NO. 24-_____

IN THE SUPREME COURT OF THE UNITED STATES

Richard Lee David Brown,

Petitioner,

-vs.-

United States of America,

Respondent.

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

Petition for Writ of Certiorari

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Questions Presented for Review

1. Whether the admission of two prior drug convictions for the purpose of arguing in closing that "[t]he defendant possessed that crack cocaine, and he darn sure intended to distribute it *because* that's what he does" constitutes impermissible propensity.

2. Whether—as an issue of first impression and in light of (1) the obligation to consider each appellate issue for at least plain error, *Davis v. United States*, 140 S. Ct. 1060, 1061–62 (2020) (*per curiam*); and (2) the rejection of any circumscription of that obligation to the trial record, *Greer v. United States*, 593 U.S. 503, 510 (2021)—appellate courts must permit defendants to expand the record on a narrow class of constitutional challenges.

3. As an important and unclarified issue in the law, under what circumstances is a criminal defendant entitled to a specific theory of defense instruction.

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Opinion Below

Petitioner, Mr. Richard Lee David Brown, respectfully prays that a writ of certiorari issue to review the judgment of the Eighth Circuit Court of Appeals in Case No. 22-2343 entered on December 13, 2023. *United States v. Brown*, 88 F.4th 750 (8th Cir. 2023), *rehearing and rehearing en banc denied Jan. 19, 2024*. Rehearing and rehearing en banc was denied January 19, 2024.

Jurisdiction

The panel of the Eighth Circuit Court of Appeals entered its judgment on December 13, 2023. The Eighth Circuit Court of Appeals denied rehearing and rehearing en banc on January 19, 2024. Jurisdiction of this court is invoked under 28 U.S.C. § 1254.

Constitutional and Statutory Provisions Involved

This case involves the application of three federal rules: FED. R. EVID. 404(b); FED. R. CRIM. P. 52(b); FED. R. APP. P. 10(e).

Fed. R. Evid. 404(b)

(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.

Fed. R. Crim. P. 52(b)

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

Fed. R. App. P. 10(e)

(e) Correction or Modification of the Record.

(1) If any difference arises about whether the record truly discloses what occurred in the district court, the difference must be submitted to and settled by that court and the record conformed accordingly.

(2) If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected and a supplemental record may be certified and forwarded:

(A) on stipulation of the parties;

(B) by the district court before or after the record has been forwarded; or

(C) by the court of appeals.

(3) All other questions as to the form and content of the record must be presented to the court of appeals.

Statement of the Case

Following a 2-day jury trial in the Southern District of Iowa, Petitioner Mr. Brown was convicted of one count of possession with intent to distribute cocaine base in violation of 21 U.S.C. § 841 and sentenced to 264 months' imprisonment. Mr. Brown challenged several pre-trial and post-trial orders, as well as several unpreserved arguments.[1]

At trial, the Government called nine (9) witnesses consisting of seven (7) law enforcement agents; one (1) criminalist at the Iowa Department of Criminal

[1] Mr. Brown had new counsel appointed for the purpose of appeal and Mr. Brown's trial counsel withdrew shortly after filing the Notice of Appeal.

Investigation Laboratory; and one (1) civilian fact witness—Lometa Welch. *See* TT Vol. I, p. 2; TT Vol. II, p. 262.[2]

ATF Supervisory Special Agent Matt Brown testified first, and claimed to have found contraband—plastic bags of controlled substances—on the bed in Bedroom # 3. *See* TT Vol. I, 112:19 – 113:1. Ankeny Police Department Sergeant Tony Christoph testified that he was a part of the Suburban Emergency Response Team ("SERT") tasked with making entrance into the premises to be searched. *See* TT Vol. I, at 130:20 – 131:3, 131:22 – 132:1. Urbandale Police Department Sergeant Nicholas Hazel, also a member of the SERT team testified that law enforcement encountered three (3) individuals in the residence during the raid including Mr. Brown. *See* TT Vol. I, at 155:1–12. ATF Task Force Officer John Mattivi testified to assisting ATF Special Agent Matt Brown search Bedroom # 3. *See* TT Vol. I, at 161:16–24. Officer Mattivi testified that in his search of the dresser in Bedroom # 3, he discovered drug paraphernalia consistent with drug *use*. *See* TT Vol. I, at 162:19 – 163:10, 173:10–12. ATF Special Agent James Payne testified to finding $590 in cash in Mr. Brown's pocket. *See* TT Vol. I, at 191:5–11. This money had been returned to Mr. Brown before trial.[3] Special Agent Payne testified that he discovered controlled substances

[2] Throughout this Petition, Mr. Brown's record citations are identified as follows: "TT" refers to the Trial Transcript; "R. Doc." refers to the District Court's electronic docket; and "Op." refers to the Eighth Circuit's underlying opinion and as accompanied by citation to the federal reporter.

[3] On or about March 24, 2021, the Government sought to return that currency to Mr. Brown's then-counsel. This currency was *not* retained by the Government, forfeited by Mr. Brown, or otherwise preserved as traceable to criminal conduct. *Cf.* 18 U.S.C. § 982 *et seq*. (forfeiture statute). Nevertheless, a photograph of the cash was presented at trial as Government's Exhibit 18. *See also* R. Doc. 137-2, at 9.

and drug paraphernalia in the living room of the residence. *See* TT Vol. I, at 194:19 – 195:21. He further testified that near the contraband in the living room, he found the driver's license of the residence's actual renter—not Mr. Brown. *See* TT Vol. I, at 196:18–24.

Criminalist Megan Reedy testified to the laboratory testing of the substances seized—identifying the lion's share of the charged 21 grams as cocaine base. *See* TT Vol. I, at 210:6–22. Iowa Department of Public Safety Special Agent Brandon West testified that he knew the renter of the residence to be someone other than Mr. Brown ("Lisa" Harper). *See* TT Vol. I, at 224:10–14. He testified Harper was not present at the residence at the time of the raid. *See* TT Vol. I, at 290:4–9. He further testified to Mr. Brown's admissions—made both *before* and after Mr. Brown had been read any *Miranda* warnings. *See* TT Vol. I, at 225:19 – 228:1, 232:21–23. Special Agent West testified to the substance of the text messages on the phone which Mr. Brown had—before any *Miranda* warnings had been issued—admitted was his. *See* TT Vol. I, pp. 236–247.

On Trial day 2, and over Mr. Brown's objection, Special Agent West testified to two prior convictions of Mr. Brown—a prior conviction for simple possession of cocaine, *see* TT Vol. II, at 275:12–15, and a prior conviction of possession with intent to deliver cocaine base, *see* TT Vol. II, at 280:2–7. Special Agent West further testified he interviewed Mr. Brown on scene at approximately 7:30am (TT Vol. II, at 296:2–6) and Harper arrived at the residence thereafter, at approximately 8:00am (TT Vol. II, at 291:19–21).

Civilian Lometa Welch—the only non-LEO fact witness at trial—testified that approximately 30 minutes before the start of the raid, she visited the residence and interacted with Lisa Harper who allegedly facilitated a drug transaction between Welch and Mr. Brown. *See* TT Vol. II, at 325:4–11, 334:11–18, 337:8–12. Welch testified the purpose of her visit to the residence was to purchase drugs from *Kenny Smart*—not Mr. Brown. TT Vol. II, at 334:5–7.

To conclude the evidentiary portion of the trial, Investigator John Scarlett testified about cocaine base generally, admitting he had no personal knowledge of the facts of the case specifically. *See* TT Vol. II, at 364:21–23. Mr. Brown moved for a judgment of acquittal (TT Vol. II, at 374:23 – 375:6), which the Court denied (TT Vol. II, at 376:2 – 377:19). The defense rested. TT Vol. II, at 389:21–24. The Court denied Mr. Brown's request for a jury instruction specifically recapitulating the law that 'mere presence' or association is an insufficient basis to return a guilty verdict. TT Vol. II, at 388:12–13. The jury ultimately returned a guilty verdict. TT Vol. II, at 430:19–24; R. Doc. 131.

After trial, Mr. Brown renewed his Motion for Judgment of Acquittal and Motion for a New Trial. R. Doc. 143. On March 9, 2022, the Court denied both Motions. R. Doc. 146. On June 23, 2022, the Court sentenced Mr. Brown to 264 months' imprisonment. R. Doc. 160.

Mr. Brown timely appealed his conviction (and the District Court's denial of various pre-trial and post-trial motions) to the United States Court of Appeals for the Eighth Circuit. On October 24, 2022, Mr. Brown filed an Amended Motion to

Expand the Record to advance six (6) items in support of his appellate claims to the Eighth Circuit panel. Specifically, Mr. Brown sought to incorporate materials from the Government's discovery production, including (A) a transcript of Mr. Brown's pre-*Miranda* statements used frequently at trial; (B) a transcript of the grand jury testimony of the residence's registered renter (submitted under seal); (C) a redacted report of investigation regarding the execution of the search warrant and interview thereafter; (D) pole camera video showing the main entrance/exit of the residence on the morning of the raid; (E) an excerpt from trial testimony available publicly on the docket of a related case; and (F) audio of an interview with the Government's lone non-LEO fact witness (excerpted for relevance and convenience).[4] Mr. Brown sought to use the materials for three of his appeal challenges: (1) the knowing false testimony of Lometa Welch;[5] (2) the use of impermissible pre-*Miranda* statements;[6]

[4] The authenticity and veracity of the proposed attachments were not disputed.

[5] Mr. Brown intended to demonstrate Lometa Welch's testimony of a drug transaction facilitated by Harper the morning of the raid was knowingly false through the following: Harper's testimony that she was at a casino the morning of the raid (and therefore not present at the residence); a pole camera footage showing no traffic in or out of the house between the time of Welch's visit to the property and the raid itself; law enforcement reports that Harper was not present at the time of the raid; and Welch's testimony in a different case from several months prior indicating that she did not "deal with" Petitioner Brown that morning (contrary to her testimony at the Petitioner's trial). Further, this material, and the failure to adduce the same during cross-examination or otherwise, goes to the heart of Mr. Brown's ineffective assistance claim.

[6] At trial, the Government repeatedly relied on Mr. Brown's admissions regarding his ownership of a cellular phone, among others. Mr. Brown intended to demonstrate the frequent use of these admissions violated *Miranda v. Arizona*, 384 U.S. 436 (1966). Mr. Brown sought to expand the appellate record to include a 10-page double-spaced transcript of the interview which contained no *Miranda* warnings.

and (3) trial counsel's ineffectiveness on cross-examination and in preserving issues for appellate review.

On December 13, 2023, the Eighth Circuit affirmed the conviction in full and denied Mr. Brown's Motion to Expand the Record. *United States v. Brown*, 88 F.4th 750 (8th Cir. 2023). On January 19, 2024, Mr. Brown's combined petition for panel rehearing and rehearing *en banc* were denied. Petitioner Brown hereby seeks a writ of certiorari to reverse the lower courts and speak on three (3) important issues of federal law.

Reasons for Granting the Writ

The United States Court of Appeals for the Eighth Circuit decided important issues of federal law not settled by this Court or otherwise conflicting with relevant Supreme Court decisions, or those of sister Circuits. *See* Supr. Ct. R. 10(a), (c). Specifically, the appellate panel (I) appeared to apply an untenable standard to the Government's use of improper propensity evidence and argument (Question Presented No. 1); (II) sidestepped an issue of first impression regarding whether an appellate court must allow the record to be expanded for certain constitutional challenges (Question Presented No. 2); and (III) declined to announce a workable standard for when a defendant may be entitled to a "mere presence" theory of defense instruction—and the degree to which prior precedent may overcome the testimony and evidence admitted in the present case (Question Presented No. 3). This Court should decide each question.

I. This Court should reverse the Eighth Circuit and find the purpose for admitting Mr. Brown's two prior convictions was merely improper propensity (Question Presented No. 1).

The Government admitted Mr. Brown's two prior controlled substances convictions, claimed to be relevant to the requisite mental state for the offense. *See* TT Vol. II 275:12–15, 280:2–7 (testifying about prior convictions for possession with intent to deliver cocaine base and simple possession of cocaine). Even before evidence of those convictions was admitted, however, the Government relied on those convictions in its opening before the jury. It later relied heavily on them in closing. Indeed, seven (7) times throughout the two-day trial the Government referred to Mr. Brown as a "drug dealer," and, at least twice, specifically urged the jury to convict "***because***" of his prior controlled substance convictions.

- "The defendant is a drug dealer. Specifically, the evidence will show that the defendant is a crack cocaine dealer." TT Vol. I, at 92:10–12.
- "The defendant intended to sell *this* crack to make money ***because*** the defendant is a crack dealer…." TT Vol. II, at 395:24–25 (emphasis supplied).
- "Drug dealers weigh it out beforehand, drug dealers like the defendant." TT Vol. II, at 404:2–3.
- "[T]he Government is not suggesting that the defendant was the only person who used this scale or even that he was the only drug dealer in this house." TT Vol. II, at 404:4–6.

- "Also consistent with the fact that the defendant is a drug dealer is what was found in his pockets. Cash." TT Vol. II, at 404:9–10.[7]
- "Ladies and gentlemen, use your common sense. The defendant is a drug dealer." TT Vol. II, at 423:25 – 424:1.
- "The defendant possessed that crack cocaine, and he darn sure intended to distribute it ***because*** that's what he does." TT Vol. II, at 424:6–7.

The Government's remarks constituted a continuous, cumulative prejudice against Mr. Brown during the relatively short trial. And, the above remarks were both the first and last items the jury heard at trial. Simply, the Government's case—one of constructive possession—rested entirely (or at least to a constitutionally significant degree) on the idea that Mr. Brown was a drug dealer and he acted in conformity with that character trait. *Cf.* FED. R. EVID. 404(b)(1) ("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."). The Rule's principled prohibition recognizes that such evidence "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." *Michelson v. United States*, 335 U.S. 469, 476 (1948).

[7] Although the Government sought to return the seized cash to Mr. Brown shortly before trial, the Government admitted an exhibit photograph of cash. Mr. Brown submits the cash was admitted to associate Mr. Brown as a 'drug dealer' and constitutes impermissible character evidence.

Accordingly, this Court should grant certiorari because (A) the Eighth Circuit decided an important issue of federal law which should be resolved by this Court, *see* Supr. Ct. R. 10(c); and (B) this Court should resolve the split among the Circuits regarding the governing standards and applications of Rule 404(b), *see* Supr. Ct. R. 10(a).

A. The Eighth Circuit decided an important issue of federal law which should be resolved by this Court.

Mr. Brown respectfully submits the Court should grant certiorari to resolve the important question as to the limits of the admission and subsequent use of prior convictions under the Federal Rules of Evidence. The applicable Eighth Circuit test concerning the admissibility of character evidence under Rule 404(b)—as does the test in most Circuits—requires demonstrating the evidence is to be used for a permissible purpose. *E.g.*, *United States v. Jackson*, 856 F.3d 1187, 1192 (8th Cir. 2017) (reciting "the government must 'identify the permissible non-propensity purpose of the evidence, and must articulate the relationship between the [evidence] and a material issue in the case'" (quoting *United States v. Cotton*, 823 F.3d 430, 432 (8th Cir. 2016))).[8]

[8] The test requires demonstrating (1) relevance; (2) the prior conviction is similar in kind and not overly remote intime; (3) supported by sufficient evidence; and (4) its potential to prejudice does not outweigh its probative value. *United States v. Williams*, 796 F.3d 951, 959 (8th Cir. 2015); *see also Brown*, 88 F.4th at 757. The Eighth Circuit's formulation omits the proper purpose element this Court required in 1988. *Huddleston v. United States*, 485 U.S. 681, 691–92 (1988). The *use* of admitted evidence has long been material to the inquiry and should not have been overwritten here. This, itself, warrants certiorari and reversal.

Indeed, it also remains binding Eighth Circuit law that "[s]imply asserting—without explanation—that the conviction is relevant to a material issue such as intent or knowledge is not enough to establish its admissibility under the Federal Rules." *United States v. Turner*, 781 F.3d 374, 390 (8th Cir 2015). The Rule itself requires this. FED. R. EVID. 404(b)(3)(B) (requiring the Government "articulate…the permitted purpose for which the prosecutor intends to offer the evidence *and the reasoning that supports that purpose*" (emphasis supplied)). Here, the Government posited only "Defendant's prior possession of crack cocaine with intent to deliver (2014) and possession of cocaine (2019) is relevant to Defendant's knowledge, motive, and intent to possess and sell crack cocaine, elements of the charged crime." R. Doc. 84, at 2. There was no explanation. *Cf.* FED. R. EVID. 404(b)(3)(B).

This Court should grant certiorari to resolve an important question of federal law which is not addressed by the foregoing standards in the Eighth Circuit—or elsewhere. Under the Federal Rules of Evidence, there presently exists no uniform governing standard for (a) assessing whether a Government use constitutes "propensity;" (b) identifying when evidence purportedly admitted pursuant to a 404(b)-permissible purpose exceeds the scope of that purpose and becomes improper, inadmissible propensity; and (c) whether Government argument linking the accused's prior convictions to the accused's alleged conduct through a causal subordinating conjunction (such as "because") constitutes improper propensity evidence.[9]

[9] The English word "because," a subordinating conjunction, has one connotation—cause and effect. *E.g.*, Aziz Thabit Saeed & Saleh Al-Salman, *Context-Based Interpretation of Subordinating Conjunctions in Communication*, 5 LANGUAGES 62,

The Eighth Circuit granted no relief. The Government's use of the evidence was paradigmatic propensity purposes—exhibited plainly by the Government's own choice of words: 'He did this because he did that.' The Rules of Evidence do not allow that, and should not have been rendered a dead-letter. This Court should grant certiorari to correct these substantial errors and clarify an issue of great importance with respect to one of the most oft-litigated Rules.

B. This Court should resolve the split among the Circuits regarding the appropriate test to apply when considering subsequent *use* of 404(b) evidence in closing argument.

Mr. Brown respectfully submits that the Government's use of a subordinating conjunction linking his prior convictions to the conformance of his character in this case was improper and reversible error. On this front, many courts have found the argument to be problematic. *E.g.*, *United States v. Green-Bowman*, 816 F.3d 958, 965 (8th Cir. 2016) (affirming a conviction only where "the government did not expressly argue [the defendant] was guilty *because* he was the sort of person who would be likely to [commit the offense]." (emphasis supplied)); *United States v. Richards*, 719 F.3d 746, 764–65 (7th Cir. 2013) (noting a prosecutor's argument that the defendant

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at 6 (Nov. 16, 2020) ("Each one of the conjunctions targeted in this study, except for *because*, assumes a number of functions besides the causal one."); *id.* at 1 (identifying "because" as the quintessential causal use of a subordinating conjunction). Indeed, "[a] subordinating conjunction," such as "because," "establishes the relationship between the dependent clause and the rest of the sentence." Emmanuel C. Sharndama, *Analysis of the Uses of Coordination and Subordination in Professional Legal Discourse*, 2 INT'L J. ON STUD. IN ENGLISH LANG. & LIT. 12, 13 (Sept. 2014). Here, it is clear the Government told the jury its theory of the case, that Mr. Brown possessed this controlled substance for purpose of distribution, was predicated on his prior actions—"***because*** that's what he does." *E.g.*, TT Vol. II, at 424:6–7 (emphasis supplied).

was a "drug dealer" "***because***" of his prior convictions required remanding for a new trial); *United States v. Brown*, 327 F.3d 867, 872 (9th Cir. 2003) (remanding for a new trial in light of the prosecution's closing argument, which the Court recognized was "clearly designed to show Brown's criminal propensity in violation of Fed. R. Evid. 404(b)."); *United States v. Himelwright*, 42 F.3d 777, 786–87 (3d Cir. 1994) (remanding for a new trial for the "disproportionate emphasis by the prosecution" of 404(b) evidence). Indeed, that the Eighth Circuit here rejected Mr. Brown's argument and affirmed the conviction is itself another basis on which this Court should grant certiorari. *See* Supr. Ct. R. 10(a) (identifying circuit conflicts as a basis for granting certiorari).

And, in fact, here the Eighth Circuit panel noted that "the government's proposed uses of Brown's prior convictions to prove knowledge, motive, and intent 'were not well-explained, and might prudently have been omitted.'" *See* Op., at 7, *Brown*, 88 F.4th at 758 (quoting *United States v. Monds*, 945 F.3d 1049, 1052 (8th Cir. 2019)). Mr. Brown respectfully submits that the mere invocation of the Rule 404(b)-permitted purposes cannot insulate improper causal propensity arguments made by the Government in closing.

The mere invocation of a permissible Rule 404(b) purpose—and the fact that evidence was admitted at all—does not and cannot end the analysis. There is further split among the Circuits about the proper test to use in ruling on the admissibility of prior wrongs through Rule 404(b). Several circuits, like the Eighth Circuit, require analysis of relevance, similarity, sufficiency, and prejudice balancing. *See United*

States v. Horner, 853 F.3d 1201, 1213 (11th Cir. 2017); *Williams*, 796 F.3d at 959; *United States v. Vo*, 413 F.3d 1010, 1018 (9th Cir. 2005).

Other circuits offer different permutations of the elements. But in each of the following Circuits, the analysis of relevance or proper purpose requires the court to specifically consider whether the material will be used for a propensity purpose. *E.g.*, *United States v. Santana*, 342 F.3d 60, 67 (1st Cir. 2003) (requiring the prior conviction "must have some relevance other than to show the defendant's propensity to commit the crime"); *United States v. Inserra*, 34 F.3d 83, 89 (2d Cir. 1994) (permitting "admission of such evidence for any purpose other than to show a defendant's criminal propensity"); *United States v. Davis*, 726 F.3d 434, 442 (3d Cir. 2013) (requiring *inter alia* a proper, non-propensity relevance be articulated); *United States v. Hall*, 858 F.3d 254, 266 (4th Cir. 2017) (requiring the evidence to be "necessary" and not used "to establish the general character of the defendant"); *United States v. Conner*, 583 F.3d 1011, 1022 (7th Cir. 2009) (analyzing how the evidence is "directed" to either a matter in issue or a defendant's propensity). This standard imposes a heightened obligation the Eighth Circuit's four-step approach omits—even if a 404(b) permissible purposes can be called out, that itself must not be founded in propensity.

Others decline to hold the Government to its burden of articulating and explaining the permissible purpose, and otherwise make no mention of limits on the subsequent use of the evidence thereafter. *United States v. Esquivel-Rios*, 725 F.3d 1231, 1240 (10th Cir. 2013); *United States v. Ayoub*, 498 F.3d 532, 547 (6th Cir. 2007);

United States v. Griffin, 324 F.3d 330, 359 (5th Cir. 2003); *United States v. Miller*, 895 F.2d 1431, 1440 (D.C. Cir. 1990).

The differences among the Circuits, however, hardly ends there. Many courts have recognized that prejudicial closing statements made on the backs of admitted 404(b) evidence are oftentimes overlooked as impermissible propensity inferences. *E.g.*, *Richards*, 719 F.3d at 765 ("[B]ut Rule 404(b) prohibits the government's theory of the case from resting on the propensity inference."); *United States v. Moore*, 375 F.2d 259, 264 (3d Cir. 2004) ("Rather, what is crystal clear is that the evidence came in for one reason and one reason only: to demonstrate [the defendant's] propensity to act in a particular manner…."); *see also United States v. Harrison*, 70 F.4th 1094, 1099 (8th Cir. 2023) (Stras, J., concurring) ("How does a decade-old firearm-possession offense show that [the defendant] knowingly possessed a gun this time around? Neither the government nor the court provides much of a reason, so I will. It shows that [the defendant] has committed the same criminal act before and 'acted in accordance' with that character by doing it again. Once a criminal, always a criminal." (quoting FED. R. EVID. 404(b)(1), citation omitted)).; *United States v. Vaca*, 38 F.4th 718, 721 (8th Cir. 2022) ("[P]ropensity evidence is out of bounds: using another bad act to show that an individual is likely to do the same thing again in the future.").

Yet, others have imposed an additional required proof point—a demonstration of prejudice. *E.g.*, *United States v. Rodella*, 804 F.3d 1317, 1336 (10th Cir. 2015) ("Even assuming that this statement was an improper use of the 404(b) evidence, the government has carried its burden of showing that it was not prejudicial to

Rodella…."). Such a position defeats the principled approach long-established that the Government ought to bear the burden of demonstrating the admissibility of its evidence. And, with respect to Rule 404(b), that requires showing both a *proper use* and the *absence of prejudice*. *See Jackson*, 856 F.3d at 1192. It is not the defendant's burden to show prejudice. It is the Government's burden to disprove it. The problem further arises where, as here, the reviewing court accepts the unexplained permissible purpose recitation and declines to consider the propensity argument actually, expressly articulated to the jury. In short, there is no uniformity among either the decisions/outcomes nor the test to apply in determining the propriety of evidence or argument. This is the question Mr. Brown urges this Court to resolve, and, in doing so, reverse his conviction.

In sum, the Eighth Circuit's test inadequately addresses the inevitability of abuse—by which the Government uses otherwise-admitted 404(b) evidence for a purpose exceeding the permissible scope of the Rule. In light of the significant cumulative prejudice the constant remarks effected on Mr. Brown's two-day trial, and the lack of uniformity among the Circuits, this Court should grant certiorari and remand for a new trial to limit the Government's propensity argument and inference.

II. As an issue of first impression, this Court should grant certiorari for the purpose of assessing the circumstances under which appellate courts should or must sustain a motion to expand the appellate record (Question Presented No. 2).

Mr. Brown raised several substantive challenges to the Eighth Circuit which his trial counsel had not preserved at the District Court. In support of several of those issues—including ineffective assistance of counsel, *Miranda*, and the knowing false

testimony of a Government case-in-chief witness[10]—Mr. Brown moved to expand the appellate record.[11]

Mr. Brown moved to expand the appellate record on the basis that this Court has held "[o]ur cases likewise do not purport to shield any category of errors from plain-error review." *Davis*, 140 S. Ct. at 1061–62. This is specifically contemplated in the Federal Rules. *See* FED. R. CRIM. P. 52(b). Albeit in other contexts, this Court has also rejected an "argument that plain-error review must focus exclusively on the trial record" as "contraven[ing] both logic and precedent." *Greer*, 593 U.S. at 510. Mr. Brown further relied on the Eighth Circuit's interpretation of the same authority—that lower courts may not avoid an argument under at least a plain error standard. *United States v. Hill*, 31 F.4th 1076, 1083 n.3 (8th Cir. 2022).

The nature of the substantive appellate issues raised is also instructive, and not addressed by the Eighth Circuit. Mr. Brown has not sought to expand the record on all of his appellate issues. Indeed, Mr. Brown merely asked the Eighth Circuit to expand the appellate record specifically as it relates to his appellate issues challenging the constitutionality of the *failure to include those documents in the record*. To the extent there is a constitutional violation—the violation is the fact that

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[10] *Napue v. Illinois*, 360 U.S. 264 (1959).

[11] Indeed, Federal Rule of Appellate Procedure 10 governs the extent and identification of the Record on Appeal. Rule 10(e) contains certain procedural vehicles to correct or modify the record on appeal, including noting that "[a]ll other questions as to the form and content of the record must be presented to the court of appeals." FED. R. APP. P. 10(e)(3). Noteworthy, Mr. Brown never misrepresented or concealed what was a part of the record and what was intended to be modest supplement. From the outset, Mr. Brown urged plain error review here.

those documents were not disclosed.[12] Indeed, it remains the judiciary's "solemn responsibility for maintaining the Constitution inviolate." *Napue*, 360 U.S. at 271. The Constitution ought not be set aside for procedural convenience—especially following this Court's recent pronouncements. *E.g.*, *Davis*, 140 S. Ct. at 1061–62.

This is an issue of first impression: whether a narrow class of specific constitutional violations characterized by the non-disclosure of the proposed materials or information, warrants granting a motion to expand the appellate record. Regardless of the answer on the merits, however, there exists a larger, predicate problem. There is no test—whether in the Eighth Circuit or elsewhere—for analyzing whether expanded records should be permitted on direct appeal, particularly after this Court's decisions relative to appellate courts' obligatory "plain error review."[13] The proposed test found in footnote 13, *supra*, is an application of existing principles of judicial discretion and superior constitutional obligations. It only applies to a

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[12] Rhetorically, Mr. Brown respectfully submits that criminal defendants would be hamstrung on direct appeal, in large part deprived the opportunity to bring such narrow, constitutional challenges and without the ability to, for example, present the testimony as false.

[13] One example test could be *first* demonstrating the challenge falls within a narrow class of constitutional challenges premised on the nondisclosure of some essential truth; *second* determining whether the allegation—if accepted as true—would constitute plain error sufficient to reverse/remand; and *third*, if the second prong is answered in the affirmative, expanding the record to look at the proposed documentation to determine whether the proposed documentation sufficiently supports the proposition advanced. Indeed, Mr. Brown further does not seek to apply this test—or expand the record—on *all* unpreserved errors. Rather, Mr. Brown respectfully submits that this test may appropriately apply to circumstances—such as a *Napue* violation, 360 U.S. 264—where the issue challenged is the very nondisclosure itself. As a matter of practicality, had the true state of the facts been in the record there would no merits to such a claim for constitutional violation and no need to expand the record. It was simply omitted from the trial record here.

limited subset of challenges, under one of the most difficult burdens in the law (plain error), and ferrets out meritless allegations. It further promotes judicial economy and endeavors to maintain constitutional guarantees are accessible, reachable, and meaningful.

Here, contrary to Mr. Brown's ask, the Eighth Circuit denied Mr. Brown's Motion to Expand the Record. *See* Op., at 4–5, *Brown*, 88 F.4th at 756 ("Consequently, we deny Brown's Amended Motion to Expand the Record on Appeal and we examine his arguments based on the record that was before the district court."). But the panel decision was not unanimous. In fact, one Circuit Judge issued a separate concurrence that none of the unpreserved arguments should be reviewed at all—let alone the attachments proposed to support the appellate arguments. *Id.* at 762–63 (Gruender, J., concurring in part and concurring in the judgment). The separate concurrence relies on 2023 Eighth Circuit precedent standing for the proposition that an issue may be "waived" and not subject to plain error review whatsoever. *See United States v. Pickens*, 58 F.4th 983, 988 (8th Cir. 2023). Mr. Brown respectfully submits that the cited precedent—whether binding or not on Mr. Brown's Eighth Circuit panel—is incompatible with this Court's *Davis* opinion. *Davis*, 140 S. Ct. at 1061–62 ("Put simply, there is no legal basis for the Fifth Circuit's practice of declining to review certain unpreserved…arguments for plain error.").

Mr. Brown submits that the Eighth Circuit's panel decision relegated "plain error" review to a toothless standard. Mr. Brown respectfully submits that despite the extensive citation to and reliance on this Court's precedent (including *Davis*, 140

S. Ct. 1060), the Eighth Circuit conducted no analysis of the same. *See generally Brown*, 88 F.4th 750 (omitting *Davis* entirely). And, Mr. Brown respectfully submits that the panel's two separate positions on the issue, the Circuit's other split precedent,[14] the lack of uniform authority elsewhere, and this Court's recent precedent are all potentially in conflict with one another—this conflict can only be resolved by this Supreme Court. *See* Supr. Ct. R. 10(a), (c). Accordingly, certiorari should be granted as to Question Presented No. 2.

III. The Eighth Circuit erred in deferring to prior *applications* of jury instructions instead of the evidence and argument admitted in this case (Question Presented No. 3).

Mr. Brown finally requests this Court grant certiorari for the purpose of clarifying the role, standards, and extent to which a criminal defendant is entitled to a theory of defense instruction—specifically a "mere presence" instruction. In support of his argument, Mr. Brown relied on valid, binding Eighth Circuit authority to both the District Court and the Eighth Circuit. *See United States v. Manning*, 618 F.2d 45, 48 (8th Cir. 1980). The panel did not cite to or distinguish *Manning* in its opinion—despite the instructions being substantively identical in both cases:

> The law recognizes two kinds of possession: actual possession and constructive possession.

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[14] The same week in which the Eighth Circuit affirmed Mr. Brown's conviction, the Eighth Circuit released a separate unpublished opinion in a separate case which permitted the Government to expand the record, without nearly as substantial a showing as in Mr. Brown's case. *E.g.*, *United States v. Parker*, No. 22-2905, 2023 WL 8714098, at *1 (8th Cir. Dec. 18, 2023). Simply, there is a plethora of positions on Mr. Brown's Motion, and due to its grounding in the Supreme Court precedent, federal rules, and constitutional guarantees, it would benefit the lower courts to have these questions—and the standards which ought to govern them—uniformly decided.

> A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it.
> A person who, although not in actual possession, knowingly has both the power and the intention, at a given time, to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it.
> If you should find beyond a reasonable doubt, from the evidence in the case, that at the time and place of the alleged offense the defendant had actual or constructive possession of the shotgun described in the indictment, then you may find that such shotgun was in the possession of, within the meaning of the word "possession" as used in these instructions.

Manning, 618 F.2d at 47.

> The law recognizes several kinds of possession. A person may have actual possession or constructive possession. A person may have sole or joint possession.
> A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it.
> A person who, although not in actual possession, has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it.
> If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint.
> Whenever the words "possession" or "possessed" have been used in these instructions, it includes actual as well as constructive possession and also sole as well as joint possession.

R. Doc. 129, at 14 (Jury Instruction 13).

The Eighth Circuit did not cite to, nor address *Manning*. *See generally Brown*, 88 F.4th 750. Rather, the panel looked to different Eighth Circuit caselaw applying a requested mere presence instruction in distinct trials. *E.g.*, *United States v. Drew*, 9 F.4th 718, 725 (8th Cir. 2021) ("A defendant is not entitled to a particularly worded instruction on his theory of defense, but he should be given avenue to present his contention." (quotation omitted)); *United States v. Franklin*, 960 N.W.2d 1070, 1072

(8th Cir. 2020) (requiring "the 'unmistakable implication'" of the jury instructions to suggest "that something more than mere presence was required in order to convict" (quotation omitted)).

Mr. Brown respectfully submits that the theory of defense instruction—like all instructions ultimately given—must be catered to the specific evidence offered at trial, and reliance on precedent from other circumstances in different cases is of limited assistance in making that determination. Here, the Government relied heavily on Mr. Brown's proximity to the contraband in order to convict him. *See, e.g.*, TT, at 395:21–22 ("The evidence shows that the defendant's crack was found next to his hat and next to his phone."), *id.* at 398:24 – 399:1 ("He left his cell phone right there, and he kept the other thing that was incredibly valuable to him right next to him too, and that was his crack."); *id.* at 412:13–15 ("Where is the only place in this apartment that a substantial amount of crack cocaine is found? Bedroom No. 3, the defendant's bedroom, next to his hat, next to his phone."). Even on appeal, the Government continued to rely on Mr. Brown's mere presence. *E.g.*, Appellee Br., at 20 ("The evidence of Brown's possession with the intent to distribute crack cocaine was significant and strong, *including based upon Brown's physical proximity to distribution quantities of crack cocaine*" (emphasis supplied)).

The Government's theory centered on Mr. Brown's physical juxtaposition to the contraband. Mr. Brown respectfully submits that whether a jury instruction is appropriate in a given case should be determined by the arguments and evidence advanced within it—not the application in a different case. Model jury instructions

are of limited value when it comes to the applicability of a case-specific theory of defense. Mr. Brown respectfully requests this Court grant certiorari to clarify that rule.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted, and the opinion of the United States Court of Appeals for the Eighth Circuit reversed and remanded.

Respectfully submitted,

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