

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS OF WEST VIRGINIA

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Jamil Adrian Cabral,

Defendant Below, Petitioner,

vs.)

State of West Virginia,

Plaintiff Below, Respondent.

(from the Circuit Court of Wood County, Case Nos.: 23-F-325)

APPELLATE BRIEF

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ASSIGNMENTS OF ERROR

- I. The circuit court erred in allowing evidence of the Fentanyl contained within a sealed pack to be introduced as evidence**
- II. The court erred in allowing the search of the vehicle**
- III. The Conspiracy of Possession of a Controlled Substance, Second Offense, conviction is against the weight of the evidence**
- IV. The court erred in allowing evidence of Petitioner's prior conviction in Washington County after ruling that evidence could not be admitted at trial**
- V. The Circuit Court erred in denying Motion for Judgment of Acquittal at trial, Motion for New Trial, and Post Trial Motion for Judgement of Acquittal**
- VI. It was plain error for Officer Joshua Snyder to testify that he wanted to talk to either Petitioner or the Codefendant about the delivery of marijuana**
- VII. The circuit court erred in sentencing the Petitioner to a 16-year determined sentence was excessive under the facts of the case and a motion for probation or alternative sentence should have been granted**
- VIII. The conviction and sentence of sixteen years for second offense Conspiracy is excessive and should be set aside**
- IX. Petitioner believes was not tried before a jury of his peers**
- X. The court erred in denying a motion for mistrial after the jury pool was tainted by the comments of a prospective juror**
- XI. Codefendant Opitz was not allowed to testify that her husband may have planted drugs in the car**
- XII. Petitioner's right to a fair trial was violated due to cumulative effect of numerous errors committed by the trial court**

STATEMENT OF THE CASE

Jamil Cabral (hereinafter "Petitioner") was tried before the Honorable Robert A. Waters, Judge, in Wood County, West Virginia, on December 12 and 13, 2023 (order entered December 26, 2023) (A.R. pp. 33-36). The jury returned a verdict of Not Guilty on the offense of

Possession of Controlled Substance with Intent to Deliver, Second offense (Fentanyl), and returned guilty verdicts for Conspiracy to Commit Possession of a Controlled Substance with Intent to Deliver, Second Offense, and Possession of a Controlled Substance (Marijuana) (A.R. pp. 94-97). The co-defendant took a plea to the general Conspiracy statute (1-5 years in prison) (A.R. pp. 430-431, 30-32, 179-219).

The case arose from a traffic stop on or about January 27, 2023, from a traffic stop of a gray/silver Nissan Rogue driven by Lydia Opitz, (hereinafter "Codefendant Opitz) (A.R. pp. 127-131). The stop due to expired registration and having a dark, tinted license plate cover (A.R. pp. 127-131).

Sargent Joshua Snyder and Officer William Reifsteck testified to detecting the odor of marijuana (A.R. pp. 135, 153- 154). Petitioner was seated in the front passenger seat at the time of the stop. Marijuana was found on Petitioner (A.R. pp. 154) after a pat down search and after asking Petitioner what was in his pocket.

A search was then conducted of the vehicle. The court allowed the search and its contents to be introduced at trial, after a pretrial hearing (A.R. pp. 171-172). The only fentanyl located at the scene was in a sealed packet between the driver's seat and the front console in a sealed package with Rick and Morty on the packet, as well as the word "cannabis" (A.R. pp. 137-138, 157, 416). The packet was later opened and found to have 3 aluminum foil folds of white powder. The powder was tested and found to contain fentanyl (A.R. pp. 473-477). Neither party claimed the packet, or the fentanyl contained in the packet. (A.R. pp. 446, 493-494).

Motion for Post-Verdict Judgement of Acquittal and a Motion for New Trial were filed (A.R. pp. 48-52). The circuit court denied both motions at the sentencing hearing for Petitioner (A.R. pp. 556-571, 53-56).

On August 17, 2023, Petitioner was sentenced to sixteen (16) years in the custody of the West Virginia Division of Corrections for Conspiracy to Commit Possession of a Controlled Substance with Intent to Deliver (Fentanyl), Second Offense, and six months for Possession of a Controlled Substance (marijuana). (A.R. pp. 53-56, 579).

From the convictions and sentences, Petitioner appeals.

SUMMARY OF ARGUMENTS

That the court erred in allowing evidence of the Fentanyl contained within a sealed pack to be introduced. **Mr.** Cabral was in neither possession nor constructive possession of the packet; that Mr. Cabral was in neither possession nor constructive possession of the packet is reflected in the jury's verdict of not guilty to Count 1, Possession of a Controlled Substance with Intent to elver, Second Offense (fentanyl).

The court erred in allowing the search of the vehicle. The search was based on the odor of marijuana in the vehicle and a baggie of substance believed to be marijuana on the person of the Petitioner after he had already stepped out of the vehicle as requested by Patrolman William Reifsteck.

The Conspiracy conviction is against the weight of the evidence as there was not sufficient evidence to prove beyond a reasonable doubt that Jamil Cabral committed the offense of Conspiracy to Commit Possession of a Controlled Substance with the Intent to Deliver (Fentanyl), Second Offense, "Conspiracy" means an agreement to commit to felony and one person has to commit an over act in furtherance of the felony. In this case, the conspiracy specifically refers to the Possession of Fentanyl with the intent to Deliver which was referred to in County 1 of the Indictment. In this case, the jury acquitted Mr. Cabral of the charge of Possession of a Controlled Substance with Intent to Deliver, Second Offense, Fentanyl. While

the co-defendant Lyndia Opitz entered a plea of guilty to Conspiracy and testified at Mr. Cabral's trial, she did not admit to possessing fentanyl, to seeing Mr. Cabral with fentanyl, to obtaining fentanyl from Mr. Cabral, to being aware of Mr. Cabral dealing fentanyl to herself or to any other person, or to acquiring fentanyl for any purpose including delivery or distribution. Likewise, Mr. Cabral did not admit to possessing fentanyl, to knowing fentanyl was in the vehicle to any conspiracy to acquire or deliver fentanyl or any drug for the purpose of delivery or distribution.

The court erred in ruling that the Defendant opened the door to be asked about his prior conviction for Cocaine Trafficking in Washington County, Ohio. The issue of the Defendant having a prior drug felony in Washington County, Ohio was stipulated. Allowing the evidence to be presented and argued in closing was unfairly prejudicial to the Petitioner.

The court erred in Denying Motion for Judgment of Acquittal at trial, Motion for New Trial, and Post Trial Motion for Judgement of Acquittal. The verdict in this case suggests a compromise verdict as Mr. Cabral was acquitted of Possession of a Controlled Substance with Intent to Deliver, which specifically references the fentanyl located next to the driver's seat in a sealed packet. As testified to at the trial by the investigating officer, co-defendant Lyndia Opitz, and Mr. Cabral, Lyndia Opitz was driving the vehicle. That said verdict is contrary to the evidence presented and is without the proper evidence to support it. The conviction is against the principle of the right to a fair trial.

Also, it was plain error for Officer Joshua Snyder to testify that he wanted to talk to either Mr. Cabral, or Ms. Opitz about the delivery of Marijuana. The evidence was a back doorway of the state intentionally prejudicing Mr. Cabral before the Jury. The 16-year determined sentence was excessive under the facts of the case and a motion for probation or alternative sentence

should have been granted. The conviction and sentence for second offense Conspiracy is excessive and should be set aside. Petitioner was prevented from presenting a full defense when the codefendant was not allowed to testify that her ex-husband could have put the fentanyl in the vehicle. Further, Petitioner believes was not tried before a jury of his peers, as the 29-member jury pool contained no minorities, and that the jury pool was tainted by the comments of a prospective juror about the repeated arrests of the same people.

Due to these errors individually and collectively, Petitioner's convictions should be given a judgment of acquittal in this matter, or he should be granted a new trial.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Because this case involves a dispute in the application of settled law, abuse of discretion, and is of fundamental public importance, as the Court may determine, this case is appropriate for Rule 19 or Rule 20 argument and disposition.

STANDARD OF REVIEW

The abuse of discretion standard has been defined in longstanding case law in West Virginia:

'In general, an abuse of discretion occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed but the circuit court makes a serious mistake in weighing them.' Id. at 553, 514 S.E.2d at 403 (quoting Gentry v. Mangum, 195 W.Va. 512, 520 n. 6, 466 S.E.2d 171, 179 n. 6 (1995)).

Shafer v. Kings Tire Serv., Inc., 215 W. Va. 169, 177, (2004).

Additionally,

[w]here improper evidence of a nonconstitutional nature is introduced by the State in a criminal trial, the test to determine if the error is harmless is: (1) the inadmissible evidence must be removed from the State's case and a determination made as to whether the remaining evidence is sufficient to convince impartial minds of the defendant's guilt beyond a reasonable doubt; (2) if the remaining evidence is found to be insufficient, the error is not harmless; (3) if the remaining

evidence is sufficient to support the conviction, an analysis must then be made to determine whether the error had any prejudicial effect on the jury.

State v. Maynard, 183 W. Va. 1, 2, (1990).

Mr. Cabral was in neither possession nor constructive possession of the packet; that Mr. Cabral was in neither possession nor constructive possession of the packet is reflected in the jury's verdict of not guilty to County 1, Possession of a Controlled Substance with Intent to elver, Second Offense (fentanyl).

ARGUMENTS

I. The circuit court erred in allowing evidence of the Fentanyl contained within a sealed pack to be introduced as evidence

Mr. Cabral was in neither possession nor constructive possession of the packet; that Mr. Cabral was in neither possession nor constructive possession of the packet is reflected in the jury's verdict of not guilty to Count 1, Possession of a Controlled Substance with Intent to Deliver, Second Offense (fentanyl). (A.R. p. 95).

"In West Virginia mere physical presence on a premises in which a controlled substance is found does not give rise to a presumption of possession of a controlled substance but is evidence to be considered along with other evidence demonstrating conscious dominion over the controlled substance." State v. Chapman, *Syl. Pt. 2*, 363 S.E.2d 755, 178 W.Va. 678 (*quoting Syl. Pt. 3, State v. Dudick*, 158 W.Va., 629, 213 S.E.2d 458 (1975)).

In the instant case, the court erred in allowing the evidence of fentanyl to be introduced to the jury because there was no other evidence tying the evidence to Petitioner. This was born out at trial when Codefendant Opitz testified that she did not know anything about the Rick and Morty baggie containing the fentanyl until she was being processed after the stop (A.R. p. 446). There was no evidence or proffer of evidence that would tie the fentanyl to Petitioner during the

suppression hearing. This decision was clearly not harmless, as the jury returned a verdict of guilty to Conspiracy to Commit Possession of a Controlled Substance with Intent to Deliver, Second Offense, while at the same time acquitting Petitioner for Possession of a Controlled Substance with Intent to Deliver. Absent this prejudicial evidence, the jury could not have convicted Petitioner for the Conspiracy Charge upon the testimony of Codefendant Opitz, who denied the existence of an actual conspiracy or agreement to commit any illegal act (other than smoking marijuana with Petitioner. There was no other evidence of any overt act, other than Fentanyl, which both Petitioner and the codefendant denied knowing was present.

II. The court erred in allowing the search of the vehicle.

The search was based on the odor of marijuana in the vehicle and a baggie of substance believed to be marijuana on the person of the Petitioner after he had already stepped out of the vehicle as requested by Patrolman William Reifsteck. (A.R. pp. 135, 153, 154). There is no other evidence of any wrongdoing. Matters involving conclusions of law, including the admissibility of evidence, are reviewed under a *de novo* standard State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995). Under this standard, the decision to allow the search of the vehicle, including the Rick and Morty pack containing fentanyl, was not properly made, and should be reversed.

III. The Conspiracy of Possession of a Controlled Substance, Second Offense, conviction is against the weight of the evidence

A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not

an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled.

Syllabus Point 3 State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995).

Controlled Substance with the Intent to Deliver (Fentanyl), Second Offense, Conspiracy" means an agreement to commit to felony and one person must commit an over act in furtherance of the felony. In this case, the conspiracy specifically refers to the Possession of Fentanyl with the intent to Deliver which was referred to in County 1 of the Indictment (A.R. pp. 15-16). In this case, the jury acquitted Mr. Cabral of the charge of Possession of a Controlled Substance with Intent to Deliver, Second Offense, Fentanyl (A.R. p. 94). While the co-defendant Lyndia Opitz entered a plea of guilty to Conspiracy and testified at Mr. Cabral's trial, she did not admit to possessing fentanyl (A.R. p. 446), to seeing Mr. Cabral with fentanyl (A.R. p. 433), to obtaining fentanyl from Mr. Cabral (A.R. pp. 433), to being aware of Mr. Cabral dealing fentanyl to herself or to any other person (A.R. pp. 433-446), or to acquiring fentanyl for delivery or distribution (A.R. p. 446). Codefendant Opitz admitted to abusing drugs, including Fentanyl, but denied using Fentanyl with or around Petitioner (A.R. pp. 433). She also denied knowing that Fentanyl was in the vehicle or knowing how the Fentanyl in the Rick and Morty pack came to be in the vehicle (A.R. pp. 446).

Likewise, Mr. Cabral denied possessing fentanyl (A.R. pp. 490-498), to knowing fentanyl was in the vehicle (A.R. pp. 490-494), to any conspiracy to acquire or deliver fentanyl or any drug for the purpose of delivery or distribution (A.R. p. 491).

The alleged baggie of marijuana (approximately 5 grams) was never tested. Officer Reifsteck testified that he believed the substance was marijuana A.R. p. 413).

IV. The court erred in allowing evidence of Petitioner's prior conviction in Washington County after ruling that evidence could not be admitted at trial

The issue of the Defendant having a prior drug felony in Washington County, Ohio was stipulated to by Petitioner. The court had properly ruled that conviction could not be presented to the jury (A.R. p. 173-174). However, at trial the court ruled that the conviction could be presented to the jury after Petitioner testified that his relationship with Codefendant Opitz ended due to "the stress and the mental madness of going through a case that I've never been through before." (A.R. p. 492). The court then allowed the State to question Petitioner about his prior conviction in Washington County, Ohio (A.R. p. 497-502). Allowing the evidence to be presented and argued in closing was unfairly prejudicial to the Petitioner, as he was then convicted, despite the lack of direct testimony against Petitioner by Codefendant Opitz.

V. The Circuit Court erred in denying Motion for Judgment of Acquittal at trial, Motion for New Trial, and Post Trial Motion for Judgement of Acquittal.

The verdict in this case suggests a compromise verdict. As discussed above, there is insufficient evidence of a conspiracy and Mr. Cabral was acquitted of Possession of a Controlled Substance with Intent to Deliver, which specifically references the fentanyl located next to the driver's seat in a sealed packet (A.R. p. 446). As testified to at the trial by the investigating officer, co-defendant Lyndia Opitz, and Mr. Cabral, Lyndia Opitz was driving the vehicle (A.R. p. 432, 492). That said verdict is contrary to the evidence presented and is without the proper evidence to support it. The conviction is against the principle of the right to a fair trial when the evidence was so lacking.

VI. It was plain error for Officer Joshua Snyder to testify that he wanted to talk to either Petitioner or the codefendant about the delivery of marijuana

To trigger application of the 'plain error' doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public

reputation of the judicial proceedings." Syllabus point 7, State v. Miller, 194 W.Va. 3, 459 S.E.2d 114 (1995).

The evidence was a backdoor way of the state intentionally prejudicing Mr. Cabral before the Jury. Officer Joshua Snyder speculated that Ms. Opitz or the Petitioner may have just been involved in the distribution of marijuana (A.R. p. 455). As can be seen in the trial transcript, Sargent Snyder was recalled to the stand, to try bolster the State's case by testifying to this perceived intent, as well as to his "expertise" regarding drug investigations. The court sustained the objections of counsel regarding most the intended testimony upon recall, but the witness has already slipped in the comment about concern for the delivery of marijuana. This was exceedingly prejudicial. By that point in the trial, there was no evidence of any attempt, or even intent, to deliver fentanyl, other than the weak testimony of Codefendant Opitz. As noted above, Codefendant Opitz had only testified that she entered a plea, that it was her vehicle, that Petitioner did not drive that vehicle, that she did not know where the fentanyl came from, and that both she and her husband had a significant drug problem (A.R. pp. 432, 433, 446, 448, 453, 454).

Clearly, this was part of the State's attempt to obtain a conviction based upon mere suspicion or conjecture by Sargent Snyder, not upon actual evidence of guilt.

VII. The circuit court erred in sentencing the Defendant to a 16-year determined sentence was excessive under the facts of the case and a motion for probation or alternative sentence should have been granted.

Sentencing orders imposed by circuit courts are reviewed under the deferential standard of review. 'The Supreme Court of Appeals reviews sentencing orders ... under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands.' Syl. Pt. 1, in part, State v. Lucas, 201 W.Va. 271, 496 S.E.2d 221 (1997)." Syl. Pt. 1, State v. James, 227

W.Va. 407, 710 S.E.2d 98 (2011).

`Sentences imposed by the trial court, if within statutory limits and if not based on some [im]permissible factor[.]' Syl. Pt. 4, State v. Goodnight, 169 W.Va. 366, 287 S.E.2d 504 (1982)." Syl. Pt. 6, State v. Slater, 222 W.Va. 499, 665 S.E.2d 674 (2008).

Petitioner was sentenced to serve a determinate sentence of sixteen (16) years in prison and to serve six (6) months for Possession of a Controlled Substance, to be served consecutively (A.R. pp. 53-56, 579).

Based on all these considerations, especially the weak circumstantial case against Petitioner, the circuit court erred in not granting Petitioner probation, home confinement or other alternative sentencing.

Counsel notes the filing of a motion for reconsideration (A.R. pp. 53-60) which was denied (A.R. p. 61).

VIII. The conviction and sentence of sixteen years for second offense Conspiracy is excessive and should be set aside

The Petitioner was sentenced to serve sixteen (16) years for second offense Conspiracy to Commit Possession of a Controlled Substance, Second Offense (A.R. pp. 53-56, 579), and to serve six (6) months for Possession of a Controlled Substance to be served consecutively.

"In determining whether a given sentence violates the proportionality principle, consideration is given to the nature of the offense, the legislative purpose behind the punishment, a comparison of the punishment with what would be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction." Syl. Pt. 5, in part, Wanstreet v. Bordenkircher, 166 W.Va. 523, 276 S.E.2d 205 (1981).

"[T]he purpose of the Double Jeopardy Clause is to ensure that sentencing courts do not exceed, by the device of multiple punishments, the limits prescribed by the legislative branch of

government, in which lies the substantive power to define crimes and prescribe punishments." Syl. Pt. 3, State v. Sears, 196 W.Va. 71, 468 S.E.2d 324 (1996).

In the instant case, Mr. Cabral was sentenced to sixteen years for the Conspiracy to Commit Possession of a Controlled Substance with Intent to Deliver, 2nd Offense, conviction (A.R. pp. 53-56, 579). The co-defendant entered a plea agreement under the general conspiracy statute and received a sentence of one to five (1-5) years in the custody of the Department of Corrections (A.R. p. 430-431, 444). For a first conviction under the drug conspiracy statute, the Petitioner could have received a maximum of ten (10) years in prison W.Va. Code Section 60A-4-401.

As discussed above, there was no evidence presented that the Defendant ever possessed any Fentanyl, or that Codefendant Opitz ever possessed Fentanyl with the intent to deliver fentanyl. Codefendant Opitz testified to having used Fentanyl but denied ever using Fentanyl around Petitioner (A.R. pp. 433, 446-447). The Fentanyl package was found next to the driver's seat of the vehicle and the evidence at trial was that the Petitioner only drove the vehicle one time — to take the vehicle home after Codefendant Opitz was arrested on January 27, 2023 (A.R. pp. 445-446).

For these reasons, Petitioner believes his sixteen-year sentence under the Second Offense standing is excessive and should be reduced either to a one to five year sentence under the general conspiracy statute, or to a determinate sentence of ten (10) years.

IX. Petitioner believes he was not tried before a jury of his peers

Petitioner asserts was not tried before a jury of his peers, as the 29-member jury pool contained no minorities. Although not apparent from the record, counsel proffers that Petitioner is a minority and counsel does not recall any minorities in the 29-member jury pool.

"A critical stage in the criminal proceeding is one where the defendant's right to a fair trial will be affected." State v. Boyd, 160 W.Va. 234,246,233 S.E.2d 710, 719 (1977). Voir dire is a critical stage of a trial because it is the "primary means by which a court may enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice[.]" State v. Miller, 197 W.Va. 588,601,476 S.E.2d 535,548 (1996).

X. The court erred in denying a motion for mistrial after the jury pool was tainted by the comments of a prospective juror

"A critical stage in the criminal proceeding is one where the defendant's right to a fair trial will be affected." State v. Boyd, 160 W.Va. 234,246,233 S.E.2d 710, 719 (1977). Voir dire is a critical stage of a trial because it is the "primary means by which a court may enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice[.]" State v. Miller, 197 W.Va. 588,601,476 S.E.2d 535,548 (1996).

MS. DAUPHIN: Okay, okay. Anybody I missed? Mr. Braniff?

PROSPECTIVE JUROR BRANIFF: Yes. My son's a deputy — or nephew's a deputy in Wirt County

MS. DAUPHIN: In Wirt County? Okay. And are you close with him?

PROSPECTIVE JUROR BRANIFF: Yes.

MS. DAUPHIN: Nephew, okay. And does he talk to you about his work?

PROSPECTIVE JUROR BRANIFF: Yeah.

MS. DAUPHIN: okay. So do you ----

PROSPECTIVE JUROR BRANIFF: Somewhat.

MS. DAUPHIN: Do you consider yourself to be unable to sit fairly and impartially on a case because you have---

PROSPECTIVE JUROR BRANIFF: Absolutely.

MS. DAUPHIN: And why is that?

PROSPECTIVE JUROR BRANIFF: Because they arrest the same people over and over and over.

MS. DAUPHIN: In Wirt County?

PROSPECTIVE JUROR BRANIFF: Yeah. They just get off and they do it again.

MS. DAUPHIN: Okay. Do you feel like the same is true in Wood County?

PROSPECTIVE JUROR BRANIFF: I haven't lived in Wood County a long time, but I think it's across the board there's a problem.

MS. DAUPHIN: Okay. So, despite the fact that you think that the same people get arrested over and over and then get out and it's a problem across the board, would you be able to sit fairly and impartially today?

PROSPECTIVE JUROR BRANIFF: No.

MS. DAUPHIN: You would not?

PROSPECTIVE JUROR BRANIFF: I think the fact that we're here says it all.

MS. DAUPHIN: Okay. All Right. Thank you, Mr. Braniff. Thank you for being honest; I appreciate it.

(A.R., p. 277-279)

Counsel for Petitioner moved for a mistrial in chambers after this exchange because the entire jury pool was tainted by this exchange (A.R. pp. 281-285). The court erred when it struck Prospective Juror Braniff for cause but denied the motion for a mistrial. Clearly the pool was tainted by the comments regarding the "fact" that law enforcement continually arrests the same people repeatedly and his comment that "I think the fact that we're here says it all."

These are not the typical comments made by prospective jurors. Mr. Braniff also acted as if he had inside knowledge of law enforcement and dealing with criminals in his comments. The State made the situation worse by continuing to question the juror, even after he unequivocally stated that he could not be impartial.

XI. Codefendant was not allowed to testify that her husband may have planted drugs in the car

Codefendant Opitz was asked if she knew of anyone else that could have placed the Rick and Morty baggie in her vehicle (A.R. p. 448). When she started to explain that her ex-husband had a bad drug problem and could have placed it there, she was prevented from doing so (A.R., p. 449-451), even though she stated he had done numerous things to her (A.R. p. 448). This would have offered an important alternative, i.e. reasonable doubt, for the jury to consider. This fact became extremely important in light the testimony of Codefendant Opitz that she did not know the fentanyl was in her vehicle and offered no other explanation for the fentanyl being found there. Codefendant Opitz was able to know if her husband could have place fentanyl in her vehicle. Likewise, Petitioner did not know of the fentanyl or how it was found in the vehicle.

XII Petitioner's right to a fair trial was violated due to cumulative effect of numerous errors committed by the trial court

"Where the record of a criminal trial shows that the cumulative effect of numerous errors committed during the trial prevented the defendant from receiving a fair trial, his conviction should be set aside, even though any one of such, errors standing alone would be harmless." Syllabus Point 7, State v. Plumley, 181 W.Va. 685, 384 S.E.2d 130 (1989) (citing Syllabus Point 5 State v. Smith, 156 W.Va. 385, 193 S.E.2d 550 (1972)).

As set forth herein, the record of your petitioner's trial is filled with errors by the trial court. As a result, Petitioner was deprived of his constitutional and fundamental right to a fair trial and appeal and his conviction and sentence herein must be rendered null and void.

CONCLUSION

Petitioner respectfully requests that he be granted a judgment of acquittal because the verdict was not sufficiently supported by the evidence. In the alternative, Petitioner requests a

new trial. As an alternative to incarceration, Petitioner also requests that he be granted probation or alternative sentence.

/s/Reggie Bailey
Reggie Bailey (WV Bar #6858)

CERTIFICATE OF SERVICE

I, Reggie Bailey, the undersigned counsel herein, certify that on this 22ⁿd day of July 2024, true and accurate copies of the foregoing **PETITIONER'S BRIEF and APPENDIX** were served electronically upon:

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