CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October 2023 Term

ROBERT E. HARRISON

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for a Writ of Certiorari
To the Eighth Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

Submitted By:

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QUESTION PRESENTED

Entrenched disagreement exists among six circuits on whether Fed. R. Evid. 404(b) prohibits proof of a prior gun conviction in a new prosecution alleging that a suspect threw away a gun that the accused denies ever possessing. Rule 404(b)(1) provides "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with that character." Here, the U.S. Attorney claimed a 2010 conviction for gun possession proved a new charge he possessed a gun in 2020 by showing "the history of the intent, the knowledge of and the prior pattern or habit of this Defendant[.]" The District Court allowed the evidence, reasoning a demand for trial makes the statutory element of knowing possession categorically material under Rule 404(b)(2). Three circuits rule otherwise, reasoning that a prior gun crime only proves a later possession of a firearm as propensity, unless the accused claims he mistook it for a toy or accidentally possessed it. A concurring judge here summarized the conflict of this view with Rule 404(b)(1):

> The scenario usually proceeds this way: the government asserts that the prior conviction is relevant to knowledge, intent, and absence of mistake—a kitchen-sink approach because no one really understands Rule 404(b) the way we have interpreted it. The district court then asks why, and the government usually responds with some variation of 'the Eighth Circuit says so.' The truth is that a prior conviction is irrelevant in most actual-possession cases, unless, of course, the whole point is to allow the jury to make a propensity inference. . ..

The Circuit decisions that declare old convictions admissible by reasoning a trial demand makes knowledge categorically material conflict with *Huddleston v. United States*, 485 U.S. 681 (1988), and Fed. R. Evid. 401-404. This case is the vehicle to resolve the conflict on this issue:

> **1. Are prior gun possession convictions admissible under Rule 404(b) to prove knowing or intentional gun possession on a later date when the government claims the accused physically possessed a gun the defendant claims he never possessed?**

Parties to the Proceedings

Petitioner Robert E. Harrison was represented in the lower court proceedings by his appointed counsel, Nanci H. McCarthy, Public Defender, and Assistant Federal Public Defender Mohammed G. Ahmed, 1010 Market, Suite 200, Saint Louis, Missouri 63101. The United States was represented by United States Attorney Sayler Fleming and Assistant United States Attorney Courtney Bell, Thomas Eagleton Courthouse, 111 South 10th Street, Saint Louis, Missouri 63102.

DIRECTLY RELATED PROCEEDINGS

This case arises from the following proceedings:

• United States v. Harrison, 4:20-CR-00143-JAR-1, (E.D. Mo) (criminal proceeding), judgment entered Mar. 2, 2022,

• United States v. Harrison, 22-1537 (8th Cir.) (direct criminal appeal), appellate judgment entered June 14, 2022,

• United States v. Harrison, 22-1537 (8th Cir.) (direct criminal appeal), order denying petition for rehearing *en banc* and panel rehearing entered Aug. 14, 2023, and

• Harrison v. United States, 23A396 (Supreme Court) (Application to extend time to file a petition for a writ of certiorari) order granting additional time entered Jan. 11, 2024.

There are no other proceedings directly related to this case within the meaning of Rule 14.1(b)(iii).

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is published at 70 F. 4th 1094. The opinion appears in the Appendix ("Appx.", at 1).

JURISDICTION

The Eighth Circuit Court of Appeals entered its judgment on June 24, 2023. Appx. 1-8. Mr. Harrison filed a timely motion for rehearing and rehearing *en banc*, which was denied August 14, 2023. Appx. 9. Justice Kavanaugh granted Mr. Harrison's timely application for additional time in which to file his petition up through January 11, 2024. Appx. 10. This petition is timely filed within the time Justice Kavanaugh granted. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

FEDERAL STATUTORY PROVISIONS

18 U.S.C. § 922 Unlawful acts (2020)

(g) It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

. . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 924 Penalties (2020)

(a)(2) Whoever knowingly violates subsection . . . (g). . . of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

FEDERAL RULES OF EVIDENCE

Fed. R. Evid. 105. Limiting Evidence That Is Not Admissible Against Other Parties or for Other Purposes

If the court admits evidence that is admissible against a party or for a purpose—but not against another party or for another purpose—the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly.

Fed. R. Evid. 401. Test for Relevant Evidence

Evidence is relevant if:

(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and

(b) the fact is of consequence in determining the action.

Fed. R. Evid. 402. General Admissibility of Relevant Evidence.

Relevant Evidence is admissible unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court

Irrelevant evidence is not admissible.

Fed. R. Evid. 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons.

The 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."

Fed. R. Evid 404(b) Crimes, Wrongs, or Other Acts

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

Supreme Court Rule 10

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Courts discretion, indicate the character of the reasons the Court considers:

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

STATEMENT OF THE CASE

This case presents the best vehicle by which to resolve entrenched circuit conflict as to the admissibility of prior convictions for gun possession to prove a new charge based on police accusations a suspect physically possessed and threw away a gun that the accused denies ever having. The federal prosecutor here declared the probative import of Petitioner's 10-year-old conviction for possessing a gun as establishing "the history of the intent, the knowledge of and the prior pattern or habit of this Defendant possessing firearms[.]" Appx. 16. Fed. R. Evid. 404(a)(1) declares that "[e]vidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait." Four Circuits hold that when the Government's theory of guilt contends the accused had personal possession of a gun that the accused denies, the old crime only tends to prove the new charge by implying repeated conduct—"propensity evidence" which Fed. R. Evid. 404(b)(1) explicitly prohibits. The concurring judge here succinctly stated the crux of the conflict:

> How does a decade-old firearm possession offense show that Harrison knowingly possessed a gun this time around? Neither the government nor the court provides much of a reason, so I will. It shows that Harrison has committed the same criminal act before and "acted in accordance" with that character by doing it again. Fed. R. Evid. 404(b)(1). Once a criminal, always a criminal. The problem, however, is that that is precisely the situation in which the rules require the conviction to stay out. . . .
>
> Decades of precedent allow this shoehorning to happen. The scenario usually proceeds this way: the government asserts that the prior conviction is relevant to knowledge, intent, and absence of mistake—a kitchen-sink approach because no one really understands Rule 404(b) the way we have interpreted it. The district court then asks why, and the government usually responds with some variation of 'the Eighth Circuit says so.' The truth is that a prior conviction is irrelevant in most actual-possession cases, unless, of course, the whole point is to allow the jury to make a propensity inference. *See United Stats v. Caldewell*, 760 F.3d 267, 282 (3d Cir. 2014).

Appx. 7-8. The record in Mr. Harrison's case portrays the ripe potential for prejudice posed by prior convictions in the trial of a new charge that underlies the Rule 404(b)(1) prohibition.

Petitioner Harrison denied a charge that he discarded a gun an officer retrieved near a tire of his disabled van after police answered a call about a single-vehicle accident by residents of a home the City of Saint Louis at about 6:20 p.m. on January 8, 2020. Two of the residents testified about hearing a loud crash outside their home. Outside they saw Harrison's van sitting askew between the street curb and a retaining wall on their property. One resident could not identify the man who got out of the van because of poor lighting at the scene. Neither resident ever saw the man hold a gun, although the man spoke of someone on the street pointing a gun at him just before he crashed his van. Two St. Louis Police Officers responded to a call reporting the one-vehicle accident. Officer Joseph Kopfensteiner approached Mr. Harrison standing by the van and suggested they both walk to the sidewalk in front of the van to avoid street traffic. The officer claimed he followed three or four steps behind Mr. Harrison and saw him pull a handgun from his waistband that he then dropped and kicked under the van. No other witness, including Officer Kopfensteiner's partner, claimed to see Mr. Harrison hold or kick any gun.

The Government charged Mr. Harrison with unlawful firearm possession by a person previously convicted of a crime punishable by more than a year in prison, 18 U.S.C. §§ 922(g)(1), 924(a)(2). Mr. Harrison exercised his right to trial. The Government filed notice that it planned to introduce Mr. Harrison's prior conviction for possessing a gun in 2010 at trial. Mr. Harrison filed an objection arguing that when the government claims a defendant personally held a gun, a defendant's knowledge is almost never a material issue absent unusual circumstances, such as when a defendant claims he did not realize the object in his hand was a gun. At a pre-trial hearing, the District Court asked the Government to explain the relevance of the evidence under Rule 404(b). The prosecutor replied that the 2010 offense showed "the history of the

intent, the knowledge of and the prior pattern or habit of this Defendant possessing firearms."

Pre-Trial Tr. 23. The Judge claimed it understood the Government to have claimed,

> "that because the Government has the burden of proving that the Defendant knowingly possessed the firearm, and under the facts of this case, as I understand them, the police are going to testify that Mr. Harrison had a gun, dropped it, and then kicked it under a vehicle, and under those circumstances where the gun is not found on the person, that knowledge and intent are clearly relevant and important issues in the case, and his prior possession of a firearm would tend to show knowledge and intent[.]"

Mr. Harrison did not testify at trial or raise any defense of accidental or mistaken possession of a firearm. The District Court admitted the evidence, again citing the State's burden to prove knowing possession:

> THE COURT: And let me just say for the record, again, as I have indicated previously, the Court does believe under the circumstances of this case where the officer says yes, he sees the gun in his possession, but it is ultimately retrieved from under the vehicle.
>
> The Government has the burden of proving that he knowingly possessed it. Under these circumstances, the Court does believe that this is relevant to show knowledge that he had a gun in his possession. It shows lack of mistake that he didn't just mistakenly have the gun in his possession.
>
> That it wasn't just mistakenly on the ground. It goes to those issues, and specifically, under the particular facts in this case, the Court does find that it is admissible as 404(b) evidence. So, for that reason, the objection again will be overruled.

The Government's summation highlighted that Mr. Harrison had stipulated he had a prior conviction and that he knew he had previously been convicted of an offense punishable by more than one year in prison. It stressed that the only issue the jury had to decide was whether he did or did not possess the gun as Officer Kopfensteiner claimed. Mr. Harrison challenged the credulity of the Officer's claim that he would pull a firearm out of his pocket with an officer walking right behind him and kick it away under the van. He also noted the conduct of the police in foregoing any effort to get a forensic examination for fingerprints or DNA. The jury deliberated more than two hours on this single issue before reaching a verdict.

The Eighth Circuit's Ruling

Appellant maintained his challenge to the evidence citing the prosecuting attorney's candid admission that Mr. Harrison's 10-year-old offense was probative by proving "the history of the intent, the knowledge of and the prior pattern or habit of this Defendant possessing firearms"—in other words his propensity to possess firearms. The Government cited Eighth Circuit cases holding that a defendant's exercise of the right to a trial made every element of the charge—including the element of knowing possession— "material" and compelled admission of such proof. The Government alternatively argued that the error was harmless, a claim it premised on a recitation of only Officer Kopfensteiner's testimony alone, rather than the contradictions of that testimony by the two residents of the house who heard the crash outside.

Chief Judge Smith authored the opinion for the Eighth Circuit panel affirming Mr. Harrison's conviction, joined in full by Judge Gruender. Appx. 1-7. The panel opinion cited Circuit case law that "a not-guilty plea in a felon-in-possession case makes past firearm convictions relevant to show the material issues of [the defendant's] knowledge of the presence of the firearm and his intent to possess it." Appx. 5, quoting *United States v. Drew*, 9 F. 4th 718, 723 (8th Cir. 2021) (cleaned up). The opinion noted that "[t]his rule applies 'even when the prosecution proceeds solely on an actual possession theory.'" *Id.* quoting *United States v. Smith*, 978 F.3d 613, 616 (8th Cir. 2020). Appx 4. Judge Stras concurred in the judgment, but noted that the Circuit's precedents, in effect, led to the introduction of proof of an accused's propensity prohibited by Rule 404(b) because "the Eighth Circuit says so." Appx. 7-8.

The Eighth Circuit denied Mr. Harrison's timely motion for rehearing *en banc* on August 14, 2023. Appx. 9. Mr. Harrison's application for additional time through January 11, 2024, to file his petition. Appx. 10.

GROUNDS FOR GRANTING THE WRIT

I. The Court should resolve whether Fed. R. Evid. 404(b) allows proof of prior gun possession convictions to show an accused knowingly had personal possession of a gun the accused claims never to have touched or possessed.

This case clearly portrays the source of the circuit conflict on the admissibility of prior gun convictions in a trial for a new charge of illegally possessing a gun the accused denies ever having. The government justified its request to show a jury Mr. Harrison's 10-year-old gun conviction to prove "the history of the intent, the knowledge of and the prior pattern or habit of this Defendant possessing firearms." Appx. 16. As Judge Stras's concurrence made plain, the inferences by which the 10-year-old-crime tended to prove the new crime imply a propensity to possess guns, which Rule 404(b)(1) prohibits. Appx. 7-8. Mr. Harrison made no claim of accidental or mistaken possession of a gun he thought was a toy or candy, as would make the 2010 crime potentially probative without inferring propensity under Rule 404(b)(2).

Three circuits essentially apply a "categorical approach" declaring prior convictions for gun possession admissible by reasoning a defendant's demand for trial makes every fact tending to prove the element of "knowing" possession (*see* 18 U.S.C. § 924(a)(2)) "material" within the meaning of Fed. R. Evid. 404(b)(2). *See Drew*, 9 F. 4th at 723 (8th Cir.); *United States v. Jernigan*, 341 F.3d 1273, 1281 & n.7 (11th Cir. 2003) (accused's plea of guilty placed the element of knowledge applicable to Section 922(g) "in issue"); *United States v. Hill*, 60 F.3d 672, 676 (10th Cir. 1995) ("By standing on his not guilty plea, Hill put in issue every material ingredient of the crime charged."). The Eighth Circuit declares prior crimes "presumptively admissible" under Rule 404(b)(2), notwithstanding Rule 404(b)(1)'s prohibition of evidence used to prove conduct in accordance with bad character. *See United States v. Adams*, 783 F.3d 1145, 1150 (8th Cir. 2015).

The Circuits that reject prior convictions in cases not presenting issues of "mistake or accident" recognize that when the government's theory of guilt is based on physical possession of a gun, no material dispute generally arises as to whether the defendant's possession was "knowing." *United States v. Jones*, 484 F.3d 783, 785 (5th Cir. 2007); *United States v. Linares*, 367 F.3d 941, 948 (D.C. Cir. 2004); *United States v. Caldwell*, 760 F.3d 267 (3rd Cir. 2014). *Accord United States v. Gomez*, 763 F.3d 845, 860 (7th Cir. 2014) (*en banc*) ("we reiterate that the district court should consider the degree to which the non-propensity issue actually is contested when evaluating the probative value of the proposed other-act evidence."). These varying analyses "explain[], perhaps, why the rule is the single most heavily litigated of all the Federal Rules of Evidence." New Wigmore Evid. Of Other Misconduct, §4.2 (2016), *quoting* 1 Edward J. Imwinkelried, *Uncharged Misconduct Evidence*, §1.04, at 19-20 (1998). The threat of prejudice impairing a defendant's ability to secure a fair trial enhances the need for this Court to finally address and resolve the matter. "Where a prior conviction was for a gun crime or one similar to other charges in a pending case the risk of unfair prejudice would be especially obvious[.]" *Old Chief v. United States*, 519 U.S. 172, 185 (1997). The Government's candor in basing the probity of Mr. Harrison's 10-year-old conviction for gun possession on inferences of propensity makes this case a penultimate vehicle to resolve this conflict, one that threatens the right to fair trial in thousands of federal prosecutions for gun possession litigated every year.

A. Circuits that categorically base "materiality" on statutory elements like knowledge disregard the relevance limits and balancing of prejudicial risks Rules 401-404 require, contrary to *Michelson, Huddleston,* and *Old Chief.*

Compelling reason to grant certiorari exists when the United States Courts of Appeal decide an important federal question in a way that conflicts with relevant decisions of this Court. S. Ct. Rule 10(c). *See United States v. Marcus*, 560 U.S. 258, 260 (2010)(certiorari was granted

to determine if the Second Circuit's approach to "plain error" review under Fed. Rule Crim. Proc. 52(b) conflicted with this Court's prior interpretations). The view of the Eighth, Tenth, and Eleventh Circuits that the statutory elements a jury must find when the accused goes to trial on a new charge categorically make prior convictions for similar conduct "material" evidence in subsequent prosecutions for similar conduct conflicts with this Court's ruling in *Huddleston v. United States*, 485 U.S. 681 (1988). This Court explained that "[t]he threshold inquiry a court must make before admitting similar acts evidence under Rule 404(b) is whether that evidence is probative of a *material* issue other than character." *Id.* at 686 (emphasis added). To answer the question, the Court cited the three Federal Rules of Evidence preceding Rule 404(b). *Id.* at 687.

Fed. R. Evid. 401 states the "Test for Relevant Evidence" providing that "evidence is relevant if" (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) *the fact is of consequence in determining the action.*" (Emphasis added). Fed. R. Evid 402 provides that relevant evidence is admissible "unless the Rules provide otherwise." 485 U.S. at 687. Fed. R. Evid. 403 restricts admissibility by "Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons." It provides that:

> "The 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."

The "unfair prejudice" to which Rule 403 refers consists of "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Fed. R. Evid. 403, Advisory Committee Notes (1972).

Huddleston was charged with selling stolen goods and possessing stolen property (blank Memorex video cassette tapes) in interstate commerce between April 11 and 15, 1985. *Id.* at 682. The District Court allowed the Government to introduce evidence of "similar acts" based on

a prior offer to sell stolen televisions in February 1985. The Supreme Court observed that because there was no dispute at trial that the tapes Huddleston was shown to have sold were stolen; "the *only material issue at trial* was whether petitioner knew they were stolen." *Id.* at 682-83 (emphasis added). This demonstrated that the determination of whether facts relate to a "material issue" justifying admission of prior crimes under Rule 404(b) does not employ a "categorical approach" defined by the statutory elements of the crime charged, but by whether it relates to "a fact . . . of consequence to determining the action." Fed. R. Evid. 401(b). *Cf Descamps v. United States*, 495 U.S. 254, 260-61 (2013) (confirming the "categorical approach" to identifying predicate violent felonies under 18 U.S.C. § 924(e)(2)(B)(i)-(ii) focuses on the elements of a crime and *not* to the particular facts underlying those convictions).

The categorical materiality the Eighth, Tenth, and Eleventh Circuits grant to statutory elements to render prior convictions admissible conflicts with the "materiality" analysis this Court established in *Huddleston.* Far from authorizing federal prosecutors to "parade past the jury a litany of potentially prejudicial similar acts", 485 U.S., at 689, the Court recognized the validity of Huddleston's concerns about the prejudicial impact of Rule 404(b) evidence and designated the other evidentiary rules of factual and legal relevancy as the requisite safeguards to avoiding prejudicial evidence reaching the jury. 485 U.S. at 691-92. In contrast, the Eighth Circuit's rule encourages judges to admit into evidence an accused's prior conviction *even* when the judge finds that evidence far more prejudicial than probative. *See United States v. Adams,* 783 F.3d 1145, 1148-49. This cannot be reconciled with the emphasis *Huddleston* placed both on the district court's Rule 403 balancing and on the high risk of prejudice posed by evidence a defendant has previously been convicted of the same type of offense conduct alleged at trial. *Id.*

The analysis applied by the Third, Fifth, and D.C. Circuits rejecting prior gun offenses in prosecutions based on personal possession of a firearm absent claims of mistake or accident fits the *Huddleston* formulation perfectly. These circuits frame their analysis using this Court's original explanation of why Rule 404(b) prohibits character evidence in *Michelson v. United States*, 335 U.S. 469 (1948):

> The [character] inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise, and undue prejudice.

United States v. Linares, 367 F.3d at 946 (*quoting Michelson*, 335 U.S. at 475-76); *United States v. Caldwell*, 760 F.3d at 275 (same).

Only this Court can resolve the discord between the rule of the Eighth, Tenth, and Eleventh Circuits that deem prior convictions for the same offense presumptively admissible whenever an accused demands a trial and the case-specific analysis required by *Huddleston.*

B. A categorical approach to the materiality of any evidence tending to prove a statutory element (no matter how undisputed) conflicts with *Old Chief*

The presumption of admissibility employed by the Eighth, Tenth, and Eleventh circuits also clashes with this Court's view of Rule 403 balancing in the specific context of prosecutions pursuant to Section 922(g)(1) in *Old Chief,* 519 U.S. at 177-79. The *Old Chief* opinion stressed the enhanced risk of prejudice posed by the prior conviction at issue in Mr. Harrison's case:

> "In dealing with the specific problem raised by § 922(g)(1) and its prior-conviction element, there can be no question that evidence of the name or nature of the prior offense generally carries a risk of unfair prejudice to the defendant. That risk will vary from case to case, . . . but will be substantial whenever the official record offered by the Government would be arresting enough to lure a juror into a sequence of bad character reasoning. *Where a prior conviction was for a gun crime or one similar to other charges in a pending case the risk of unfair prejudice would be especially obvious . . .*"

Id. at 185 (emphasis added). The prosecutor's pre-trial justification for introducing Mr. Harrison's 10-year-old conviction relied explicitly on "a sequence of bad character reasoning," as Judge Stras noted. Appx. 7-8. The Eighth Circuit's stance that prior convictions for the same offense are presumptively admissible cannot be reconciled with this part of *Old Chief*. The Third Circuit and D.C. Circuit cases rejecting prior convictions in cases like Mr. Harrison's noted this Court's prior cautions about the very real risk of prejudice posed in this scenario. *See United States v. Linares,* 367 F.3d at 946 (quoting *Michelson,* 335 U.S. at 475-76); *United States v. Caldwell,* 760 F.3d at 275 (same). This underscores the conflict between the Eighth Circuit's view of the "presumptive admissibility" of prior gun convictions to secure new convictions based on the same statute and this Court's longstanding recognition of the greater risk of prejudice in this context. Only this Court can resolve this discord.

C. This case presents an excellent vehicle in which to resolve these conflicts.

Mr. Harrison's case presents a strong vehicle by which to resolve the circuit conflict on the admissibility of prior convictions for gun possession to convict a defendant later on a new charge of personally possessing a firearm he insists he never had. The issue was fully preserved and developed at trial. The unusual clarity in the Government's invocation of inferences of current conduct "in accordance" with prior bad behavior, and the District Court's admission of that evidence restatement based on the categorical elements of the crime for which Mr. Harrison demanded a trial rather than focusing on whether knowing possession constituted "a fact . . . of consequence to determining the action" exemplifies the sources of conflict in the views the opposing circuits have adopted.

The Eastern and Western Districts of Missouri tend to lead the nation in the number of convictions for violations of illegal gun possession by persons with prior felony convictions. *See*

U.S. Sentencing Commission, *Quick Facts—Felon in Possession of a Firearm* (Fiscal Year 2020) (The Eastern District of Missouri led the nation with 380 convictions while the Western District had 219).[1] Petitioner's case presents the best vehicle by which to determine the proper application of Rule 404(b) in such prosecutions and resolve the circuit conflict on the admissibility of prior gun possession convictions in a new charge for the same crime.

Petitioner notes that the opinion of the Eighth Circuit panel did not belittle the impact the 2010 conviction had or declare any error in its admission would be harmless. Appx. 6-7. Notwithstanding concurring Judge Stras's view that the error was harmless, the jury's two-hour deliberation to decide the only disputed fact of whether Mr. Harrison did or did not personally possess the gun as Officer Kopfensteiner alleged weighs against a finding of harmless error. One of the residents in the house who reported the accident testified that the driver of the van spoke of some person or persons shooting at him. The Eighth Circuit has observed that when a trial presents a jury with a choice between a single police officer's testimony to a version of an incident against the different version posed by the defense, the evidence "is less than overwhelming." *See United States v. Holmes,* 413 F.3d 770, 776 (8th Cir. 2005). The potential for prejudicial evidence to improperly influence a jury's determination is highest when the evidence is not overwhelming.

Petitioner seeks certiorari to resolve this recurrent and important issue and then remand his case to the Eighth Circuit to properly decide his claim on appeal.

[1] Accessible at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Felon_In_Possession_FY20.pdf (last accessed Jan. 11, 2024).

CONCLUSION

WHEREFORE, Petitioner Harrison requests that this Court grant his Petition for a Writ of Certiorari.

Respectfully submitted,

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