No.18-____

In The
Supreme Court of the United States

DAVON KELLY BENNETT,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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October 17, 2018

QUESTIONS PRESENTED

1. Whether the District Court deprived Petitioner of his right to confront witnesses by limiting defense counsel's opportunity to cross-examine the government's witnesses.

2. Whether the District Court erred in denying Petitioner's motion to suppress un-Mirandized statements elicited during custodial interrogation.

3. Whether the evidence was legally insufficient to sustain a conviction for possessing a firearm in furtherance of a drug trafficking crime and whether the evidence was legally insufficient to sustain a conviction for money laundering by concealment.

4. Whether the District Court abused its discretion by admitting "other acts" evidence under Rule 404(b).

5. Whether the District Court abused its discretion by admitting expert witness testimony without satisfying the factors set forth in Daubert.

PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Fourth Circuit.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

CONSTITUTIONAL PROVISIONS AND STATUTES

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Davon Kelly Bennet, respectfully prays that a writ of certiorari be issued to review the judgments of United States Court of Appeals for the Fourth Circuit entered in the above-entitled case on June 20, 2018.

OPINIONS BELOW

The June 20, 2018 opinions of the United States Court of Appeals for the Fourth Circuit whose judgment is herein sought to be reviewed, is reprinted in the separate Appendix to this Petition, pages App. 1.

JURISDICTION

This Petition is filed within 90 days of the June 20, 2018 decision of the United States Court of Appeals for the Fourth Circuit and one extension granted by this Court. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. CONST. Amend. V

U.S. CONST. Amend. VI

U.S. CONST. Amend. XIV

STATEMENT OF THE CASE

On March 4, 2015, at approximately 1:25 a.m., members of a joint Federal and State task force executed a search warrant on 1300 Brothers Lane, Elizabeth City, North Carolina. Task Force Officer ("TFO") Williams found Petitioner with his hands in the air in a submitting fashion. With their firearms drawn, agents ordered Petitioner to put his hands in the air, lay on the floor facedown, and not to move. After conducting a sweep of the house and securing the Defendant and his son, TFO Williams handcuffed Petitioner, forced him sit at a kitchen table, and discussed the search warrant.

TFO Williams conceded that there is no law or department policy that required him to discuss the search warrant with Petitioner. He also conceded that he may have said that it would benefit Petitioner to cooperate. During this discussion, TFO Williams testified that he pointed to Attachment A of the search warrant where it said the word "Cocaine" at the very top. In response, the Petitioner told them, "Yeah, the weed is in the kitchen cabinet." At no time during this initial interaction and discussion was the Petitioner read his Miranda rights.

TFO Williams testified that Attachment B in the Search Warrant gave law enforcement probable cause to search for cocaine. TFO Williams stated that he did not receive any information regarding the presence of marijuana or heroin at the premises of the Petitioner.

Agent Greg Coats arrived at Petitioner's residence as Petitioner was being escorted through the kitchen by a uniformed deputy. Agent Coats asked to speak to Petitioner. The deputy and agent then took Petitioner into another room adjacent to Petitioner's bedroom, sat him down, and initiated a discussion with Petitioner. Agent Coats conceded that he engaged in a conversation with Petitioner. Agent Coats identified himself to Petitioner as an FBI agent and stated that Petitioner was part of a larger FBI drug investigation. Petitioner asked if he would be transported to Greenville to which Agent Coats responded that Petitioner would be transported to the Pasquotank County Jail. Agent Coats asked for Petitioner's cooperation to help with the investigation, and in response the Petitioner became emotional and stated that he had fully cooperated with the deputies and that the money was in the laundry hamper. Coats testified that Petitioner became so emotional "that we weren't getting anywhere." At no time during this subsequent interaction and discussion was the Petitioner read his Miranda rights.

Thereafter, Petitioner was removed from the residence and transported to the Pasquotank County Sheriff's Office for processing. Agent Michael Scherger and TFO Jay Winslow were asked to interview and talk to Petitioner. (Petitioner was brought into an interview room where Petitioner was told by Agent Scherger that if he wanted to talk, then it was his chance to talk. It was at this time, on March 4, 2015 at 5:38 a.m., Petitioner invoked his Fifth Amendment right to an attorney pursuant to Miranda. Agent Scherger testified that while he was advising

Petitioner of his rights, Petitioner stated, "Y'all should have come by tomorrow, I was going to buy a whole bunch of weed."

TFO Williams and TFO Winslow began processing Petitioner on March 4, 2015 at 6:00 a.m. Petitioner was removed from him holding cell and seated in a chair next to TFO Williams. During the arrest processing Petitioner was again questioned about drug activity. During this interrogation, law enforcement agents asked him if he was still "hustling" and wanted to know where he obtained drugs, and whether he was getting more drugs. In response to those questions, TFO Williams testified that Petitioner gave the incriminating statements; to wit: "Man, y'all should have come tomorrow, I was going to take all that money and buy a whole bunch of marijuana. I was going to go into that shed and go to work."

Thereafter, law enforcement continued to interrogate Petitioner about drug trafficking, asking him specific questions about whether he sold drugs or knew anyone who sold drugs. TFO Williams testified that while Petitioner was being fingerprinted by TFO Winslow, Petitioner stated that he had not sold any, "work" since law enforcement arrested Maurice Baum and that he had just been selling marijuana. This statement was elicited from Petitioner by law enforcement despite his invocation of his Fifth Amendment right to an attorney roughly thirty (30) minutes prior.

It is worth noting that both Agent Scherger and TFO Williams, who both questioned Petitioner on different floors of the Sherriff's Office, allege that Petitioner stated, "Y'all should have come tomorrow."

On April 12, 2016, Petitioner was charged in a Superseding Indictment with: Count # 1, Conspiracy to Distribute and Possess with the Intent to Distribute to Cocaine, Heroin, and Marijuana (21 U.S.C. §§ 846, 841(b)(1)(A)); Count # 2, Possession With the Intent to Distribute Cocaine, Heroin, and Marijuana (21 U.S.C. § 841(a)(1), 841(b)(1)(B)); Count #3, Possessing a Firearm in Furtherance of a Drug Trafficking Crime (18 U.S.C. § 924(c)(1)(A)(i)); and Count #4, Laundering of Monetary Instruments (18 U.S.C. § 1956(a)(1)(B)(i)).

The Trial

The Government first called Task Force Officer Jay Winslow who was one of the officers who executed the search warrant of Petitioner's house. Winslow first testified about his surveillance of Jarrku Bennett on March 3, 2015. (App. 202). Winslow entered Petitioner's home at 1:25 a.m. Petitioner cooperated and told law enforcement that marijuana was in the kitchen cabinet, money was in the washing machine, but he did not mention anything about cocaine or heroin. Wilson conducted a search of Petitioner's bedroom and found a Smith & Wesson .40 caliber handgun between the mattress and the box spring. A 9mm Hi-Point rifle was discovered in the corner of Petitioner's bedroom. Inside of Petitioner's closet was a leather case that contained a Calico 9mm rifle. These

firearms were not altered in any way and purchased legally by Petitioner from a federally licensed firearms dealer. A White Chevrolet Silverado was found on Petitioner's property and this vehicle was registered to Petitioner. Winslow found home improvement tools in that vehicle and inflatables inside of a box working truck on Petitioner's property.

The Government called David Bryan who was an investigator with the Dare County Sheriff's Office. The Government called Bryan to testify about the latent fingerprint analysis in this case. Bryan attempted to obtain fingerprints from processing three-kilogram packages of cocaine and a partial kilogram package of heroin, six vacuum-sealed packages of U.S. currency, a plastic bottle, a water bottle, and a Brisk Ice Tea can. Bryan was not able to find any fingerprints on these items.

The Government called Timothy Baize who was a forensic science supervisor in the Forensic Biology Section of the Raleigh Crime Lab. The Government called Baize to testify about the RstR DNA analysis conducted in this case. Baize analyzed a swab from the zipper area of a Ziploc bag, a swab from a Brisk Ice Tea from a Honda Odyssey van, a swab from a water bottle from a Honda van, a swab from a Taurus .38 from inside the trap in a Honda van, and known standards from Petitioner and Jarrku Bennett. (Id.). Baize did not find any matches, per se.

The Government called Jason Chappell who was a law enforcement officer with the Greeneville Police Department. Chappell was called by the

Government to testify about his involvement with the investigation of Petitioner's cousin, Jarrku Bennett.

The Government called Ritchie Pearce who was an investigator assigned to the Greenville Regional Drug Task Force. The Government called Pearce to testify about his involvement in the investigation of Petitioner's cousin, Jarrku Bennett.

The Government called Shanetra White who testified that she is an acquaintance of Petitioner. The blue 2003 Honda Odyssey van found at Petitioner's house was registered in White's name. White titled the Honda Odyssey in her name at the request of Petitioner's cousin, Jarrku Bennett. After White registered the vehicle in her name, Petitioner's cousin thanked White, in person. Winslow searched the Honda Odyssey van found at Petitioner's residence and found heroin, cocaine, cash, and a Taurus .38 revolver that was found to be stolen. There was no indication that Petitioner stole the revolver found in the Honda Odyssey. A car title was found in Petitioner's trailer for a 2004 Volvo that was registered in White's name. White testified that she owned the 2004 Volvo, but sold it to Petitioner's cousin. Petitioner's cousin never transferred the 2004 Volvo car title to his name.

The Government called Terrence Cooper to testify that he first engaged in drug related activity about two (2) decades before the trial and his last drug interaction with Bennett was thirteen (13) years ago. The District Court allowed this prior "bad act" evidence to be admitted over Petitioner's objection.

Cooper testified that he went to federal prison for drugs in 2007. Cooper entered into a cooperation agreement with the Government where he would provide testimony in exchange for a reduced sentence. On cross, the Defense asked whether Cooper subjectively believed that he was still bound by the agreement; however, the District Court prevented Cooper from answering the question and proceeding to answer questions regarding the cooperation agreement on behalf of the witness.

The Government called Shawn Elliot to testify that he bought controlled substances from Bennett thirteen (13) years before the trial. Elliot testified that he went to federal prison on two occasions for drugs or drug conspiracy. He was on supervised released at the time of the trial. Elliot testified that he did not want to testify at the trial. Elliot stated that he had entered into two different cooperation agreements with the government and he was unsure as to whether the agreement was still valid. Elliot agreed to cooperate and testify for the Government as necessary. He believed that he had to testify for the Government when called to do so because he signed a plea agreement where he specifically agreed to testify.

The Government called Gevon Owens to testify that he bought controlled substances from Petitioner in 2010, around six (6) years before the trial at Petitioner's grocery store that he operated. However, Owens later conceded that six (6) years ago Petitioner's grocery store has been closed and that he had not given the correct dates on direct-examination. Petitioner's store had been closed since 2007. He

stated that at one point, Petitioner stopped dealing to him and cut him off. Owens plead guilty in federal court for a drug conspiracy charge. He previously entered into a cooperation agreement with the Government. Owens believed that he was still bound by the cooperation agreement that he entered with the Government and believed that he did not have a choice in testifying at the trial. He did not feel as if he could tell the Government that he did not want to testify. Owens believed that if he did not testify that he would be incarcerated and violate the terms of his supervised release. Owens stated that he would do what is asked of him in order to not return to prison.

Jarrku Bennett is a cousin of the Petitioner. The Government called Bennett to testify about his interaction with Petitioner on March 3, 2015. On that day, Bennett was pulled over by law enforcement and arrested on a probation warrant and after a search of his vehicle. During Bennett's testimony, several family members of both Bennett and the Petitioner walked into the courtroom. The District Court inquired of Bennett whether his testimony would be affected by their presence and whether he felt intimidated by his family being in the courtroom. Bennett stated that it was difficult to testify in front of them. The District Court went on to say "I mean, you're testifying here as a witness for the United States. And the people you're testifying against, the person you're testifying against is your cousin. And his family is all here in the courtroom. So it's awkward and reluctant for you to do this?" Bennett testified that Petitioner had rental houses that he owned and rented to people for a business. Bennett testified that he

previously went to prison for a federal drug charge in 2011. At the time of the trial, Bennett was pending sentencing in federal court in relation to his March 3, 2015 arrest. On August 17, 2015, Bennett plead guilty to drug charges and entered into a cooperation agreement with the Government. He agreed to cooperate and testify on behalf of the Government. The obligations outlined in the cooperation agreement are continuing ones. Bennett testified that he did not know whether a Rule 35 motion applied before or after sentencing. Bennett conceded that he had been interviewed several times since March 3rd, 2015 and gave conflicting statements and lied in order to save himself.

The Government called Desmond White to testify that that he had drug dealings with Petitioner roughly a decade prior to the trial. Petitioner and White stopped dealing with one another in 2007. At the time of the trial, White was serving a federal sentence of thirteen and a half (13.5) years. White entered into a plea agreement with the Government in 2013 in which he agreed to testify when called by the Government. White was hopeful to receive a downward departure motion from the Government. The Court interjected at this point and ruled that the Defense was precluded from making an argument based on the repercussions of violating a cooperation agreement with the Government. White testified that he was not sure whether a Rule 35 motion was filed by the Government or by the individuals seeking relief because he was not familiar with the law.

The Government called Carlton Wilson to testify that he purchased drugs from Bennett five (5) years prior to the trial. At the time of trial, Wilson was in federal custody pending sentencing after pleading guilty to a federal drug charge. Wilson entered into a cooperation agreement with the state where he agreed to testify on behalf of the Government when called to do so.

The Government called Alejandro Fraga Santos who was a resident of Cary, North Carolina. He previously owned a 2004 Toyota Sienna minivan and decided to sell the van on Craigslist. Petitioner test drove the car and gave Fraga his business card. They arranged to sell the vehicle to Petitioner at a SunTrust bank for nine-thousand (9,000) dollars. Fraga testified that it was a normal transaction.

Over Petitioner's 404(b) objection, the Court permitted Theophus Moore to testify about vehicles not mentioned in Count # 4 of the Superseding Indictment. Moore was Petitioner's neighbor and Moore also worked for him. Petitioner ran a home improvement business where he repaired houses, a landscaping business, and a bounce house business. Moore registered three (3) vehicles in his name for Bennett, a GMC van, a Sienna van, and a Chevrolet Silverado pickup truck. Petitioner never indicated to Moore that he wanted to transfer car titles in order to conceal funds. Moore registered the vehicles in his name to be a good friend and he didn't mind doing it because Petitioner is a good man.

Over Petitioner's Rule 404(b) objection, the District Court permitted Douglas Miller to testify. Miller was a special agent with the United States Treasury Department, Internal Revenue Service. The Government called Miller to testify about his investigation of Petitioner. Over Petitioner's Rule 702 objection, the District Court permitted Miller to give tax expert opinion evidence. Over Petitioner's hearsay objection, the District Court permitted Miller to admit testimony based on title certification documents. Miller conceded that there's no requirement that an unincorporated business file a corporate income tax return. He also conceded that there is a minimum threshold or a dollar amount of income that a person must make that requires them to file an income tax return The Government rested its case-in-chief at the conclusion of Miller's testimony. The Petitioner moved for a judgment of acquittal. (App. 560). On April 25, 2017, the jury issued a verdict of guilty on all counts.

Petitioner filed a Renewed Motion for Judgment of Acquittal pursuant to Rule 29(c) on October 25, 2016 which was denied by the District Court on November 17, 2016. Bennett appealed his conviction to the United States Court of Appeals for the Fourth Circuit. On June 20, 2018, the Court of Appeals affirmed the judgement of the District Court.

This Petition follows.

REASONS FOR GRANTING THE WRIT

I. REVIEW IS NECESSARY TO DETERMINE THE MERITS OF PETITIONER'S CLAIMS OF DEPRIVATION OF HIS RIGHTS UNDER MIRANDA AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS.

A. The District Court violated the Petitioner's Sixth Amendment right to confront the Government's witnesses by improperly limiting defense counsel's cross examination.

The Confrontation Clause provides two types of protections for a criminal defendant: (1) the right physically to face those who testify against him, and (2) the right to conduct cross-examination. Delaware v. Fensterer, 474 U.S. 15, 18–19 (1985) (per curiam). The right of "cross examination is a precious one, essential to a fair trial." United States v. Cole, 622 F.2d 98, 100 (4th Cir.1980). The District Court's discretionary authority is restricted by the Constitution and the Rules of Evidence. See Delaware

v. Van Arsdall, 475 U.S. 673, 679 (1986); United States v. Turner, 198 F.3d 425, 429 (4th Cir.1999).

The right to cross-examine includes the opportunity to show that a witness is biased, or that the testimony is exaggerated or unbelievable. See United States v. Abel, 469 U.S. 45 (1984); Davis v. Alaska, 415 U.S. 308, 316 (1974). This type of evidence can make the difference between conviction and acquittal. See Napue v. Illinois, 360 U.S. 264, 269 (1959). "The rules of evidence authorize the cross-examination of witnesses on matters affecting their "credibility." United States v. Smith, 451 F.3d 209, 221 (4th Cir. 2006).

The test for the Confrontation Clause is whether a reasonable jury would have received a significantly different impression of the witness' credibility had counsel pursued the proposed line of cross-examination. See Van Arsdall, 475 U.S. 673, 680. (1986).

A defendant's Sixth Amendment right to cross-examination requires admission of evidence that the cooperating prosecution witnesses testified in exchange for a reduced sentence. Id. at 679.

In federal criminal proceedings, the prosecutor may file a motion pursuant to § 5K1.1 of the United States Sentencing Guidelines ("5K Motion"). "Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines."

Rule 35(b) of the Federal Rules of Criminal Procedure permits the Government to move for a reduced or modified sentence after a sentence has been imposed when a defendant provides substantial assistance in investigating or prosecuting another person.

The Government may also move to provide the court the authority to impose a sentence below a level established by statute as a minimum sentence to reflect a defendant's substantial assistance in the investigation or prosecution of a person who has committed an offense. 18 U.S.C. § 3553(e).

In the middle of the trial, the District Court ruled that Petitioner was precluded from questioning the Government's witnesses on their agreements based on future cooperation and prohibited Petitioner from making an argument that the witnesses may be biased or unreliable as the result of their agreements with the Government. (App. 404). The District Court stopped the proceedings and excused the jury from the courtroom. (App. 401). In forbidding the Defense to make the argument that the witnesses were inclined to testify due to cooperation agreements, the following ensued:

> THE COURT: No. No. That's not the question you were asking. You've been asking couldn't you get the higher sentence rather than the lower sentence. And

> that's just untrue, isn't it? A person cannot be re-sentenced for their unwillingness to cooperate. In other words, the cooperation happens before you've served out your sentence or before you've been sentenced.

(App. 248).

> MR. MEGARO: I would agree with the Court that he's not subject to any additional jeopardy at this time. But my point and my argument that I plan to make to the jury is that these witnesses, him and the others, had to agree at the time they signed the cooperation agreement to future cooperation. And I think the answers that the witnesses have given would tend to substantiate that. I think there's some support for that in the record.
>
> THE COURT: Well, we're going to answer this question before you make your argument. And, right

> now, the answer will be you'll be forbidden to make that argument.

(App. 404).

> THE COURT: Double jeopardy bars that. You can't bring somebody in later and raise their sentence because they didn't cooperate after -- the whole point of the agreement -- and you've distorted this -- is that it's at sentencing your cooperation will be given credit.
>
> MR. MEGARO: Your Honor, I'm relying on a 1987 Supreme Court case called Ricketts v. Adamson, and that's recorded at 483 U.S. 1, which specifically dealt with the double jeopardy issue. It was actually a re-prosecution, not just a re sentencing, but a new prosecution after a defendant had pled guilty from a first-degree murder charge to second degree murder, had been

> sentenced. And the State of Arizona wanted to bring him back to have him cooperate because that was what his original plea agreement was, to cooperate against two individuals. When the defendant in that case refused to cooperate and testify against the other two individuals, the State of Arizona voided the plea agreement and re-prosecuted him for first degree murder -- which was the original count. And the United States Supreme Court held that was not barred by double jeopardy.
>
> THE COURT: That's fine. In this case, it is barred by double jeopardy. And so you're not going to get to argue that.
> MR. MEGARO: I'll abide by the Court's ruling.
> THE COURT: Yes. And I'll just give you a heads up so you don't get into that.

(App. 495-496).

The District Court mistakenly concluded that a defendant could not get a higher sentence rather than a lower sentence as the result of not cooperating. (App. 402). However, a plain reading of U.S.S.G § 5K1.1, F. R. Crim. Pro. 35(b), and 18 U.S.C § 3553(e) shows that a higher sentence will be imposed should a defendant decide not to provide substantial assistance. While these statutes do not operate as an enhancement for not cooperating, the sentence imposed without cooperation is a higher sentence than a sentence imposed as the result of cooperation by the defendant. The District Court also mistakenly concluded that cooperation happens before the imposition of a sentence. (Id.). However, F. R. Crim. P. 35(b) provides the reduction or modification of a sentence after it has been imposed.

Relying on notions of Double Jeopardy, the District Court incorrectly ruled that the Defense "can't suggest to the jury that someone who has a plea agreement and who agrees to cooperate can, after they're sentenced, later be brought back and have their sentence raised." (App. 495). The U.S. Supreme Court dealt with the issue of double jeopardy and invalidated cooperation agreements in Ricketts v. Adamson, 483 U.S. 1 (1987).

In Ricketts, the Supreme Court held that the breach of a plea agreement removed the double jeopardy bar that otherwise would prevent prosecution. Id. After the defendant's trial for first-degree murder had commenced in state court, the defendant and the State reached an agreement where the respondent would plead guilty to second-degree

murder and testify against other parties involved in the murder. Id. at 3-4. The agreement also provided that if the respondent refused to testify the agreement would be voided and the original charge would be reinstated. Id. at 4. The trial court accepted the plea agreement and the defendant testified on behalf of the State against the other parties. Id. The state supreme court reversed the other parties' convictions and remanded for retrial. Id. The State, once again, sought the defendant's cooperation during the pre-trial proceedings, but the defendant believed that his obligation to testify under the plea agreement terminated when he was sentenced. Id. at 4-5. Finding a breach of the plea agreement, the court vacated the defendant's second-degree murder conviction, reinstated the original first-degree murder charge. Id. at 7. The Court reasoned that while the agreement did not explicitly waive the defendant's double jeopardy rights, the terms of the agreement acted as a waiver of a double jeopardy defense. Id. at 10. The Court went on, the defendant could not claim that there was a good-faith dispute about whether he was bound to testify a second time. Id. The Court opined "The State did not force the breach; respondent chose, perhaps for strategic reasons or as a gamble, to advance an interpretation of the agreement that proved erroneous. And, there is no indication that respondent did not fully understand the potential seriousness of the position he adopted." Id. at 11.

The plea agreement in Ricketts was similar to the plea agreements in the Eastern District of North Carolina. It is clear from the testimony of several witnesses that, in their mind, they were still obligated

to cooperate out of fear of being penalized regardless of the status of their sentence. (App. 601).

Regardless of whether the witnesses were correct in their belief on the terms of their cooperation agreements, they testified under the assumption that they were obligated to testify on behalf of the Government. It is the witness' beliefs of their duty to abide by the agreements that create an incentive to relay biased and incredible testimony. Therefore, a jury might reasonably have found that the witnesses had a motive for favoring the Government in their testimony. See United States v. Diaz, 26 F.3d 1533, 1539–40 (11th Cir. 1994) (providing the test for compliance with the Confrontation Clause).

The District Court violated Petitioner's rights secured by the Confrontation Clause by cutting off all questioning about failed witness cooperation and the various means by which a sentence could be modified as a result, and that a jury might reasonably have found that such continuing cooperation agreements furnished the witnesses with a motive for favoring the Government in his testimony.

B. The District Court improperly admitted Petitioner's Un-Mirandized statements elicited by law enforcement during custodial interrogation.

The prosecution may not use statements stemming from custodial interrogation of the defendant unless it demonstrates the use of

procedural safeguards. See Miranda v Arizona, 384 U.S. 436 (1966).

A. Custody

A totality of the circumstances shows that Petitioner was in custody for purposes of Miranda upon the execution of the search warrant. In determining whether an individual has been taken into custody for purposes of Miranda "the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." Berkemer v. McCarthy, 468 U.S. 420, 442 (1984). See Howes v. Fields, 565 U.S. 499, 509 (2012) (Listing relevant factors for custodial interrogation).

In United States v. Colonna, 511 F.3d 431, 433 (4th Cir. 2007). The Fourth Circuit held that several factors required suppression: the fact that the defendant was escorted at gunpoint, numerous law enforcement agents entered his house, the defendant was escorted outside by agents who stayed in his presence at all times, the defendant did not initiate police questioning, was never told he was free to leave or that he did not have to answer questions. Id. at 436. This Court held that held that the defendant was in custody for he was in custody and Miranda. Id.

The circumstances of Petitioner's police encounter were analogous to those in Colonna. The circumstances suggest that Petitioner felt that he was not free to end the encounter. Petitioner was in custody for purposes of Miranda during the time at

which he made the un-Mirandized statements. (App. 100-124).

B. Interrogation

"Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent." United States v. Innis, 446 U.S. 291, 300-01 (1980). Interrogation extends to "words or actions on part of police officers that they should have known were reasonably likely to elicit an incriminating response." Id. at 302. Law enforcement may anticipate an incriminating response to certain questions involving identity, address or other background matters such questioning gains no shelter from the booking exception to Miranda. See United States v. Henley, 984 F.2d 1040 (9th Cir.1993); United States v. Gonzalez–Sandoval, 894 F.2d 1043 (9th Cir.1990); United States v. Disla, 805 F.2d 1340 (9th Cir.1986). When law enforcement asks investigative questions under the guise of routine biographical questioning, Miranda warnings are required. See Pennsylvania v. Muniz, 496 U.S. 582, 602 n. 14 (1990).

Not only was Petitioner in custody, but he was interrogated. Petitioner was interrogated twice inside of his residence. On two separate occasions Petitioner was asked to cooperate by TFO Williams and then by Agent Coats. TFO Williams and Agent Coats should have known that asking for cooperation was reasonably likely to elicit an incriminating response and he was thus entitled to Miranda warnings. See United States v. Montana, 958 F.2d 516, 518–19 (2d

Cir.1992); United States v. Johnson, 812 F.2d 1329, 1331 (11th Cir. 1986).

Petitioner was also subjected to custodial interrogation at the police station by both Agent Scherger and TFO Williams. Prior to advising Petitioner of his Miranda rights, Agent Scherger asked Petitioner to "explain what was going on." (App. 134). He should have known the question was reasonably likely to elicit an incriminating response.

After Petitioner was advised of his Miranda rights, Petitioner invoked his right to counsel. Approximately 22 minutes after invoking his right to counsel, TFO Williams and TFO Winslow questioned Petitioner inside the processing unit. (App. 134) They continued to interrogate the Defendant with specific questions about drug trafficking. The report drafted by TFO Williams states that Petitioner's statements were spontaneous; however, two major actualities show that this is not the case. (App. 66) The specificity and nature of this statement shows that is clearly a statement made in response to questioning. Second, Petitioner was aware of his rights and clearly and unambiguously invoked his Fifth Amendment Right to Counsel pursuant to Miranda. It is inapposite to conclude that Petitioner would make spontaneous statements after he was made aware of his rights and then invoked his right to counsel.

The questioning of Petitioner by TFO Williams and TFO Winslow in the processing unit was impermissible since an attorney was not present

during this subsequent line of questioning. See Miranda, 384 U.S. at 474 (1966).

C. The evidence was legally insufficient to establish that (1) Petitioner possessed a firearm in furtherance of a drug trafficking crime and (2) Petitioner laundered monetary instruments.

Count #3

Count # 3 of the Superseding Indictment charged Defendant with a violation of 18 U.S.C. § 924(c)(1)(a)(i), Possessing a Firearm in Furtherance of a Drug Trafficking Crime. To convict a defendant under § 924(c)(1), the Government must prove that the defendant (1) committed a drug trafficking crime; (2) knowingly possessed a firearm; and (3) possessed the firearm in furtherance of the underlying crime. The Superseding Indictment did not specify which specific firearm(s) recovered by law enforcement was the basis for the charge. Count # 3 specifically only charged Count # 2, the possession count, as the predicate drug trafficking crime, not the conspiracy itself.

A firearm is possessed in furtherance of a drug trafficking offense when the firearm helped, furthered, promoted, or advanced drug trafficking. See United States v. Williams, 731 F.3d 1222, 1232 (11th Cir. 2013). In order to prove the offense "there must be a showing of some nexus between the firearm and the drug selling operation." United States v. Timmons, 283 F.3d 1246, 1253 (11th Cir. 2002) (quotation

omitted). This nexus can be established by evidence of the type of drug activity being conducted, accessibility of the firearm, the type of the weapon, whether the weapon was stolen, the status of the possession (legitimate or stolen), whether the gun was loaded, its proximity to drugs or drug profits, and the time and circumstances under which the gun is found. Id.

In addition, the Fourth Circuit has defined the term "furtherance" in 18 U.S.C. § 924(c) as "the act of furthering, advancing, or helping forward." United States v. Lomax, 293 F.3d 701, 705 (4th Cir. 2002). Accordingly, the Government therefore bears the burden "to present evidence indicating that the possession of a firearm furthered, advanced, or helped forward a drug trafficking crime." United States v. Perry, 560 F.3d 246, 254 (4th Cir. 2009); see also United States v. Porter, 293 Fed.Appx. 700, 706 (11th Cir. 2008) (requiring proof of "some nexus between the firearm and the drug selling operation").

The mere accidental or coincidental presence of a firearm at the scene of a drug trafficking offense is insufficient to establish that it was possessed in furtherance of the drug offense. United States v. Sullivan, 455 F.3d 248, 260 (4th Cir. 2006), citing United States v. Lipford, 203 F.3d 259, 266 (4th Cir. 2000).

The evidence at trial established only mere coincidental presence near, not at, the scene of the conduct alleged in Count # 2. Moreover, assuming the Government's theory of prosecution on Count # 3 was the possession of the .38 revolver, there was no

evidence that Defendant possessed this unloaded firearm to protect himself, the proceeds of drug transactions, or the drugs themselves. No witness testified that they ever saw Defendant in possession of that actual firearm, nor did any witness testify that Defendant ever possessed or used any particular firearm for any purpose, lawful or unlawful. Accordingly, the Government failed to present legally sufficient evidence that the firearms were possessed "in furtherance of" a drug trafficking offense. As a consequence, this Court should dismiss Count # 3.

As a result, this Court should vacate the conviction and remand for a new trial. In the alternative, this Court should remand with instructions to direct entry of judgment on a lesser-included offense involving a lower drug weight. See Rutledge v. United States, 517 U.S. 292 (1996).

Count # 4

Count # 4 of the Superseding Indictment charged Defendant with Money Laundering by Concealment with respect to a purchase of a 2004 Toyota Sienna van, VIN STDZA22C74S216597.

Pursuant to 18 U.S.C. § 1956(a)(1)(B)(i), the Government was required to prove that Defendant conducted or attempted to conduct a financial transaction having at least a minimal effect on interstate commerce or involving the use of a financial institution which is engaged in, or the activities of which have at least a minimal effect on, interstate or foreign commerce. United States v. Peay, 972 F.2d 71,

75 (4th Cir. 1992). Further, the Government is required to present evidence that the property involved in the transaction must represent the proceeds of an already completed offense, or a completed phase of an ongoing offense; this requires the Government to prove the alleged money laundering actually involved prior criminally-derived proceeds. United States v. Singh, 518 F.3d 236, 247 (4th Cir. 2008), United States v. Bolden, 325 F.3d 471, 488 (4th Cir. 2003).

Here, the evidence at trial established that Defendant purchased the subject vehicle for the sum of $9,000.00 from a bona fide seller, and titled the vehicle in Theophus Moore's name. (App. 553). There was no evidence from either the seller or IRS Agent Douglas Miller that the $9,000.00 used to purchase the vehicle were proceeds from drug sales or other unlawful activity, nor did the Government present any other evidence to show that the money used for the vehicle were illicit proceeds. (App. 561).

Nor did the Government present any testimony that the vehicle itself affected interstate commerce. While IRS Agent Douglas Miller testified that generally the North Carolina Department of Motor Vehicles provides information as to where a vehicle originates, there was no testimony that this particular vehicle was brought into North Carolina for the purpose of this transaction. (App. 166) Rather, the testimony established that the entire transaction of the purchase of the vehicle took place within the borders of North Carolina, and neither the vehicle itself nor the funds used to purchase it ever crossed

state lines. (Id.). As a result, the Government failed to present legally sufficient evidence as to the elements of Count # 4.

D. The District Court violated petitioner's right to Due Process by admitting evidence of uncharged "other act" evidence pursuant to rule 404(b).

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. Fed. R. Evid. 404(b). Rule 404(b) "allows admission of evidence of other acts relevant to an issue at trial except that which proves only criminal disposition." United States v. Hernandez, 975 F.2d 1035, 1039 (4th Cir. 1992). In the Fourth Circuit other acts evidence proffered pursuant to Rule 404(b) is admissible if they are (1) relevant to an issue other than character; (2) necessary, and (3) reliable. Id. "Evidence that passes this test is not automatically admissible, however. Rule 403 requires the trial judge to determine that its probative value outweighs the danger of undue prejudice to the defendant." Id.

The Government sought to prove Count Four, laundering by concealment, by establishing that Petitioner allegedly attempted "to hide his drug money by buying other assets that are in other people's names." (App. 588). Count Four of the Superseding Indictment only references payment for the purchase of a 2004 Toyota Sienna Van and makes no mentioning of any other vehicle. (Superseding

Indictment). The Government called Shanetra White and Theophus Moore to testify that Petitioner used them to register several vehicles and title several vehicles in his name. (App. 131-141). Since the only vehicle mentioned in the Superseding Indictment was the 2004 Toyota Sienna Van, then the testimony of the additional car titles in names other than Petitioner's constituted a propensity argument.

Evidence related to the car title transfers of the 2004 Volvo, 2006 Acura, 2003 Honda Odyssey minivan, 2000 GMC Savana van, and the 2007 Chevrolet Silverado was not admissible as Rule 404(b) evidence because it was neither relevant to an issue other than character, nor necessary, and its probative value outweighed the danger of undue prejudice to Petitioner.

Testimony from Theophus Moore regarding the 2004 Toyota Sienna Van, the only vehicle mentioned in Count 4, was the only relevant and necessary testimony for the Government's case-in-chief. It appears that the Government sought to back-door Petitioner's uncharged conduct though 404(b) evidence rather than charging the conduct in the indictment which would require the Government to prove additional elements beyond a reasonable doubt. This tactic permitted the Government to introduce additional evidence of uncharged other acts in the course of its case-in-chief that only served to to confuse the issues before the jury which amounted to the needless presentation of cumulative and unnecessary evidence. This type of evidence overly influenced the jury and denied Petitioner a "fair opportunity to

defend against a particular charge;" in this case, Count 4. See McBride, 676 F.3d at 395.

Evidence of the uncharged car title transfers might have been relevant if the circumstances indicating the vehicles' connection to money laundering were fully explored by the Government. However, absolutely no evidence by the Government was offered other than Petitioner asking two friends to transfer the title of cars into their name. The Government did not provide evidence of the flow of money relating to each of the vehicles to establish that the transfer of car titles involved prior criminally-derived proceeds.

The District Court also abused its discretion in permitting Government witnesses to testify about Petitioner's past dealings from a remote time in the past. The admission of past dealing constituted nothing more than a propensity evidence in violation of Rule 404(b).

In United States v. Hernandez, this Court held that a District Court abused its discretion by admitting testimony regarding the defendant's alleged participation in a prior crack distribution conspiracy to establish her intent to conspire to distribute crack on a later date and with different individuals. 975 F.2d at 1039–40. This Court reasoned that the defendant's alleged involvement in the prior crack conspiracy was irrelevant because, due to the lack of factual similarity between that prior involvement and the charged offense, defendant's participation in a previous, unrelated conspiracy "did not establish anything

about her conduct or mental state during the course of the conspiracy alleged in the indictment." Id. at 1039. "The testimony did not show that [the defendant] intended to engage in crack distribution in Washington or that she intended to continue to deal in crack after leaving New York. Nor did it show that she intended to engage in crack distribution with [a different co-conspirator], or even that she intended to engage in future crack dealing at all." Id.

Similar to Hernandez, the Government called Cooper, Elliot, Owens, White, and Wilson to testify that they engaged in drug dealings with Petitioner up to two (2) decades prior to the trial without establishing that the testimony was relevant to an issue other than character, necessary, and reliable. The Government did so notwithstanding the fact that Petitioner's past involvement in drug activity "does not in and of itself provide a sufficient nexus to the charged conduct where the prior activity is not related in time, manner, place, or pattern of conduct." United States v. Johnson, 617 F.3d 286, 297 (4th Cir. 2010) (holding that the District Court abused its discretion in holding that the defendant's alleged sale of drugs in 1998 was relevant to his intent to conspire to sell drugs in 2003).

E. The District Court violated the Petitioner's right to Due Process by admitting expert witness testimony without the proper foundation.

This Court reviews a district court's decision to qualify an expert witness, as well as the admission of

such testimony, for abuse of discretion. United States v. Garcia, 752 F.3d 382, 390 (4th Cir. 2014).

"The Daubert 'gatekeeping' obligation applies not only to 'scientific' testimony, but to all expert testimony. Rule 702 does not distinguish between 'scientific' knowledge and 'technical' or 'other specialized' knowledge, but makes clear that any such knowledge might become the subject of expert testimony." Kumho Tire Co. v. Carmichael, 526 U.S. 137, 138 (1999).

This Circuit has recognized that "individuals who testify as expert and fact witnesses can cause jury confusion, and such a manner of proceeding is only acceptable where the district court took adequate steps ... to make certain that the witness's dual role did not prejudice or confuse the jury. Such safeguards might include requiring the witness to testify at different times, in each capacity; giving a cautionary instruction to the jury regarding the basis of the testimony; allowing for cross-examination by defense counsel; establishing a proper foundation for the expertise; or having counsel ground the question in either fact or expertise while asking the question." Garcia, 752 F.3d at 392 (internal quotations and citations omitted).

Where an expert's methodology is grounded in his experience, a proper methodology analysis focuses on three areas: 1) how the expert's experience leads to the conclusion reached; 2) why that experience is a sufficient basis for the opinion; and 3) how that experience is reliably applied to the facts of the case.

See Fed. R. Evid. Rule 702 advisory committee's note (2000).

The District Court permitted the Government to call Agent Miller to testify as a fact and expert witness without providing any of the safeguard mentioned in Garcia. Miller's factual conclusions involved his investigation of Petitioner; however, Miller also gave expert testimony in the form of an opinion, based on his experience, as to illegal activity and how alleged perpetrators "cover" their paper trails without the Government having to establish the proper foundation set forth in Rule 702. (App. 400). In fact, the Daubert factors were not even addressed. See Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). Since Miller testified based on his experience, he did not provide a proper methodology analysis. Further no notice was given to Petitioner of his expertise in the particular area pursuant to Fed. R. Crim. P. Rule 16(a)(1)(G).

CONCLUSION

Relief should be granted because the District Court and the Fourth Circuit conveniently ignored this Court's precedent by allowing the Petitioner to undergo prosecution without the full protection of the rights accorded to him by the Constitution, the Rules of Evidence, and the binding precedent in Miranda. The Government was allowed to present witnesses not subject to effective cross examination. Furthermore, the Government failed to present sufficient evidence of the charged crimes and was

erroneously permitted to exceed the rules of evidence. Finally, the precedent established by this Court in Miranda, was ignored. For the reasons set forth above, this Court should grant this petition herein in its entirety

Respectfully submitted on this 17th day of October, 2018.

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CERTIFICATE OF COMPLIANCE

No.18-____

In The
Supreme Court of the United States

DAVON KELLY BENNETT,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ Of Certiorari To The
United States Court of Appeals for the Fourth Circuit

I certify that this Petition for a Writ of Certiorari complies with the requirements of Sup. Ct. R. 33.1(h). Excluding those parts exempt by Sup. Ct. R. 33.1(d), this Petition contains 8,552 words.

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 17, 2018

Patrick Michael Megaro, Esq.*
**Counsel of Record*