NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

Marcus Burrage,

Petitioner,

-vs.-

United States of America,

Respondent.

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

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

1. Whether the crime of distribution of drugs causing death under 21 U.S.C. § 841 is a strict liability crime, without a foreseeability or proximate cause requirement.
2. Whether a person can be convicted for distribution of heroin causing death utilizing jury instructions which allow a conviction when the heroin that was distributed "contributed to," death by "mixed drug intoxication," but was not the sole cause of death of a person.
3. Whether an officer can testify that the defendant is a "known" heroin dealer because the officer couched it as necessary to explain why he put the defendant's picture in a photo lineup.

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OPINION BELOW

The petitioner, Marcus Burrage, respectfully prays that a writ of certiorari issue to review the judgment of the Eighth Circuit Court of Appeals in Case No. 09-2568 entered on August 6, 2012, and made final with the denial of rehearing and rehearing en banc on September 13, 2012. *United States v. Burrage*, 687 F.3d 1015 (8th Cir. 2012).

JURISDICTION

The panel of the Eighth Circuit Court of Appeals entered its judgment on August 6, 2012. The petitioner's petition for rehearing and rehearing en banc was denied on September 13, 2012. Jurisdiction of this court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

21 U.S.C. § 841(b)(1)(C) states:

> In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of

imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

21 U.S.C.A. § 841(b)(1)(C).

Federal Rule of Evidence 801 states:

(a) Statement. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.
(b) Declarant. "Declarant" means the person who made the statement.
(c) Hearsay. "Hearsay" means a statement that:
(1) the declarant does not make while testifying at the current trial or hearing; and
(2) a party offers in evidence to prove the truth of the matter asserted in the statement.
(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:
(1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:
(A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;
(B) is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or
(C) identifies a person as someone the declarant perceived earlier.
(2) An Opposing Party's Statement. The statement is offered against an opposing party and:
(A) was made by the party in an individual or representative capacity;
(B) is one the party manifested that it adopted or believed to be true;
(C) was made by a person whom the party authorized to make a statement on the subject;
(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or
(E) was made by the party's coconspirator during and in furtherance of the conspiracy.
The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

Fed. R. Evid. 801

STATEMENT OF THE CASE

On April 27, 2011, a federal grand jury returned a two-count superseding indictment against Burrage, charging him with one count of distribution of heroin and one count of distribution of heroin causing death. (CR 26).

Count I, distribution of heroin stemmed from a controlled sale of heroin to an informant, Breanne Brown. (TT 90-91).

Count II, distribution of heroin causing death, stemmed from the death of Joshua Banka after Banka executed a planned bender of various illegal drugs. (TT 278). The government's two experts testified the cause of Banka's death was not heroin overdose, but instead was "mixed-drug intoxication." Banka was a life-long multi-drug user with extensive pending legal problems, mental health issues, a history of suicidal behavior, and hospitalizations for drug overdoses. (TT 253-54, 261). Banka's wife, Tammy Noragon, also an extensive drug user, testified Banka had struggled with drug abuse since he was 17 years old. (TT 184). He used marijuana, OxyContin, crack, heroin, and prescription drugs. (TT 184-85). Noragon said Banka started using heroin in September of 2009 until October of 2009, and was using heroin, crack and OxyContin daily. (TT 185). Despite evidence to the contrary, Noragon testified that Banka abruptly stopped using heroin in October of 2009 and didn't use again until the day of his bender, on April 13, 2010, before his death on April 14, 2010. (TT 185). Banka had continued to use marijuana, Clonzaepam, Xanax, OxyContin, Lortab and other illegal substances daily throughout this time period. (TT 186, 221-24). Banka was also stealing OxyContin when he could not buy it. (TT 225).

On March 3, 2010, Banka got arrested after crashing his car on Interstate 35 and was charged with OWI and possession of marijuana. (TT 186). Two weeks later, he was again

driving drunk and had to be stopped by a spike stick when he ran from the police. (TT 187). Banka was charged with felony eluding, marijuana possession, resisting arrest and disorderly conduct. (TT 187). As a result of his arrests, Banka did a substance abuse evaluation, which recommended he go into intensive outpatient treatment with daily meetings to address his drug addiction and mental health issues. (TT 188). On April 13, 2010, despite Banka's pending dual criminal matters, and despite his imminent substance abuse treatment program, Noragon and Banka decided that Banka would have one last bender of drug use. (TT 192-93). Noragon drove him around during this bender. (TT 193-94).

Early in the day on April 13, Banka stole Percocet and OxyContin from an acquaintance and used the drugs. (TT 208, 251). Banka and Noragon, apparently dissatisfied with their stolen loot, then started texting Marcus Burrage. Noragon testified that they went to buy heroin from Burrage at a Hy-Vee parking lot in Ames, Iowa. Noragon said that they then drove a block and a half away and Banka shot up alone, even though he was no longer addicted to heroin and supposedly had not used for six months. (TT 198, 240-41). Noragon said she then drove Banka home, where he shot up heroin again between 12:00 a.m. and 1:00 a.m. (TT 201). At 3:00 a.m. and 5:00 a.m. he went to the bathroom again to use more drugs. (TT 201-03). At 10:30 a.m., Noragon found Banka dead in the bathroom and called law enforcement. (TT 204). Noragon could tell Banka had come into the bedroom and left again after 5:00 a.m., but didn't know what drugs he had used at that point right before he died. (TT 251).

Noragon said the OxyContin found in the house Banka had gotten "from someone else" other than Burrage. (TT 207). Noragon said that there would be a full syringe in the car with heroin, and "maybe" some OxyContins. (TT 210-11). Banka ingested the OxyContins and the heroin both by syringe.

When officers arrived, Banka was already dead. (TT 127). There was a syringe in the bathroom sink with a baggie lying next to it, containing heroin. (TT 127, 136). There were three empty syringes, one full syringe and a bag of unused syringes in the vehicle. (TT 136.) There was a bottle of Baclofen prescribed to David Letsch, a bottle of clonazepam, alprazolam, a bottle of hydrocodone, and Oxycodone tablets. (TT 136, 154). There were three syringes and three unused syringes in the bathroom. (TT 136). There was a Mountain Dew can and a marijuana bong in the house. (TT 136). Also, there was a baggie of other narcotics found in the vehicle, which while recorded in some of the reports, officers failed to identify what controlled substance was found in the vehicle. (TT 144, 169). One officer knew it to contain suspected narcotics, though those narcotics were never submitted to a lab or recorded on the property inventory. (TT 327, 332).

At trial, Burrage testified he met Banka and Noragon in February of 2010, not in April of 2010 as Noragon stated. (TT 364). Also contrary to Noragon's testimony, Burrage testified he had seen Noragon use heroin and had seen Banka use OxyContin and heroin because he had used with them in the past. (TT 364). He testified that he did meet them in the HyVee parking lot on August 13, but he met them to trade OxyContin pills to Banka for heroin that Banka had. (TT 366). Burrage testified he traded five OxyContin pills for a half gram of heroin. (TT 368). Burrage testified that Banka was already high when he met the couple in the Hyvee parking lot. (TT 368.)

At trial, the government called two experts, Dr. Jerri McLemore and Dr. Eugene Schwilke. McLemore was a medical doctor who was employed by the State of Iowa as a Medical Examiner at the time of Banka's death. (TT 257-58). Schwilke was a toxicologist from AIT Laboratory. (TT 269).

McLemore had performed the autopsy of Banka on April 16, 2010. (TT 258). She testified Banka had aspirated on his own vomit. (TT 264). She noted he had scarred vessels in his arms, indicating a long history of intravenous drug use. (TT 265-66). She also saw other indications that Banka was injecting drugs into other areas of his body, and had developed a condition in his lungs, both of which indicated long-term intravenous drug use. (TT 266, 277). McLemore also noted that Banka had heart disease and his heart was twice the size and weight of a normal man's heart. (TT 267). McLemore and Schwilke both evaluated the test results of Banka's comprehensive drug panel.

In reference to the results of the blood panel, McLemore stated,

> Values – or drugs that were detected were sorts of benzodiazepines, such as clonazepam and alprazolam. The breakdown of marijuana was found. There were a number of opiates, such as Oxycodone, which is a prescription medication, and morphine…
>
> Morphine, again, is an opiate. It's a narcotic. Many drugs that are morphine based, drugs for even prescription medications will show up as morphine. Heroin will break down into morphine, and it may not be possible to distinguish between morphine from heroin versus morphine from, say, morphine sulfate that you get as a prescription medication. However, heroin will first break down into something called 6-Monoacetylmorphine, 6-MAM for short. When 6-Monoacetylmorphine is also present in the blood, then that came – the morphine you're seeing came from heroin…

(TT 270-71).

When asked what the levels found in Banka's blood indicated, McLemore stated,

> First of all, the fact that the 6-MAM is there, to me, is more significant, again, because that helps me determine that the morphine I'm seeing was derived **at least in part** by heroin. As far as the level of the morphine, the morphine was at a significantly high level, at a level higher than what the published reference range for a therapeutic dose was given.

(TT 273, emphasis added). McLemore went on to testify that the morphine range in Banka's system was 2 ½ times higher than the top of the therapeutic range. (TT 274). The morphine,

which could be developed by both the oxycodone and the heroin, was the only drug in his system above the therapeutic range. (TT 278). She explained that the use of any of the opiates creates a tolerance to the other opiates, which can affect the significance of the therapeutic range. (TT 289). Thus Banka's use of oxycodone created a tolerance to the use of heroin. (TT 289).

McLemore's final conclusion was that the cause of death was a "mixed drug intoxication with the drugs contributing to death, including heroin, the oxycodone, the alprazolam and the clonazepam." (TT 278). She stated that in her opinion, that the circumstances of the case were "consistent with those drugs, including the heroin, as contributing to death." (TT 278-79).

Medically, a "cause of death" is a disease or disease processes or injury that brought about the death of a person. (TT 279). A "contributory" is a disease, disease process, or injury that aided in bringing about the death of a person. (TT 279). The difference between the two is causation – a "contributory" cause means that it is not necessarily true that a person would not have died but for that cause. (TT 279-80). Specifically, McLemore testified that she could not say that had Banka not taken the heroin he would not have died. (TT 280, 293). Had she made that finding, she said her report would have read "heroin overdose" rather than "mixed drug intoxication." (TT 280). Specifically, other contributory causes to Banka's death were oxycodone, benzodiazepines, and marijuana. (TT 280-81). McLemore could not determine which drug caused Banka to aspirate. (TT 281). She could not tell what caused him to vomit. (TT 287-88). And she could not say that had he not used oxycodone he would not have died. (TT 291).

The toxicologist, Dr. Schwilke, testified that "every drug on this list" in Banka's system, with the exception of marijuana, had a central nervous system depressant affect. (TT 300). In his opinion the slowed breathing process, also called respiratory depression, is a common toxic

effect when multiple central nervous system depressant medications are combined together. (TT 300). Schwilke also explained that the "therapeutic range" would not necessarily apply to someone who has developed a tolerance for a certain type of drug. (TT 301). Schwilke could determine that marijuana was smoked within the last several hours prior to death – a fact that demonstrated Noragon's testimony was inaccurate. (TT 307-08). Schwilke also explained that the level of "201 nanograms per milliliter" that had been utilized by the government to say Banka's heroin use level was 2 ½ times greater than the therapeutic dose of 10-80 nanograms per milliliter was like "compar[ing] apples to oranges." (TT 309). In his opinion, a 201 level for a regular user may not be toxic. (TT 310). He further verified that cross-tolerance from a regular oxycodone user, like Banka who was a daily oxycodone user, would develop and raise the tolerance level. (TT 311). Like McLemore, Schwilke could not say that if Burrage had not taken the heroin he would not have died, or if he had not taken the oxycodone, he would not have died. (TT 316).

At trial, Burrage submitted jury instructions requiring a foreseeability element, requesting a "proximate cause" instruction and and objected to the use of "contributing cause." He also objected, unsuccessfully, to a law enforcement officer testifying that he was a "known heroin dealer." On August 6, 2012, the Eighth Circuit affirmed Burrage's conviction, stating that the district court's use of "contributing cause" in the jury instructions was appropriate under *United States v. McIntosh*, 236 F.3d 968 (8th Cir. 2001), that there was no foreseeability or proximate cause element for conviction, and noted that only the court sitting en banc can overrule the Circuit's prior opinion in *McIntosh*. (Opinion at 6-7). The panel further held that even if the district court erred in admitting the officer's testimonial hearsay in violation of Rule 404(b), the error was harmless.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE THE SPLIT AMONG THE CIRCUITS AS TO WHETHER THE CRIME OF DISTRIBUTING DRUGS CAUSING DEATH IS A STRICT LIABILITY CRIME WITHOUT A MENS REA, FORESEEABILITY, OR PROXIMATE CAUSE REQUIREMENT.

The US Supreme Court has been clear that "the existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Staples v. United States*, 511 U.S. 600, 604 (1994); *United States v. United States Gypsum Co*, 438 U.S. 422, 436-37 (1978). Even when a statute does not include terms of *mens rea* within in, the Supreme Court tells lower courts that "offenses that require no *mens rea* generally are disfavored," and courts should look for some indication of congressional intent before *mens rea* is dispensed as an element of a crime. *Staples*, 511 U.S. at 604.

Despite these instructions from the Supreme Court, the Eighth Circuit continues in the instant case to hold that the "death resulting" language under 21 U.S.C. section 841(b) creates a strict liability crime, in which the court may not impose a foreseeability or proximate cause requirement. *See also United States v. Monnier*, 412 F.3d 859 (8th Cir. 2005) (proximate cause is not required for a conviction under 841(b)); *United States v. McIntosh*, 236 F.3d 968, 972 (8th Cir. 2001) (death need not be reasonably foreseeable to the defendant under 841(b)). However, the Seventh Circuit has recently expressed reserve about the "strict liability" interpretation of the "death resulting" element. *United States v. Hatfield*, 591 F.3d 945 (7th Cir. 2010). In the Seventh Circuit opinion, Judge Posner stated that the strict liability interpretation "could lead to some strange results." Judge Posner interpreted the other circuits' use of strict liability to mean "simply the omission of any reference to foreseeability or state of mind." *Hatfield*, 591 F.3d at 950. However, because the defendants in the *Hatfield* case did not challenge the interpretation of

the statute as imposing strict liability on them for death or injury to the recipients of their drugs, the circuit court did not reach the issue of whether the "death results" element creates strict liability. *Id.*

In his opinion, Judge Posner gave examples of strange results that may occur due to the lack of a foreseeability or proximate cause requirement. For instance, if a defendant sells an illegal drug to a person who ingests it in a bathroom, and while in the bathroom, the ceiling collapses and kills him, strict liability could support a conviction. As Judge Posner reasoned, had the person not ingested the drug, he would not have been in the bathroom and would not have been crushed under the falling ceiling – but it would be "strange" to think that the seller of the drug was punishable under 21 U.S.C. § 841(b)(1)(C). *Id*. at 948. Another "strange result" could occur when, unbeknownst to the seller of an illegal drug, the buyer was intending to commit suicide by taking an overdose of drugs, bought from the seller, that were not abnormally strong, and the seller had informed the buyer of the strength of the drugs so that there was no reasonable likelihood of an accidental overdose. *Id*. at 950.

Burrage was convicted of a strict liability homicide count without a proximate cause, foreseeability, or *mens rea* requirement. His conviction should not stand and the Supreme Court should intervene.

II. THE EIGHTH CIRCUIT HAS DECIDED IMPORTANT ISSUES OF FEDERAL LAW THAT HAVE NOT YET BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

A. The Supreme Court should intervene and correct the Eighth Circuit's holding that a conviction for distribution of heroin causing death can be sustained when the heroin was merely a "contributing cause" of the death by mixed drug intoxication, rather than the sole cause of the death.

The Eighth Circuit has read "contributing cause" into 21 U.S.C. §841(b)'s and its inclusion raises a question of exceptional importance. While the 8th Circuit has stated that the

"contributing cause" instruction is consistent with § 841(b)(1)'s "results from" requirement, there is a circuit split on this question. *See United States v. Monnier*, 412 F.3d 859, 862 (8th Cir. 2005), *United States v. Hatfield*, 591 F.3d 945 (7th Cir. 2010). In *Hatfield*, the Seventh Circuit expressly rejected a jury instruction adopting the "contributing cause" language from *Monnier* and instead endorsed a jury instruction using the statute's language without embellishment. *Id*. at 947-51. The 2011 edition of the *Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit* does not include any embellishing language to define the "death resulting" element.

In the instant case, in addition to denying Defendant's proposal of the criteria of proximate cause for establishing the "death resulting" element, the Eighth Circuit approved an embellishment of the "death resulting" requirement by inserting "contributing cause" as the standard, triggering the concerns prevalent in Judge Posner's decision in *Hatfield*. The government cited as its authority for the instruction the Eighth Circuit's decision in *United States v. Faulkner*, 636 F.3d 1009 (8th Cir. 2011). *Faulkner* does not hold, however, that the language "contributing factor" is required to be included in the jury instructions. *Faulkner*, 636 F.3d at 1012 ("[t]he jury also found that the Government proved beyond a reasonable doubt that heroin distributed pursuant to the conspiracy in count one was a *contributing factor* in the death of a third party and that the death was reasonably foreseeable to Faulkner") (emphasis added). Nor does the *Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit*, promulgated in 2011, require the use of any embellishing language to define the "death resulting" element. Instead, the Eighth Circuit has continued with this instant case, down the path of creating a completely new type of homicide crime – one that Congress did not intend and this Court should not allow.

Illinois's U.S. Attorney's office had previously tried a similar maneuver to make it easier to convict a defendant under 21 U.S.C. §841(b), as evidenced within the Seventh Circuit's opinion in *Hatfield*. In *Hatfield*, the government had embellished the jury instruction on "death resulting" by stating that "the controlled substances distributed by the defendants had to have been 'a factor that resulted in death or serious bodily injury,' and that although they 'need not be the primary cause of death or serious bodily injury' they 'must at least have played a part in the death or in the serious bodily injury.'" *Hatfield*, 591 F.3d at 947. The defendants' attorney objected to the addition as a confusing gloss, but the district judge refused to remove the addition. *Id.* The court of appeals reversed, holding that there was error in the instruction and it was not harmless. *Id.* at 951. The court stated that it did not understand "what a jury would make of 'primary cause' and 'played a part.' *Id.* at 949. The court also stated that "[a]ll that would have been needed to satisfy [the defendants' objection to the instruction] was to eliminate the addition to the statutory language, which was a good deal clearer than the addition and probably clear enough." *Id.* at 949.

Because the government succeed in Iowa the same thing it had failed in Illinois, we now have a circuit split on an important issue of federal law that the Supreme Court should step in and resolve.

Without the "contributing cause" embellishment to the jury instructions, there was insufficient evidence to justify a conviction of Burrage because under a traditional causation analysis, Banka's death did not, beyond a reasonable doubt, "result from" the use of heroin that he purchased from Burrage. The government's experts both testified that they could not say that Banka would not have died if he had not used heroin. (TT 280, 293, 316). By definition, this must mean that, under the law, his death did not "result" from the use of the heroin beyond a

reasonable doubt. Because there is certainly insufficient evidence to justify a conviction when taking this embellishment out of the jury instruction, a different jury instruction, one in line with the model instructions as well as *Hatfield*, would have certainly yielded a different conclusion in favor of Burrage. The Supreme Court should grant certiorari to fix this injustice.

B. The Supreme Court should step in and fix the Eighth Circuit's decision that an officer can testify during trial that a defendant is a "known heroin dealer" as a reason for putting the defendant's picture in a photo lineup.

A question of exceptional importance exists as to whether an officer can sneak in exceptionally prejudicial hearsay that a defendant is a "known heroin dealer" by pretending he needed to explain to the jury why he put the defendant's photo in a lineup. At Burrage's trial, Officer Miller explained, over objection, that Burrage was a known heroin dealer in the city, which is why he sent Burrage's photo to be included in the line-up.

Miller's testimony that Burrage was a known heroin dealer during a heroin distribution trial is not only classic hearsay, but exceptionally prejudicial. *United States v. Reyes*, 18 F.3d 65, 70 (2d Cir. 1994), provides a framework for assessing the government's proffer of this type of background evidence and uses a two-part inquiry: (1) whether the non-hearsay purpose by which the evidence is sought to be justified is relevant; and (2) whether the probative value of this evidence for its non-hearsay purpose is outweighed by the danger of unfair prejudice resulting from the impermissible hearsay use of the declarant's statement. This Court should adopt the *Reyes* framework for all of the Circuits and apply it in assessing Officer Miller's testimony in the instant case.

While witnesses' testimony about actions they took in response to a conversation is not necessarily hearsay, *see United States v. Walker*, 636 F.2d 194, 195 (8th Cir. 1980), the question and Miller's response was more than talking about his actions. The question asked *why* Miller

sent a photograph of Burrage, not *what* he did upon having conversations with the officers. Miller's explanation as to *why* he sent Burrage's photograph to another sergeant was in no plausible way relevant to the government's case. In addition any remote relevance was clearly outweighed by the danger of unfair prejudice, as the testimony essentially labels Burrage, who is on trial for selling heroin, as a heroin dealer. Accusing a defendant of being a drug dealer in front of a jury is extremely prejudicial and not harmless error. *See United States v. Moorehead*, 57 F.3d 875 (9th Cir. 1995) (possession of a firearm case was remanded for new trial after jury heard assertions that defendant was a drug dealer). A similar conclusion can be found in *United States v. Rodriguez*, 524 F.2d 485 (5th Cir. 1975), in which the court held that background tips should be excluded if they contain out-of-court statements that point directly to the defendant with a charge of crime, which can result in prejudicial error. As this Court has explained, this type of character evidence is excluded, not because it is not relevant, but because of a general distaste for propensity evidence in criminal cases.

> Not that the law invests the defendant with a presumption of good character, *Greer v. United States*, 245 U.S. 559, 38 S.Ct. 209, 62 L.Ed. 469, but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The 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.

Michelson v. United States, 335 U.S. 469, 475-76 (1948).

This court should review Officer Miller's statements and issue a rule in accord with the Second and Fifth Circuits, determining that such background information is irrelevant and prejudicial. Certiorari should be granted on this issue.

CONCLUSION

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

RESPECTFULLY SUBMITTED,

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Appendix

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