NO. 23–7174

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

Reply Brief for the Petitioner

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Reply Argument

The Government's Opposition makes important concessions compelling this Court's grant of certiorari. *First*, it admits the Eighth Circuit failed to address the prosecution's propensity *use* of Petitioner's prior convictions. *See* Br. in Opp. at 12 ("neither credited *nor even addressed by the court of appeals*" (emphasis supplied)). This Court is not in the business of rewarding dereliction. *Next*, it acknowledges there remains an open question as to "the scope of the record that appellate courts must consider in" reviewing the narrow class of claims Mr. Brown's Petition encompasses. *Id.* at 17. This Court is the only one equipped to address it. *Finally*, the Opposition ignores this Court's precedent reviewing the legal questions raised in an instructional challenge. In short, Mr. Brown's Petition involves: (I) an issue on which circuit courts of appeals take divergent approaches; (II) an issue of first impression; and (III) a foundational—yet legal—instructional challenge. This Court's review is merited.

I. The Rules of Evidence matter.

As to his first question presented, Mr. Brown's Petition for Certiorari should be granted because: (A) his prior convictions were admitted to elicit the impermissible propensity inference that he is guilty "because" he is a "drug dealer"; and (B) as demonstrated by the Eighth Circuit's opinion, courts of appeals take divergent approaches to the permissible *use* of Rule 404(b) evidence after it is *admitted*. These divergent approaches warrant certiorari.

A. "[B]ecause that's what he does."

As below, the Government's resistance fails to explain how Mr. Brown's prior convictions are in any way relevant to this case. *But see* FED. R. EVID. 404(b)(3)(B)

(requiring the Government more than merely allege "intent" or "knowledge"). The reason for this lapse is clear—his prior convictions were only useful to the Government because of the impermissible propensity inference they raise.

Although the Government mechanically claimed the prior convictions were relevant to Mr. Brown's "knowledge" and "intent," it nowhere connected the dots as to *how* they establish those propositions. *See* Pet. for Cert. at 11. The Government's (belated) assertion that the prior convictions "undermine the possibilities that [Mr. Brown] either was unaware of the cocaine base in [the] bedroom or had stored it in small plastic baggies for personal use rather than distribution" (Br. in Opp. at 9) does not do the trick. These contentions rely solely on propensity.

In the Government's view, although someone who has not been previously convicted of drug crimes might more plausibly argue that they were unaware of drugs nearby, or stored drugs in a certain way for their personal use rather than for distribution, for Mr. Brown, his prior convictions "undermine[d] th[ose] possibilities" (*id.*) *because* of his *character*—that's who he is, and what he does. Indeed, in its closing arguments to the jury, the Government said the quiet part out loud: "[Mr. Brown] 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 (emphasis supplied).[1] "[Mr. Brown] intended to sell this crack to make money ***because*** [***he***] ***is a crack dealer*** . . . ."

[1] Throughout this Reply Brief, 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.

Id. at 395:24–25 (emphasis supplied).

By "routinely call[ing] the defendant a 'drug dealer,' " the Government invited "precisely the inference" Rule 404 is meant to prohibit—Mr. Brown's "propensity to engage in criminal behavior." *United States v. Richards*, 719 F.3d 746, 764 (7th Cir. 2013). Thus, the Government's asserted 'permissible' uses of Mr. Brown's prior convictions, when scrutinized for what they truly are, invariably reduce to the impermissible maxim, "[o]nce a criminal, always a criminal." *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))).

The Government attempts to downplay its actions by arguing that, in contrast to the facts of *United States v. Richards*, its "statement that [Mr. Brown] was a 'drug dealer' " referenced, not his previous convictions, but instead "evidence of the charged offense that was recovered during the search." Br. in Opp. at 11. Indeed, the Government even contends it "did not refer to the prior convictions at all during closing." *Id.* at 15. But its contentions are affirmatively belied by the record. Indeed, at the very outset of its closing arguments, the Government alluded to Mr. Brown's prior convictions in arguing he "knew [the drug recovered] was crack, and he intended to sell it, *just like he had done so many times before*." TT Vol. II at 395:19–20

(emphasis supplied). Thus, *Richards* is squarely on point.

The Federal Rules of Evidence prohibit the introduction of prior convictions to avoid precisely this type of circumstance. FED. R. EVID. 404(a)(1), (b)(1); *Richards*, 719 F.3d at 764 ("[The Government] cannot ever rely upon that evidence to argue propensity."). And, as members of this Court have emphatically remarked across generations, the efficacy of 'curative' jury instructions like those provided by the District Court here is dubious at best. *See Erlinger v. United States*, 144 S. Ct. 1840, 1885–86 (2024) (Jackson, J., dissenting) (arguing that "some degree of prejudice from the sheer fact of the defendant's having been previously convicted of crimes of this nature is inevitable" from having juries determine whether prior offenses were committed on separate occasions for ACCA purposes); *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) ("The naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction." (citation omitted)); *see also Richards*, 719 F.3d at 766 ("When the government explicitly argues propensity, however, the curative value of a limiting instruction diminishes dramatically.").

In short, Mr. Brown's prior convictions had no relevance in this case, and should not have been admitted in the first place. For this reason alone, Mr. Brown's case warrants review.

B. The distinction in Rule 404(b) between admission and use requires clarification.

The Eighth Circuit's truncated analysis is not the national standard. Indeed, where the Eighth Circuit analyzed only the propriety of the prosecution's *admission*

of the prior convictions—blind to how the prosecution thereafter *used* them—other Circuits (like the Seventh) are not so circumscribed and continue their diligent inquiry. Under these (proper) analyses, even if Mr. Brown's prior convictions were properly *admitted* (they were not), the Government's improper *use* of that evidence still warrants correction. The Government does not dispute that a distinction exists between *admission* and *use*, but attempts to obfuscate the divergent approaches by instead characterizing them as merely the result of differences in "the application of Rule 404(b) to different factual scenarios." Br. in Opp. at 10–11. Not so; the Seventh Circuit's approach is true to the Rule, the Eighth's is not.

Indeed, the Eighth Circuit's approach suggests that, so long as evidence is properly admitted under Rule 404(b), it may thereafter be used for *any* purpose—including the Rule's prohibited propensity purpose, so long as that is not its *sole* use. *See* Op. at 7–8, *United States v. Brown*, 88 F.4th 750, 757–58 (8th Cir. 2023) ("We 'revers[e] only when the evidence clearly had no bearing on the case and was introduced *solely to prove* the defendant's propensity to commit criminal acts.' " (alteration in original) (emphasis supplied) (quoting *United States v. Abarca*, 61 F.4th 578, 581 (8th Cir. 2023))) ("The convictions 'thus had some "bearing on the case," and w[ere] not used "solely to prove" his "propensity to commit criminal acts." ' " (alteration in original) (quoting *Abarca*, 61 F.4th at 581)).

But, as the Seventh Circuit recognizes, the Rule prohibits using 'prior bad acts' evidence from drawing improper propensity inferences *at all*, regardless of whether the evidence is properly admitted for some other purpose. Indeed, as that circuit

cogently explained in *Richards*,

> *Admission of Rule 404(b) evidence, however, does not grant the government free rein to use that evidence however it wishes*. Having obtained admission of the evidence for a specific, non-propensity purpose, the government cannot then deploy the Rule 404(b) evidence in support of some other argument or inference. Rather, it must limit its use of the evidence to the purpose proffered when admitting the evidence. *It cannot ever rely upon that evidence to argue propensity*.

Richards, 719 F.3d at 763–64 (citation omitted) (emphases supplied).

And, to be sure, Mr. Brown's prior convictions *were used* to draw a propensity inference here. The central theme of the Government's case was that Mr. Brown was guilty *because* he is a "drug dealer." *See, e.g.*, TT Vol. I at 92:10–12 ("*The defendant is a drug dealer*. Specifically, the evidence will show that *the defendant is a crack cocaine dealer*." (emphases supplied)); TT Vol. II at 395:19–20 ("He knew it was crack, and he intended to sell it, *just like he had done so many times before*." (emphasis supplied)); *id.* at 424:6–7 ("The defendant possessed that crack cocaine, and he darn sure intended to distribute it *because that's what he does* . . . ." (emphasis supplied)). As the Seventh Circuit held in *Richards*, by "routinely call[ing] the defendant a 'drug dealer,' " the Government invites "precisely the inference" Rule 404(b) is meant to prohibit—the defendant's "propensity to engage in criminal behavior." *Richards*, 719 F.3d at 764.

The Government's Opposition asks this Court to absolve the improper application of the Rule by struthious reliance on 'curative' instructions. Its argument merely illustrates another Circuit division. To wit, the Opposition argues that Mr. Brown's prior convictions were not used for an improper purpose because the trial court admonished the jury not to draw such an inference. Br. in Opp. at 10. But that

argument, at least according to the Seventh Circuit, misunderstands the issue by focusing on the wrong actor. It is the *Government*'s use of the evidence, not the *jurors*', that must be scrutinized here. *See Richards*, 719 F.3d at 764 (" 'Just as introducing evidence to show propensity is improper, so too is *arguing to a jury* that it should convict a defendant based on the defendant's propensity to commit a crime.' This prohibition remains even when the court has admitted the Rule 404(b) evidence for some permissible non-propensity purpose—*the government* cannot later argue that the evidence shows the defendant's propensity to engage in criminal behavior." (citations omitted) (emphases supplied) (quoting *United States v. Simpson*, 479 F.3d 492, 503 (7th Cir. 2007))).

Accordingly, the Eighth Circuit's failure to apply Rule 404's bright-line prohibition on using evidence to argue for an impermissible propensity inference cannot be chalked up to a mere 'difference in factual scenarios.' It is, on the contrary, emphatically the result of differing interpretations of the Rule, which this Court is needed to resolve.

II. *Davis*'s plain-error review must be meaningful.

This Court was unequivocal in *Davis v. United States*: courts of appeals must conduct plain-error review for *all* unpreserved errors. 589 U.S. 345, 347 (2020) (per curiam); *see also* FED. R. CRIM. P. 52(b). The Rules and this Court's pronouncements are intended to be *meaningful*, not whimsically overwritten where convenient. Mr. Brown asks only that this Court provide guidance for litigants and appellate courts seeking to use them.

The Government's criticism that *Davis* and *Greer v. United States*, 593 U.S. 503 (2021), "do not *require* courts of appeals to add evidence to the appellate record that was never presented in the district court" (Br. in Opp. at 16–17 (emphasis supplied)) does no more than restate the obvious—Mr. Brown's argument is in fact one of first impression. But there is a great deal of difference between *requiring* something be done and *guiding* toward a particular result: To the former end, the Government ignores the clear holding of *Davis* and *Greer*—that meaningful plain-error review is *required*. To the latter end, it fails to consider the implications of that holding—how it *guides* courts in outlining the contours of plain-error review. Indeed, the Government does not even address Mr. Brown's proposed outline for identifying the narrow class of cases in which expanding the appellate record will be appropriate. *See* Pet. for Cert. at 18 n.13. Nor does it contest that, under Mr. Brown's or any other test this Court might fashion, expanding the appellate record would be appropriate here; there is no dispute as to the authenticity or veracity of the evidence with which Mr. Brown seeks to supplement the record. And, on the merits, that evidence casts substantial doubt on the only non-LEO fact witness to testify against Mr. Brown.

Lacking a basis in the caselaw to refute Mr. Brown's argument, the Government appeals to doctrinal considerations. As a matter of practice, it urges, " 'a motion brought under [28 U.S.C.] 2255 is preferable to direct appeal' because it allows for consideration 'in the first instance in the district court.' " Br. in Opp. at 16 (alteration in original) (quoting *Massaro v. United States*, 538 U.S. 500, 504–05

(2003)). That the Government posits a different solution is not grounds for denying certiorari—it counsels for the opposite. As this Court has held, where error can be corrected on direct appeal, such errors, even ineffective assistance of counsel, need not await post-conviction relief proceedings. *See Massaro*, 538 U.S. at 508 ("We do not hold that ineffective-assistance claims must be reserved for collateral review."). The only question is—when is a motion to expand the record appropriate to facilitate correction on direct appeal? As appellate courts unquestionably have authority to expand the record, and as they routinely utilize that authority, *see, e.g.*, FED. R. APP. P. 10(e); *United States v. Wolter*, No. 23-1848, 2024 WL 3768528, at *1 n.3 (8th Cir. Aug. 13, 2024) (granting motion to expand record); *United States v. Parker*, No. 22-2905, 2023 WL 8714098, at *1 (8th Cir. Dec. 18, 2023) (per curiam) (same), the narrow issue for this Court's resolution is outlining when that authority is properly invoked.

The Eighth Circuit is far from the only appellate court confronting motions to expand the record, and it is far from the only court which has orders granting *and* denying the requests with seemingly arbitrary and aimless bases distinguishing the same. At a minimum, the guidelines made necessary by *Davis* include directing courts how to address appellate arguments turning on the very *absence* of the supplemental documentation from the district court record. This is a frequently occurring issue, fully briefed below, deriving from constitutional roots, and lacking important fundamental guidance.

As the Government concludes its Opposition on this point: "The [*Davis*] Court did not address the scope of the record that appellate courts must consider in performing [plain-error] review, let alone hold that appellate courts must admit new evidence never offered below." Br. in Opp. at 17. That is the very question Mr. Brown poses, and it is one the Government admits remains unanswered. This Court should grant certiorari to pick up where *Davis* and *Greer* left off, and provide guidance as to when a Motion to Expand the Record is appropriate.

III. Errors in instructing juries present questions of law.

On Mr. Brown's third question presented, the Government contends that the Eighth Circuit's consideration of Mr. Brown's requested 'mere presence' jury instruction "does not warrant this Court's review" because it was "factbound." Br. in Opp. at 18. The afterthought is unavailing.

Whether a specific jury instruction should be given in any particular case is a question of *law*; one which this Court routinely reviews. *See, e.g.*, *Rosemond v. United States*, 572 U.S. 65, 67 (2014) (holding "that the jury instructions given below were erroneous because they failed to require that the defendant knew in advance that one of his cohorts would be armed"); *United States v. Park*, 421 U.S. 658, 674–75 (1975) (affirming district court's jury instructions, holding, "[r]eading the entire charge satisfies us that the jury's attention was adequately focused on the issue of respondent's authority with respect to the conditions that formed the basis of the alleged violations"). Of course, legal issues cannot be decided in a vacuum, and review of many legal issues, including this one, will often depend upon the facts of each individual case. *Id.* at 675 ("We conclude that, viewed as a whole and in the context

of the trial, the charge was not misleading and contained an adequate statement of the law to guide the jury's determination."). *A fortiori*, that resolution of a legal issue may depend upon the particulars of a given case does not somehow make the case inapposite for this Court's review.[2] It *does* mean, however—as Mr. Brown argues here—that prior resolutions of such issues will be of limited persuasive value in future cases.

The Government's complaint, then, appears to reduce to a belief that this Court should grant review only where its decision will have an impact outside of the particular case in front of it. But, as courts necessarily decide only the individual cases before them, *see Upjohn Co. v. United States*, 449 U.S. 383, 397 (1981) ("Needless to say, we decide only the case before us . . . ."); *see also United States v. Windsor*, 570 U.S. 744, 787 (2013) (Scalia, J., dissenting) ("Only when a 'particular case' is before us—that is, a controversy that it is our business to resolve under Article III—do we have the province and duty to pronounce the law."), it is not a defect but a *feature* of appellate review that resolution of a case may only be relevant to that specific case.

The Government's argument echoes the reasoning the Fifth Circuit employed, which this Court rejected, in *Davis* to justify its refusal to conduct plain-error review.

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[2] Indeed, this Court has affirmed its *obligation* to review the facts of cases under certain circumstances, such as when constitutional violations are implicated. *See Napue v. Illinois*, 360 U.S. 264, 271–72 (1959) ("The duty of this Court to make its own independent examination of the record when federal constitutional deprivations are alleged is clear, resting, as it does, on our solemn responsibility for maintaining the Constitution inviolate.").

There, "[t]he Fifth Circuit did not employ plain-error review because the court characterized Davis' argument as raising factual issues, and under Fifth Circuit precedent, '[q]uestions of fact capable of resolution by the district court upon proper objection at sentencing can never constitute plain error.' " *Davis*, 589 U.S. at 346–47. Thus, the view that "factbound" determinations are somehow incapable of or unsuited for appellate review was soundly rejected in *Davis*. Yet, that is precisely the argument the Government seeks to revive here.

In sum, appellate review is meant to be meaningful. When the appellate panel diminished that review, and perceived it bound by somebody else's case, decided on somebody else's facts, it committed legal error. Mr. Brown's Petition for Certiorari should be granted accordingly.

Conclusion

For the foregoing reasons and those stated in Mr. Brown's Petition for Writ of Certiorari, Mr. Brown's Petition 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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