motion for new trial was filed, the government turned over even more new discovery, a report from the interview of a witness, Cory Turner, that included exculpatory information. Specifically, the report included Turner telling the government he had been present at the Loggins residence at the same time as Smart, but Smart did not cook crack cocaine there "because Smart doesn't know how" and Smart never had a firearm at the Loggins residence, or anywhere else.

The court ruled on the motion for new trial, holding that the failure to disclose Turner's June 2021 interview report and the full pole camera video prior to trial was "unacceptable." (App. p. 14a). But, ultimately, the motion for new trial was denied.

The court initially sentenced Smart to 180 months on Count I (which was amended to 120 months after resentencing on remand from the 8th Circuit), and 180 months on Count II. The court revoked Smart's supervised release as a result of the new convictions. Smart was sentenced to 54 months on the revocation.

Smart appealed on several grounds, but was only successful in one sentencing argument, which resulted in a remand for resentencing. His remaining challenges to his conviction were rejected by the Eighth Circuit. At issue here are

(1) his challenge to the use of his prior convictions in the trial under the Eighth Circuit's precedent allowing, seemingly without exception, all convictions to be admissible in 18 USC 922(g) prosecutions under Federal Rule of Evidence 404(b), and (2) the denial of his request for a new trial for the *Brady* violations. Smart submits that the Eighth Circuit's opinion denying both of these two claims place this case in the middle of circuit splits on both issues, warranting review by the Supreme Court.

REASONS FOR GRANTING THE WRIT

I. **THIS COURT SHOULD RESOLVE THE SPLIT AMONG THE CIRCUITS AS TO THE PROPER STANDARD OF REVIEW OF EVIDENTIARY RULINGS UNDER FEDERAL RULE OF EVIDENCE 404(b) AND WHETHER RULE 404(b) IS A RULE OF INCLUSION WHICH ALWAYS Allows THE NATURE OF PRIOR CONVICTIONS IN TRIALS FOR ALLEGED VIOLATIONS OF 18 USC §922(g).**

The Eighth Circuit reviews evidentiary rulings for a clear abuse of discretion, to be reversed "only when an improper evidentiary ruling affected the defendant's substantial rights or had more than slight influence on the verdict." *United States v. Summage*, 575 F.3d 864, 877 (8th Cir. 2009). The Eighth Circuit reviews F.R.E. 404(b) evidence for abuse of discretion, and will only reverse those admissions "when they clearly had no bearing on the case and were introduced solely to prove the defendant's propensity to commit criminal acts." *United States v. Drew*, 9 F.4th 718, 722 (8th Cir. 2021). In the instant case, the Eighth Circuit was clear that, "In this circuit, Rule 404(b) is a rule of inclusion." (App. p. 7a).

In other circuits, evidentiary rulings are reviewed for abuse of discretion, without the additional requirements, and if it the evidentiary ruling rests on an interpretation of law, *de novo*. *See, e.g., United States v. Burgos-Montes*, 786 F.3d 92, 114 (1st Cir. 2015); *United States v. Pang*, 362 F.3d 1187, 1191-92 (9th Cir. 2004). As the Sixth Circuit has noted, adding in multiple steps of an analysis, rather than employing the simple abuse-of-discretion standard to reviews of evidentiary decisions, runs contrary to Supreme Court precedent. *United States v. Ray*, 549 F.3d. Appx. 428, 430 (6th Cir. 2013), *citing General Electric v. Joiner*, 522 U.S. 136 (1997).

The jury here heard details about Smart's prior convictions, through both the arresting officer and Smart's federal probation officer, even though those prior convictions were similar only in the type of charge, not the circumstances surrounding the charge. Yet the Eighth Circuit held, "We have 'routinely affirmed the use of past gun possession offenses to prove the element of knowing possession in violation of 18 U.S.C. §922(g)(1)," essentially confirming blanketly admission of such evidence in the Eighth Circuit in felon in possession cases, creating a circuit split.

Other circuits prohibit such a "trial-by-character" evidence that Rule 404(b) in all types of cases, including felon in possession cases. *See, e.g., United States v. Jones*, 484 F.3d 783 (5th Cir. 2007) (Reversing conviction for improperly offering prior convictions for firearms in a felon in possession case because it was improper propensity evidence.)

Certiorari is necessary to resolve these splits among the Circuits in both the standard of review, as well as the application of, FRE 404(b) in 18 USC §922(g) cases.

II. THIS COURT SHOULD RESOLVE A SPLIT AMONG THE CIRCUITS REGARDING THE CORRECT STANDARD OF REVIEW FOR DENIALS OF MOTIONS FOR NEW TRIAL BASED ON *BRADY v. MARYLAND* VIOLATIONS.

The Eighth Circuit has historically reviewed denials of motions for new trial based on a *Brady* violation for abuse of discretion. *United States v. Ruzicka*, 988 F.3d 997, 1006 (8th Cir. 2021). The panel in this case followed suit. (App. p. 16a, “The district court did not abuse its discretion...”). But, constitutional claims are supposed to be reviewed de novo, and in other contexts in the Eighth Circuit, are reviewed de novo. *United States v. Dones-Vargas*, 936 F.3d 720, 722 (8th Cir. 2019). In other contexts other than in a motion for new trial setting, the Eighth Circuit even reviews *Brady* claims de novo. *See, e.g., United States v. Bechman*, 787 F.3d 466, 492 (8th Cir. 2015).

Other circuits review denials of motions for new trial for *Brady* violations de novo. *See, e.g., United States v. Kaipat Pelisamen*, 641 F.3d 399, 408 (9th Cir. 2011); *United States v. Reese*, 745 F.3d 1075, 1083 (10th Cir. 2014).

Due process requires a defendant to receive a new trial if the government withholds evidence that is favorable to the defendant and material to guilt or punishment. *Smith v. Cain*, 565 U.S. 73, 76 (2012). *Cain* makes it clear that this is a constitutional issue that should therefore be reviewed de novo by the circuits. Had the Eighth Circuit done that de novo review, it necessarily would have

concluded that an evidentiary hearing, and a new trial, were warranted for the repeated, flagrant violations in this case. Certiorari is warranted to require this de novo review of the issue to create a consistency among the circuits about the standard of review when there is a *Brady* violation and a new trial is requested by the defendant as a result.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Petition for a Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,

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