No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

KALID KORON OCEAN-AVENT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Government proved beyond a reasonable doubt that Mr. Ocean-Avent possessed a firearm.

II. Whether the district court's evidentiary errors denied Mr. Ocean-Avent his right to a fair trial.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner, who was the Defendant-Appellant below, is Kalid Koron Ocean-Avent. Respondent, who was the Plaintiff-Appellee below, is the United States of America.

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CITATION OF PRIOR OPINION

The United States Court of Appeals for the Fourth Circuit decided this case by unpublished opinion issued 28 December 2022, in which it affirmed the judgment of the trial court. A copy of the Fourth Circuit's opinion is included in the Appendix to this petition.

JURISDICTIONAL STATEMENT

This petition seeks review of an opinion affirming Mr. Ocean-Avent's conviction, following a jury verdict of guilty of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1) and § 924. The petition is being filed within the time permitted by the Rules of this Court. *See* S. Ct. R. 13. This Court has jurisdiction to review the Fourth Circuit's opinion pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Mr. Ocean-Avent's Arrest

In the early morning hours of 16 January 2020, Rocky Mount, North Carolina Police Officers Daryl Jones and Zach Schuessler were patrolling a residential area of Rocky Mount. J.A. 170-71, 225-26. The officers observed a vehicle pull to the side of the road, and the officers pulled up next to the parked car. J.A. 171-73, 180, 226. The officers could see that there were two occupants in the vehicle. J.A. 174-75, 228. Officer Schuessler got out of the police cruiser to approach the parked car, while Officer Jones remained in the police cruiser. J.A. 176, 228.

The parked car then pulled away and led the police on a chase through adjacent neighborhoods. J.A. 176-81, 231. The police saw the fleeing vehicle hit a parked car and then stop in a yard,; both occupants got out of the car and fled on foot. J.A. 181-82, 234-35. Officer Jones caught and arrested Mr. Ocean-Avent, who had been driving the car. J.A. 187-89. Upon searching the car, the police found a handgun, a cell phone, and marijuana. J.A. 214, 236-39, 241, 246, 250-51, 254. The police did not apprehend the passenger. J.A. 194-96.

Original Indictment

Mr. Ocean-Avent was charged in a one-count indictment with felon in possession of a firearm on or about 16 January 2020, in violation of 18 U.S.C. §§ 922(g)(1), 924. J.A. 3.

Pretrial Proceedings

Fourteen days before the trial was set to begin, the Government filed a Notice of Intent to Present Evidence Pursuant to F.R.E. 404(b). J.A. 35-38. The Government argued that some of the conduct discussed in the Notice "falls squarely within the Count of the Indictment," the felon in possession charge. J.A. 35; *see* J.A. 3. The Government also argued that the evidence described in the motion "is alternatively admissible pursuant to F.R.E. 404(b) and 403." J.A. 35.

The Government stated that it intended to offer evidence that Mr. Ocean-Avent "is a member of the 9-Trey Gangsta Killa Bloods, a subset of the United Blood Nation, in Rocky Mount, North Carolina." J.A. 35. The Government further stated that "9-Trey Bloods are responsible for near-daily shootings in neighborhoods

surrounding Cokey Road and Long Avenue" in Rocky Mount. J.A. 35.

In its Notice, the Government also stated that it intended to offer evidence that Mr. Ocean-Avent was on federal supervised release prior to his arrest on the current charges, that he had tested positive for marijuana, and that his "status as a gang-member and post-release supervisee prevented the defendant from entering a night club in Rocky Mount a few weeks prior to" his arrest. J.A. 36. The Government further stated in the Notice that Rocky Mount Police Officer Zach Schuessler was working as a security guard at the club and would not let Mr. Ocean-Avent enter the club. J.A. 36-37.

Two days after the Government filed the Notice, a grand jury returned a superseding indictment. J.A. 39-41. Mr. Ocean-Avent was charged in two counts in the superseding indictment: Count One charged receipt of a firearm, between on or about 5 March 2018 and 27 August 2018, while under a felony indictment, in violation of 18 U.S.C. §§ 922(n) and 924; and Count Two, previously pleaded as the only count in the original indictment, charged possession of a firearm on or about 16 January 2020, after having been convicted of a felony, in violation of 18 U.S.C. §§ 922(g)(1) and 924. J.A. 39-41.

The Government filed a Notice of Experts Under Fed. R. Crim. P. 16(a)(1)(G). J.A. 50-53. The Government identified David Christman, a corporal with the Rocky Mount Police Department, and gave notice that Corporal Christman would testify to "the gang validation process" used by the Rocky Mount police. J.A. 50.

Mr. Ocean-Avent filed a Motion in Limine to Exclude 404(b) Evidence,

seeking to preclude admission of the gang evidence the Government forecasted in its Notice. J.A. 42-49. Mr. Ocean-Avent argued that the gang evidence was not intrinsic to the crimes charged in the superseding indictment, and further that it was not admissible under Rule 404(b) of the Federal Rules of Evidence. J.A. 44-46. In its response, the Government argued Mr. Ocean-Avent's gang membership was admissible to show motive and intent to possess the firearm as alleged in Count Two of the superseding indictment. J.A. 53; *see* J.A. 60-65. The Government argued that Mr. Ocean-Avent had a pattern of running to evade law enforcement when he possessed a firearm or ammunition, "which can only be deemed his modus operandi." J.A. 53; *see* J.A. 65-68. The Government further argued that Mr. Ocean-Avent's gang membership and "pattern of flight" assisted the police officers in identifying Mr. Ocean-Avent as the driver of the vehicle when he was arrested on 16 January 2020. J.A. 53; *see* J.A. 63-64, 68-69.

At the pretrial conference, the court ruled that the gang evidence was admissible, but that the court would give a limiting instruction as to evidence associated with Mr. Ocean-Avent's alleged gang membership. J.A. 86. The court also ruled that the incidents related to Mr. Ocean-Avent's post-release supervision were admissible as intrinsic evidence. J.A. 87-88.

Trial

Testimony regarding the 16 January 2020 arrest

Rocky Mount Police Officers Daryl Jones and Zach Schuessler were in a marked police cruiser patrolling in the Branch Road area of Rocky Mount in the

early morning hours of 16 January 2020. J.A. 170-71, 225-26. According to the officers, there had been numerous reports of violent crime in this residential area of Rocky Mount, although there were no such reports that evening. J.A. 171, 207, 225. Officer Schuessler testified that there was a Bloods gang set known to frequent that area. J.A. 225.

Officers Jones and Schuessler saw a silver Ford Fusion with Virginia license plates cross an intersection, and they got behind that vehicle. J.A. 171-73, 180, 226. Although the police did not turn on their blue lights, the Fusion pulled to the side of the road and stopped. J.A. 173, 226. Officer Jones was driving and pulled up beside the Fusion while Officer Schuessler shined his flashlight into the vehicle. J.A. 171, 173-74, 226-27. Besides the driver, there was another man in the front passenger seat. J.A. 174-75, 228. Officer Jones testified that he could not recognize either occupant of the Fusion. J.A. 175-76, 209-10. Officer Schuessler said that the driver said they were "okay." J.A. 227.

Officer Schuessler got out of the car, J.A. 176, 228; when he made eye contact with the driver, Officer Schuessler testified that he recognized the driver, who had a street name of "Nine," or "Number Nine," J.A. 228. According to Officer Schuessler, after he made eye contact with the driver, the Fusion accelerated away from the stop. J.A. 230-31; *see* J.A. 176. Officer Schuessler got back in the police cruiser and activated his body camera. J.A. 231.

Officers Jones and Schuessler pursued the Fusion through adjacent neighborhoods and observed the Fusion speeding, and running stop signs and a red

light. J.A. 176-181, 231. At some point, Officer Jones turned on the vehicle's blue lights to initiate a traffic stop, but the Fusion did not stop. J.A. 178. After going through an intersection at high speed, the driver of the Fusion lost control of the vehicle and it hit a parked car before coming to rest in a yard. J.A. 181, 234. The Government showed video recordings from the police cruiser's dash camera and from Officer Schuessler's body camera. J.A. 183-84, 232-34.

Officers Jones and Schuessler observed both the driver and the passenger get out of the vehicle and flee on foot. J.A. 181-82, 234-35. Officer Jones chased the driver and caught him; Officer Jones recognized that the driver was Mr. Ocean-Avent. J.A. 187-89. The Government played video recordings from Officer Jones's body camera. J.A. 191, 193. Although a K-9 unit arrived to assist in the efforts to locate the passenger, the police did not apprehend the passenger in the Fusion. J.A. 194, 196.

Officer Schuessler conducted the initial search of the Fusion. J.A. 195, 236. The Fusion sustained substantial damage to the exterior of the vehicle and the air bags were deployed inside the vehicle. J.A. 198-201. Officer Schuessler testified that he found a loaded handgun in an open compartment under the entertainment center, J.A. 236, 241, 246, 250, 254; *see* J.A. 214; he removed and secured the handgun, J.A. 239. Officer Schuessler said he also found a water bottle, a cell phone, and a marijuana cigarette in the center console, but he left the cell phone in a cup holder inside the Fusion. J.A. 237-38, 239, 251. The Government introduced screen shots from the body cam video showing the area Officer Schuessler described

searching inside the Fusion. J.A. 237-38.

Officer Jones conducted a secondary search of the Fusion. J.A. 201. Officer Jones testified that Mr. Ocean-Avent had asked for his cell phone from in the Fusion. J.A. 204. Officer Jones testified that he found a cell phone in a cup holder, and that upon showing it to Mr. Ocean-Avent, Mr. Ocean-Avent confirmed it was his cell phone. J.A. 204; *see* J.A. 244 (Officer Schuessler's testimony). Officer Jones testified that he found an identification card for Mr. Ocean-Avent and marijuana inside the center console. J.A. 202; *see* J.A. 250. Officer Jones testified that he also found paper copies of bills addressed to Keisha Ocean-Avent, Mr. Ocean-Avent's mother, in the glove box of the vehicle. J.A. 202-04, 214. On cross-examination, Officer Jones agreed that there were no pictures of an identification card, and that his body cam video did not show the identification card. J.A. 214-15.

Keisha Ocean-Avent testified that she had rented a silver or gray Ford Fusion with Virginia license plates. J.A. 223. She testified that her cousin stole the Fusion and "it got wrecked." J.A. 223.

Officer Schuessler said he had recognized Mr. Ocean-Avent because one evening that fall, in October or November, when he was working security for a club, Mr. Ocean-Avent tried to get into the club. J.A. 229; *see* J.A. 175 (Officer Jones's testimony). Officer Schuessler said the club owner had a policy that gang members and people involved in violent crimes could not be admitted to the club, and Officer Schuessler said he refused to admit Mr. Ocean-Avent to the club based on this policy. J.A. 229-30; *see* J.A. 175 (Officer Jones's testimony). Although Officer

Schuessler testified that he recognized Mr. Ocean-Avent when he approached the Fusion parked on the side of the road, J.A. 228, Officer Schuessler said in his incident report that he could not identify the driver at that time, J.A. 249.

The officers arrested Mr. Ocean-Avent and had him sit inside the police cruiser. J.A. 242. According to Officer Schuessler, Mr. Ocean-Avent denied that he was the driver of the Fusion. J.A. 241, 242, 243, 245. Mr. Ocean-Avent was booked at the Edgecombe County Detention center after his arrest. J.A. 259-60. When he was booked, Mr. Ocean-Avent's personal property included a lighter, a cell phone, an identification card, and clothing. J.A. 260.

Officer Schuessler requested that the handgun be tested for fingerprints and DNA evidence, and that the water bottle be fingerprinted. J.A. 252. However, the Government presented no fingerprint evidence or DNA evidence at trial. J.A. 252.

The Government offered in evidence a stipulation that Mr. Ocean-Avent had been convicted of a felony in March 2019, that Mr. Ocean-Avent knew he had been convicted of a felony, and that as of 16 January 2020 he had not had his right to possess a firearm restored. J.A. 262.

Expert evidence on gangs

The Government offered, and the district court accepted, Rocky Mount Police Department Corporal David Christman as an expert "in street gangs, including their identification and member sets." J.A. 267-68. Corporal Christman said that in his opinion, Mr. Ocean-Avent was a member of the Bloods, specifically, the 9-Trey set. J.A. 270, 285. Corporal Christman said that the Rocky Mount Police

follow criteria set by the North Carolina Gang Investigators Association to "validate" a suspect as a member of a gang. J.A. 266. He said that for the Rocky Mount Police, evidence of four of twelve criteria is sufficient for gang validation, but he said that Mr. Ocean-Avent met five of the criteria to be validated as a gang member. J.A. 266, 269-70.

Corporal Christman testified that the predominant gangs in Rocky Mount are the Bloods and the Crips. J.A. 268. He identified the areas of the city where he said Bloods gang members were frequently found. J.A. 269, 270. He testified about several photographs in the "validation packet" that he said supported his opinion that Mr. Ocean-Avent was in the Bloods gang. J.A. 270-72, 282-85. Corporal Christman said that in the photographs Mr. Ocean-Avent was wearing Bloods gang colors and displaying Bloods gang hand signals while he was with other validated Bloods gang members. J.A. 270-72, 282-85.

Closing arguments

In his closing, the Assistant United States Attorney summarized what he said the evidence showed. J.A. 288-306. The Assistant United States Attorney recited what he said were the elements of Count One, J.A. 291-92, and Count Two, J.A. 295-96. The Assistant United States attorney played some of the video evidence that had been admitted during the Government's case-in-chief. J.A. 298, 299, 300, 301, 306. The Assistant United States Attorney argued that he was "putting all these puzzle pieces together." J.A. 302.

The Assistant United States Attorney then argued, "So while putting the

pieces together, we also have to show a motive, and you have one, a very clear and real motive. The defendant is a 9-Trey Blood." J.A. 303. The Assistant United States Attorney said, "Now, his gang membership, that doesn't make him guilty. We're not saying that it casts any kind of character. We're saying it gave him a motive to have the firearm." J.A. 303. The "motive," according to the Assistant United States Attorney, was to protect himself where a gang "war" was "raging." J.A. 303.

Mr. Ocean-Avent's attorney reminded the jury that Mr. Ocean-Avent was not on trial for running from the police or for being an alleged gang member. J.A. 307-08. He noted "the Government's evidence that they continually present about that he runs with guns and he's a 9-Trey Blood gang member." J.A. 310. He argued that Mr. Ocean-Avent's general fear of interacting with law enforcement would explain the Government's evidence of flight. J.A. 311.

Mr. Ocean-Avent's attorney argued that the Government had not proved the only contested element in the Count Two charge, that Mr. Ocean-Avent knowingly possessed the firearm found inside the Fusion after the crash. J.A. 311-14. Mr. Ocean-Avent's attorney argued that there was a missing piece in the Government's "puzzle," the passenger in the Fusion. J.A. 312. He argued, "So the puzzle that the Government has put together for you to prove their case beyond a reasonable doubt is missing a piece, and it's a crucial piece in Count 2, and that's the passenger." J.A. 313. Mr. Ocean-Avent's attorney argued that the Government had not proven Mr. Ocean-Avent's guilt beyond a reasonable doubt, where the Government had

offered no physical evidence, such as fingerprints or DNA evidence, showing that Mr. Ocean-Avent had possessed the firearm found in the Fusion. J.A. 312-13.

Verdict

The jury found Mr. Ocean-Avent not guilty on Count One, and guilty on Count Two. J.A. 8, 354-55.

Appeal

Mr. Ocean-Avent appealed his conviction. On appeal, Mr. Ocean-Avent argued that the Government offered insufficient evidence that he possessed the firearm, and that the district court erred in admitting evidence , including expert testimony, that he was allegedly a gang member. *See* App. pp. 2-5. The Fourth Circuit affirmed Mr. Johnson's conviction. *See* App. p. 6. Mr. Ocean-Avent also argued that his trial counsel provided ineffective assistance of counsel, but the Fourth Circuit did not consider this issue, finding that the alleged ineffectiveness did not conclusively appear from the record. *See* App. pp. 5-6.

CONSTITUTIONAL PROVISION INVOLVED

"No person shall . . . be deprived of life, liberty, or property, without due process of law[.]" U.S. Const. amend V.

MANNER IN WHICH THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The questions presented were argued and reviewed below because Mr. Ocean-Avent argued on appeal the Government did not present sufficient evidence

to prove him guilty beyond a reasonable doubt of the felon in possession charge, and that the district court made the evidentiary errors described below. *See* App. 2-5. The Fourth Circuit concluded that there was sufficient evidence to prove that Mr. Ocean-Avent knew about the gun and had motive for carrying it. *See* App. 3. The Fourth Circuit further concluded that there was sufficient evidence that Mr. Ocean-Avent constructively possessed the firearm in the car. *See* App. 3. The Fourth Circuit rejected Mr. Ocean-Avent's objections to the admission of gang evidence, holding that the district court did not abuse its discretion in admitting the evidence, and that the admission of the evidence, if error, was harmless. *See* App. 3-4. The Fourth Circuit also rejected Mr. Ocean-Avent's objection to the Government's expert evidence as not plain error. *See* App. 4-5.

REASONS FOR GRANTING THE WRIT

Mr. Smith respectfully contends that there are "compelling reasons" for granting his petition for writ of certiorari. *See* S. Ct. R. 10. The requirement that the Government must prove a defendant guilty beyond a reasonable doubt is "a prime instrument for reducing the risk of convictions resting on factual error," and provides "concrete substance for the presumption of innocence—that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law." *In re Winship*, 397 U.S. 358, 363 (1970) (quotation omitted). The right to a fair trial is also a fundamental due process right, and admitting evidence intended to prove Mr. Ocean-Avent's bad character as

a gang member violated that fundamental due process right.

DISCUSSION

I. THE GOVERNMENT OFFERED INSUFFICIENT EVIDENCE THAT MR. OCEAN-AVENT POSSESSED THE FIREARM FOUND IN THE VEHICLE.

This Court has made clear that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. at 364; *see Clark v. Arizona*, 548 U.S. 735, 766 (2006) ("a defendant is innocent unless and until the government proves beyond a reasonable doubt each element of the offense charged"). "The *Winship* doctrine requires more than simply a trial ritual." *Jackson v. Virginia*, 443 U.S. 307, 316-17 (1979). On review of the sufficiency of the evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319. Mr. Ocean-Avent respectfully contends that the Government did not present sufficient evidence to convict him of felon in possession of a firearm.

To prove the offense of possession of a firearm by a convicted felon, the Government must show four essential elements: (1) that the defendant had been convicted of a crime punishable by a term of imprisonment of more than one year; (2) that the defendant knew he had been convicted of a crime punishable by a term of imprisonment of more than one year; (3) that after the conviction the defendant voluntarily and intentionally possessed a firearm; and (4) that the firearm traveled

in interstate commerce at some point. 18 U.S.C. § 922(g)(1); *see Rehaif v. United States*, 139 S. Ct. 2191, 2200 (2019); *United States v. Moye*, 454 F.3d 390, 395 (4th Cir. 2006) (en banc); *United States v. Gallimore*, 247 F.3d 134, 136 (4th Cir. 2001). Possession can be actual or constructive. *E.g.*, *United States v. Moye*, 454 F.3d at 395. "Constructive possession is established when a person, though lacking such physical custody, still has the power and intent to exercise control over the object." *Henderson v. United States*, 575 U.S. 622, 626 (2015); *see United States v. Moye*, 454 F.3d at 395 ("Constructive possession is established if it is shown 'that the defendant exercised, or had the power to exercise, dominion and control over the item.'") (quoting *United States v. Rusher*, 966 F.2d 868, 878 (4th Cir.1992)); *United States v. Smith*, 357 F. App'x 555, 557 (4th Cir. 2009) (per curiam) ("When the Government seeks to establish constructive possession, it must prove that the defendant intentionally exercised dominion and control or had the power and the intention to exercise dominion and control over the item in question.").

Proof of constructive possession requires proof the defendant had knowledge of the presence of the contraband. *E.g.*, *United States v. Herder*, 594 F.3d 352, 358 (4th Cir. 2010). The Fourth Circuit has looked to several factors to decide when an individual exercises dominion and control over a vehicle, although no one factor is dispositive and the inquiry is fact-specific. *See United States v. Moody*, 2 F.4th 180, 191 (4th Cir. 2021); *see also United States v. Herder*, 594 F.3d at 358 (fact finder "may properly consider the totality of the circumstances surrounding the

defendant's arrest and his alleged possession"). The jury may consider whether the defendant was the driver of a vehicle in which the contraband was found. *See United States v. Moody*, 2 F.4th at 191.

The Government in this case presented no evidence of actual possession. No witness testified that she ever saw Mr. Ocean-Avent with a firearm at any time, and specifically, no witness testified that she saw Mr. Ocean-Avent possess the handgun recovered from the Ford Fusion. The Government also presented no physical evidence that could have supported a finding that Mr. Ocean-Avent actually possessed the firearm. Although Officer Schuessler requested that the firearm he found inside the Fusion be fingerprinted and tested for DNA evidence, J.A. 252, the Government presented no evidence that these tests were conducted.

The Government effectively conceded that it depended on a theory of constructive possession to prove Mr. Ocean-Avent possessed a firearm on 16 January 2020. *See* J.A. 297. Mr. Ocean-Avent did not contest that he was the driver of the Fusion, J.A. 312, and the jury could consider that fact, *see United States v. Moody*, 2 F.4th at 191. Mr. Ocean-Avent's mother had rented the Fusion, and she testified that her cousin had stolen the vehicle. J.A. 223. The evidence was undisputed that there was a passenger in the front seat who was never identified or apprehended. J.A. 175-76, 194, 196, 209-10. The evidence was also undisputed that the police chased the Fusion through several neighborhoods before the Fusion crashed violently, with the air bags deploying. J.A. 176-81, 198-201, 231.

According to Officer Schuessler, he found the handgun in an open compartment, underneath a water bottle, where he also found Mr. Ocean-Avent's cell phone. J.A. 236-39, 241-46, 250-51, 254.

Mr. Ocean-Avent recognizes that "[i]t is often necessary for the trier of fact to determine the existence of an element of the crime—that is, an ultimate or elemental fact—from the existence of one or more evidentiary or basic facts." *County Ct. of Ulster Cnty., N.Y. v. Allen*, 442 U.S. 140, 156 (1979) (quotations omitted). In this fact-specific inquiry, *see United States v. Moody*, 2 F.4th at 191, and viewing the evidence in the light most favorable to the Government, *see Jackson v. Virginia*, 443 U.S. at 319, the evidence was insufficient to prove constructive possession. The fact that Mr. Ocean-Avent was driving the Fusion is not sufficient to prove constructive possession of the firearm found in the Fusion. *See United States v. Moody*, 2 F.4th at 191 ("no one factor is dispositive"). Mr. Ocean-Avent was not the owner of the Fusion. *See* J.A. 223; *United States v. Lawing*, 703 F.3d 229, 240 (4th Cir. 2012) (affirming conviction where defendant was driver and owner of vehicle). The Fourth Circuit's conclusion that there was sufficient evidence that Mr. Ocean-Avent knew the firearm was in the car does not account for the fact that the passenger had time to put the handgun in the container without Mr. Ocean-Avent's knowledge during a vehicle chase that would necessarily have required all of Mr. Ocean-Avent's attention. *See* J.A. 176-81 (describing the Fusion making multiple turns). Inferring that Mr. Ocean-Avent had

knowledge of the handgun is inconsistent with the rule that although "all inferences must be made in favor of the prosecution, leaps of logic should not be." *Evans-Smith v. Taylor*, 19 F.3d 899, 908 n.22 (4th Cir. 1994). The Government did not prove that Mr. Ocean-Avent possessed the firearm on 16 January 2020 as was required to prove him guilty of Count Two.

II. THE DISTRICT COURT'S ERRONEOUS ADMISSION OF GANG-RELATED EVIDENCE, INCLUDING UNDISCLOSED EXPERT EVIDENCE, DENIED MR. OCEAN-AVENT A FAIR TRIAL.

The Due Process Clause of the Fifth Amendment guarantees every criminal defendant the right to receive a fair trial. *See Estes v. Texas*, 381 U.S. 532, 543 (1965) ("A fair trial in a fair tribunal is a basic requirement of due process."). There are compelling reasons for this Court to grant the writ of certiorari because the district court's evidentiary errors denied Mr. Ocean-Avent a fair trial.

A. The District Court Erred By Allowing Corporal Christman To Give Expert Testimony Without Adequate Disclosure.

Rule 16(a)(1)(G)[1] of the Federal Rules of Criminal Procedure provides that "[a]t the defendant's request, the government must give to the defendant a written summary of any testimony that the government intends to use under Rules 702, 703, and 705 of the Federal Rules of Evidence during its case-in-chief at trial." Fed. R. Crim. P. 16(a)(1)(G). The summary "must describe the witness's opinions the bases and reasons for those opinions, and the witness's qualifications." *Id.*

[1] The expert disclosure provisions of Rule 16 were amended effective 1 December 2022. All references to Rule 16 in this petition are to the pre-amendment version of the rule in effect as of Mr. Ocean-Avent's trial.

The expert disclosure provisions of Rule 16 are "intended to minimize surprise that often results from unexpected expert testimony, reduce the need for continuances, and to provide the opponent with a fair opportunity to test the merit of the expert's testimony through focused cross-examination." Fed. R. Crim. P. 16 advisory committee's note to 1993 amendment. As the Advisory Committee has explained, the requirement that the Government provide a summary of the bases for an expert's opinion is "perhaps [the] most important" requirement in the rule. *Id.* The summary "should cover not only written and oral reports, tests, reports, and investigations, but any information that might be recognized as a legitimate basis for an opinion under Federal Rule of Evidence 703, including opinions of other experts." *Id.* Although an expert witness may be qualified on the basis of experience, "[i]f the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than simply 'taking the expert's word for it.'" Fed. R. Evid. 702 advisory committee's note to 2000 amendments.

The district court failed to play this essential gatekeeping function at Mr. Ocean-Avent's trial when it allowed Corporal Christman to testify "as an expert in street gangs" despite the Government's failure to disclose Corporal Christman's opinions or the bases and reasons for them. *See* J.A. 267. Mr. Ocean-Avent's failure to object to the expert evidence will not prevent this Court from correcting

the plain error in the admission of that evidence. *See* Fed. R. Crim. P. 52(b); *United States v. Olano*, 507 U.S. 725, 732 (1993).

In response to Mr. Ocean-Avent's discovery request, J.A. 18, the Government disclosed only that:

> Corporal Christman will testify to the gang validation process used by Rocky Mount Investigators. Corporal Christman's training and experience with street gangs, their identifying actions, and signs of membership assisted Corporal Christman in re-validating the defendant's membership recently. The Curriculum Vitae for Corporal Christman will be provided to defense counsel.

J.A. 50-51. The Government did not disclose what Corporal Christman's opinion was, or what the bases and reasons for his opinion might be. *See* J.A. 50-51. The Government did not say how Corporal Christman's "training and experience with street gangs, their identifying actions, and signs of membership" supported his opinion. *See* J.A. 50. The Government did not list any "identifying actions" or "signs of membership." *See* J.A. 50.

The Government's disclosure was inadequate. An expert disclosure that "include[s] only the general topics concerning which each proposed expert would testify," and that "fail[s] to describe the witnesses' opinions or provide the bases and reasons for the witnesses' opinions," does not comply with Rule 16. *See United States v. Concessi*, 38 F. App'x 866, 868 (4th Cir. 2002) (per curiam) (affirming exclusion of expert testimony where disclosures were inadequate under Rule 16).

Corporal Christman's trial testimony illustrates the inadequacy of the disclosure. When the Government called Corporal Christman as a witness at trial,

Corporal Christman testified that there are specific criteria the Rocky Mount Police Department uses to validate a gang member:

> Some of the criteria would be if they self admit to being a gang member, if they're known to frequent gang areas, if they're wearing gang colors, displaying gang hand signs, if they're involved in any kind of gang incident, if they use a social media page to further the gang, who they associate with, where they associate, if it's a known gang area, things such like that.

J.A. 267. The Government did not disclose that these criteria informed Corporal Christman's opinion. *See* J.A. 50-51.

While the Government disclosed only that Corporal Christman would testify "to the gang validation process used by Rocky Mount Investigators," J.A. 50, the court qualified Corporal Christman more broadly "as an expert in street gangs, including their identification and member sets." J.A. 267. The Government elicited testimony from Corporal Christman about gangs in Rocky Mount, including some of the identifying features of a Bloods gang member: clothing colors, hand signs, and location. *See* J.A. 268-69. Corporal Christman also identified the parts of town that he believed were "major Blood areas." J.A. 269.

Corporal Christman testified that he had completed a gang validation packet on Mr. Ocean-Avent in 2017, and that the packet was recently updated. J.A. 269. Corporal Christman further testified that Mr. Ocean-Avent met five criteria for gang membership, although he did not specify what those five criteria were. J.A. 269-70. Corporal Christman opined that Mr. Ocean-Avent was a member of the Bloods gang, specifically affiliated with the 9-Trey set. J.A. 270.

Corporal Christman explained that he relied on three photographs of Mr. Ocean-Avent. *See* J.A. 271-72, 282-85. In the first photograph, Mr. Ocean-Avent was wearing red and black; according to Corporal Christman, red and black were a "mixture of colors that they wear." J.A. 271. Corporal Christman testified that Mr. Ocean-Avent was in the company of two validated gang members in the picture: one who was "holding up a Blood hand sign that's commonly used," and another who was wearing red pants and was later shot to death. J.A. 271-72. Corporal Christman identified a second photograph where he said Mr. Ocean-Avent was "displaying Blood hand signs." J.A. 283. In a third photograph, according to Corporal Christman, Mr. Ocean-Avent could be seen with a local gang leader who was associated with the common gang areas of Rocky Mount. J.A. 284-85. Corporal Christman did not testify as to the date on which any of the photographs were taken. *See* J.A. 271-72, 282-85. Finally, Corporal Christman testified to his opinion that as of 16 January 2020, Mr. Ocean-Avent was a member of the Bloods gang. J.A. 285.

The district court erred by admitting Corporal Christman's undisclosed expert opinion testimony. Where a party fails to comply with the expert disclosure requirements, the district court may: "(A) order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms and conditions; (B) grant a continuance; (C) prohibit that party from introducing the undisclosed evidence; or (D) enter any other order that is just under the circumstances." Fed. R. Crim. P. 16(d)(2).

Although Rule 16 gives the district court discretion in responding to a disclosure violation, each of the remedial options recognizes that fairness requires that a party have the right to respond effectively to expert evidence. *See id.* As this Court has noted, "[e]xpert evidence can be both powerful and quite misleading because of the difficulty of evaluating it." *Daubert v. Merrill Dow Pharms., Inc.*, 509 U.S. 579, 595 (1993) (citation omitted). Because the Government failed to disclose Corporal Christman's opinion or any of the evidence he relied on to form his opinion, the Government frustrated a central purpose of the disclosure rule. *See* Fed. R. Crim. P. 16 advisory committee's note to 1993 amendment. Mr. Ocean-Avent's trial counsel could not prepare to cross-examine Corporal Christman about his opinions, and Mr. Ocean-Avent had no opportunity to test the foundations of the opinion or the reliability of Corporal Christman's methodology. The district court committed reversible error by allowing Corporal Christman's expert testimony.

B. The District Court Erred By Allowing The Government To Offer Evidence Of Mr. Ocean-Avent's Gang Membership To Prove His Bad Character.

"Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt." *Michelson v. United States*, 335 U.S. 469, 475 (1948). Federal Rule of Evidence 404(b) "reflects this common-law tradition by addressing propensity reasoning directly: '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.'" *Old Chief v. United States*, 519 U.S. 172, 181-82

(1997) (quoting Fed. R. Evid. 404(b)); *see Huddleston v. United States*, 485 U.S. 681, 685 (1988) (Rule 404(b) "generally prohibits the introduction of evidence of extrinsic acts that might adversely reflect on the actor's character, unless that evidence bears upon a relevant issue in the case such as motive, opportunity, or knowledge"). The Government used evidence that Mr. Ocean-Avent was a gang member to show Mr. Ocean-Avent's bad character, and the admission of that evidence was not harmless error. *See United States v. Hall*, 858 F.3d 254, 280 (4th Cir. 2017) (where Mr. Ocean-Avent objected to evidence of gang membership, Government had burden to show error was harmless).

This Court has recognized that "unduly prejudicial evidence might be introduced under Rule 404(b)." *Huddleston v. United States*, 485 U.S. at 691. The Fourth Circuit applies a four-prong test in assessing the admissibility of prior act evidence: "(1) the prior act evidence must be relevant to an issue other than character, such as intent; (2) it must be necessary to prove an element of the crime charged; (3) it must be reliable; and (4) as required by Federal Rule of Evidence 403, its probative value must not be substantially outweighed by its prejudicial nature." *United States v. Queen*, 132 F.3d 991, 995 (4th Cir. 1997); *see Huddleston v. United States*, 485 U.S. at 691 (to protect against unfair prejudice, evidence must be offered for proper purpose, be relevant, and its probative value not substantially outweighed by potential for unfair prejudice).

Over Mr. Ocean-Avent's objection, the district court allowed Corporal

Christman, as well as Officers Creech, Schuessler, and Jones, to testify that Mr. Ocean-Avent was a gang member. J.A. 120, 175, 193-94, 229, 271-85.[2] The Government argued, and the district court agreed, that evidence of Mr. Ocean-Avent's gang membership was admissible to show Mr. Ocean-Avent's motive and intent to possess the firearm alleged in Count 2. J.A. 53, 60-65; J.A. 86 (district court's ruling that gang evidence was admissible under Rule 404(b) because "it does explain motive and intent, identity, knowledge and modus operandi for all the reasons the Government outlined"). The admission of gang evidence was error, where the evidence fails the necessity prong of the Rule 404(b) analysis, and because the probative value of the evidence was substantially outweighed by the grave risk of prejudice to Mr. Ocean-Avent. *See United States v. Queen*, 132 F.3d at 995; *Huddleston v. United States*, 485 U.S. at 691.

1. Showing that Mr. Ocean-Avent was a gang member was not necessary to prove any element of the crimes charged.

To prove Mr. Ocean-Avent guilty of Count Two, the Government had to show: (1) that he had been convicted of a felony; (2) that he knew he had been convicted of a felony; (3) that after the conviction he voluntarily and intentionally possessed a firearm; and (4) that the firearm traveled in interstate commerce. 18 U.S.C. § 922(g)(1); *see Rehaif v. United States*, 139 S. Ct. at 2200; *United States v. Gallimore*, 247 F.3d at 136. The Government's professed reason for offering the

[2] Consistent with the Government's attempt to prove Mr. Ocean-Avent's bad character, the Government elicited from Officer Wrenn that he recognized Mr. Ocean-Avent "from my time working as a detention officer in the jail." J.A. 163.

gang evidence—to show motive, J.A. 303—is not an element of the crime of felon in possession of a firearm. Evidence of Mr. Ocean-Avent's gang membership was not necessary to prove him guilty of possession of a firearm by a felon.

"Evidence is necessary where it is an essential part of the crimes on trial, or where it furnishes part of the context of the crime." *United States v. Lighty*, 616 F.3d 321, 354 (4th Cir. 2010) (quotation omitted). "The necessity prong must be analyzed in light of other evidence available to the government." *Id.* (quotation omitted). The district court erred by admitting evidence of gang membership because it was not necessary to show that Mr. Ocean-Avent intended or had a motive to possess a firearm on 16 January 2020.

The evidence of what actually occurred on 16 January 2020 was more probative of Mr. Ocean-Avent's knowing possession of a firearm than the gang evidence the Government introduced. The Government offered evidence at trial that officers recognized Mr. Ocean-Avent as the driver of the Fusion where they located a loaded handgun, and that they recovered Mr. Ocean-Avent's personal property from the Fusion. *See supra* pp. 5-7. This evidence connected Mr. Ocean-Avent to the firearm directly—it was in a car he had been driving, with his personal effects, in an area accessible to the driver. J.A. 202-04, 214, 228, 244. The Government also offered evidence that Mr. Ocean-Avent was in a neighborhood known for violent crime. J.A. 220. The evidence of the events of 16 January 2020 was also more reliable than the gang evidence—Corporal Christman offered a conclusory assertion that Mr. Ocean-Avent was a gang member as of that date, J.A.

285, but he gave no explanation of why the conclusion he reached in 2017 when he "validated" Mr. Ocean-Avent as a gang member was still true three years later, *see* J.A. 271-72, 282-85.

Because the Government failed to disclose Corporal Christman's opinions or the bases and reasons for them, the reliability of Corporal Christman's assertion about Mr. Ocean-Avent's gang status on 16 January 2020 went untested. Other evidence "more directly and more reliably" supported the Government's argument that Mr. Ocean-Avent knowingly possessed the handgun, and therefore evidence of his gang membership was unnecessary. *See United States v. Lighty*, 616 F.3d at 355 (Rule 404(b) evidence was unnecessary where other evidence "more directly and more reliably" connected defendant to crime charged).

2. The risk of unfair prejudice substantially outweighed any probative value of the gang evidence.

Relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403. Unfair prejudice means "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Fed. R. Evid. 403 advisory committee's note to proposed rules. "Gangs generally arouse negative connotations and often invoke images of criminal activity and deviant behavior." *United States v. Irvin*, 87 F.3d 860, 865 (7th Cir. 1996). "There is therefore always the possibility that a jury will

attach a propensity for committing crimes to defendants who are affiliated with gangs or that a jury's negative feelings toward gangs will influence its verdict." *Id.*

The Government's reliance on evidence of Mr. Ocean-Avent's membership in the 9-Trey set of the Bloods gang was designed to, and had the effect of, influencing the jury to convict Mr. Ocean-Avent based on fear of gangs, and not based on evidence of the offense charged. The law enforcement officers generally blamed gang members—although not Mr. Ocean-Avent himself—for the violent crimes in the neighborhood where Mr. Ocean-Avent was seen in the Fusion. Officer Jones testified that violent crimes in the neighborhood where Mr. Ocean-Avent was seen in the Fusion were attributable to "9-Trey Blood gang members." J.A. 220. Officer Schuessler testified that "the Blood gang set as well as the Crip gang set" were responsible for recent shootings in the area. J.A 225-26. Corporal Christman testified that "violent offenders in our area . . . are commonly gang members." J.A. 266.

Although Mr. Ocean-Avent was not charged with a violent offense, and there was no evidence that he was involved in the shootings the officers testified about, the Government's counsel used the evidence of Mr. Ocean-Avent's gang membership to accuse him of being involved in a "war" that was "raging" between gang members. J.A. 303. Implying that Mr. Ocean-Avent must be involved in rampant gun violence because of his gang affiliation was an improper effort to cause the jury to find Mr. Ocean-Avent guilty based on fear, not on evidence. *See United States v. Irvin*, 87 F.3d at 866 (district court erred in admitting highly charged gang-

affiliation evidence that served as substitute for direct evidence of guilt). The district court erred by admitting the gang evidence.

CONCLUSION

For the foregoing reasons, Petitioner Kalid Koron Ocean-Avent respectfully requests that the Court grant his petition for writ of certiorari, reverse the decision of the Fourth Circuit, and remand for further proceedings.

This the 28th day of March, 2023.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Petition for Writ of Certiorari was served on the Respondent herein by depositing a copy thereof in the United States mail, postage prepaid, first class, addressed as follows:

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This the 28th day of March, 2023.

/s/ Paul K. Sun, Jr.
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