IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Appeal No. 24-102

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STATE OF WEST VIRGINIA,

Respondent,

v.

JACQUAIN CRAWFORD,

Petitioner.

BRIEF OF RESPONDENT

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INTRODUCTION

Petitioner Jacquain Crawford was on parole for robbery in the State of New York and was not supposed to leave that state. Even so, he was found in Marion County, West Virginia, with his own mobile drug-distribution operation: a fanny pack containing fentanyl, cocaine, scales, drug-packaging materials, his New York parole officer's card, and—most importantly here—a gun. After hearing the evidence, the jury correctly decided that Petitioner had used or presented a firearm during the commission of a felony. Petitioner now contends that no reasonable juror could have found that he "used" the gun while committing a felony. But Petitioner routinely kept his firearm close at hand and in the same bag as drugs and other drug trafficking tools. The firearm was thus an integral part of his criminal operation, used alongside these other materials to facilitate his drug trafficking activities. Petitioner also argues that the testimony of the reviewing crime lab analyst violated the Confrontation Clause. Yet no violation occurred; the testifying analyst reviewed the data upon which the report was based, and he signed the report after agreeing with the findings and conclusions at the time the forensic tests were performed.

In short, neither of Petitioner's arguments have merit, and his convictions should be affirmed.

ASSIGNMENTS OF ERROR

Petitioner sets forth the following assignments of error:

A. "The evidence presented at trial was insufficient to sustain a conviction on several charges, not the least of which was the charge of Use or Presentation of a Firearm During the Commission of a Felony as well as both Possession with the Intent to Deliver a Controlled Substance Charges[.]

B. The Defendant's 6th Amendment Constitutional Right was violated when the Court allowed the State to call as a witness an individual who was not identified on its proposed witness list and was not the analyst who performed the analysis upon which the State relied[.]"

Pet’r’s Br. 1, 4.[1]

STATEMENT OF THE CASE

A. Trial

Petitioner’s charges here stemmed from an alleged shoplifting incident. On September 9, 2021, Petitioner and a female friend went to the Wal-Mart in White Hall. App. 48. Charles Longanetta, a Wal-Mart asset protection worker, noticed the female carrying a large empty bag and several items of merchandise moving quickly through the store. The woman then met up with Petitioner, and they started to conceal the merchandise. App. 48-49. They eventually went to check out, but not all the merchandise was scanned. App 49-51. After they passed the last point of sale, Mr. Longanetta tried to stop the couple, who then began recording him, being combative, and calling him racist. App. 51-52. Of relevance here, a Wal-Mart surveillance video introduced at trial showed Petitioner wearing a fanny pack over his shoulder throughout his time in the store. App. 52-53. Ultimately, Mr. Longanetta observed Petitioner leave the store, noted the vehicle he left in, and called law enforcement. App. 58.

Sergeant Steve Garret from the Marion County Sheriff’s Department responded to the shoplifting call and was able to stop the vehicle, a white Nissan SUV. App. 63-64. Petitioner was in the front passenger seat of the vehicle, and his female companion was the driver. App. 64. After the driver gave a false name and refused to give her birth date, Sergeant Garret smelled the odor of marijuana emanating from the car. App. 65-66.

Sergeant Charles Funk, from the Town of White Hall, also responded to the shoplifting complaint and participated in the traffic stop. App. 69. He also smelled marijuana in the vehicle when he arrived on scene. App. 70. After he smelled the odor, he searched the vehicle and found

[1] Petitioner’s brief is not paginated; thus, references to page numbers are based on a manual page count starting from the first page.

a black fanny pack under the front passenger seat. App. 71. The fanny pack contained multiple items, including marijuana, four separate baggies of what was believed to be cocaine, digital scales, a piece of paper with Petitioner's New York Parole Officer's information, multiple unused plastic baggies, and fifteen pills believed to be oxycontin that were later determined to be fentanyl. App. 72-74, 85.[2] Alongside the myriad drugs, the fanny pack also contained a loaded firearm. App. 75-76.

Petitioner's phone was retrieved from the car, and it contained several pictures that were introduced at trial. App. 78. The first photograph showed the firearm and U.S. currency in the fanny pack. App. 79. Two other photos from a different day depicted Petitioner wearing the fanny pack. App. 80. Likewise, a September 6, 2021, video from Petitioner's phone again showed him wearing the fanny pack. App. 82.

At trial, the State called Blake Kinder from the West Virginia State Police Crime Lab to testify about the drugs found. App. 123. Mr. Kinder has worked at the crime lab since 2017 and has been qualified as an expert approximately twelve times. App. 124-25. Mr. Kinder did not prepare the tests conducted on the cocaine and fentanyl; the original forensic scientist, Tiffany Neu, who performed the tests was no longer employed at the crime lab. App. 130. As a result, even though Mr. Kinder was not specifically noted on the State's witness list, Mr. Kinder was nonetheless involved in the forensic testing as a reviewer, and he signed Ms. Neu's report to reflect that direct involvement. A "reviewer" reviews the testing data and, if the reviewer reaches the same conclusions, (s)he signs the report. Here, he reached the same conclusions as Ms. Neu and approved the report. App. 131, Resp't App. 12-14.

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[2] Petitioner was on parole for robbery and was not permitted to leave the State of New York. App. 73.

Petitioner objected that Mr. Kinder was not included on the State's witness list. App. 132. The State pointed out that Mr. Kinder was a signatory to the report, which was disclosed well before trial, and even the State was not aware that Ms. Neu would be unable to attend the trial until shortly before it began. App. 133. The court denied Petitioner's motion and allowed Mr. Kinder to testify. App. 133. He then testified that the drugs sent to the crime lab tested positive as cocaine and fentanyl. App. 134. The tablets believed to be oxycodone were actually fentanyl. App. 136-137.

After the State rested, Petitioner moved for a directed verdict, arguing that the State failed to meet its burden to show that Petitioner used or presented a firearm during the commission of a felony. App.142-43. Further, he argued that there was no evidence that Petitioner and the co-defendant had a meeting of the minds, so there was no conspiracy. App. 143. Finally, he argued that no evidence showed Petitioner knew the pills were fentanyl, and he only had four small bags, indicating they were not for resale. App. 144-45. The court denied the motion, finding that plenty of circumstantial evidence supported all counts, and the questions Petitioner had raised were questions of fact for the jury. App. 148. Petitioner did not present any evidence. App. 149.

The jury found Petitioner guilty of possession with intent to deliver a controlled substance, cocaine, in count one of the indictment; guilty of the offense of possession with intent to deliver a controlled substance, fentanyl, as charged in count two of the indictment; guilty of the use or presentation of a firearm during the commission of a felony as charged in count three of the indictment; guilty of the offense of possession of a firearm by a prohibited person as charged in count four of the indictment; not guilty of count five of the indictment; and guilty of the offense of prohibited person carrying a concealed firearm as charged in count six of the indictment. App. 186.

B. Post-trial motions

In July 2023, Petitioner filed his motion for judgment of acquittal notwithstanding the verdict or, in the alternative, motion for new trial. App. 9-16. The circuit court denied Petitioner's motion, again finding that the question of whether Petitioner used or presented a firearm during the commission of a felony was a question of fact for the jury to resolve. Resp't App. 9-10. Counsel raised the issue of whether Petitioner used or presented a firearm when examining witnesses, and they argued the issue to the jury. Resp't App. 9-10. Thus, the issue was properly identified as an element of the offense charged in count three of the indictment, and the circuit court properly instructed the jury on it. Resp't App. 9.

As to Mr. Kinder's testimony, the court rejected Petitioner's argument that he was surprised and prejudiced by that testimony. Mr. Kinder was a signatory to the report, which the State had disclosed to Petitioner almost two years prior. Resp't App. 12-14. The court relied on *Bullcoming v. New Mexico,* 564 U.S. 647 (2011), and found that Mr. Kinder was Ms. Neu's supervisor and did review and initial the certification to the lab report, Resp't App. 10. Thus, Petitioner's right to be confronted with the analyst who made the certification was satisfied when Mr. Kinder testified at trial. Resp't App. 10-11. It is from that order Petitioner now appeals.

SUMMARY OF ARGUMENT

Although Petitioner's brief fails to identify the applicable standard of review, his overarching theme is a sufficiency-of-the-evidence claim. When viewed in the light most favorable to the State, the evidence was sufficient to convict Petitioner of use or presentation of a firearm during the commission a felony because the jury made a factual determination that Petitioner used the firearm while committing two felonies (namely, possession with intent to deliver twice over). Although this Court has not defined "use," the United States Supreme Court has, and it has adopted a broader definition than Petitioner's conception. And when it comes to the separate issue of the drug analysis, Mr. Kinder's testimony did not violate the Confrontation Clause because he was a reviewer and signatory to the original analyst's report. For all those reasons, the Court should affirm Petitioner's convictions.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to West Virginia Rules of Appellate Procedure 18(a)(3) and (4), oral argument is unnecessary because the facts and legal arguments are adequately presented in the briefs and the record. This case is appropriate for resolution by memorandum decision.

STANDARD OF REVIEW

This Court has held that "[t]he Court applies a de novo standard of review to the denial of a motion for judgment of acquittal based upon the sufficiency of the evidence." *State v. Juntilla*, 227 W. Va. 492, 497, 711 S.E.2d 562, 567 (2011) (citing *State v. LaRock,* 196 W. Va. 294, 304, 470 S.E.2d 613, 623 (1996)). This Court held in syllabus point 3 of *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995):

> 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.

Further, in syllabus point 1 of *Guthrie.*:

> The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry 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 proved beyond a reasonable doubt.

Id.

With respect to Petitioner's claim of violation of his rights pursuant to the Confrontation Clauses of the federal and state constitutions, "[i]t is well settled that a trial court's rulings on the admissibility of evidence, 'including those affecting constitutional rights, are reviewed under an abuse of discretion standard.'" *State v. Kennedy*, 229 W. Va. 756, 763, 735 S.E.2d 905, 912 (2012) (quoting *State v. Kaufman*, 227 W. Va. 537, 548, 711 S.E.2d 607, 618 (2011)).

With these standards in mind, Petitioner's claims will be addressed.

ARGUMENT

First, Petitioner's brief fails to meet the basic threshold for appellate review in both assignments of error. *State v. Greene*, No. 22-895, 2024 WL 3618923 (W. Va. Supreme Court, July 31, 2024) (memorandum decision), this Court again reiterated that a petitioner's failure to comply with Rule 10 of the West Virginia Rules of Appellate Procedure is a fatal deficiency. Rule 10(c)(7) requires the argument section of a Petitioner's Brief contain "an argument clearly exhibiting the points of fact and law presented . . . . The argument must contain appropriate and specific citations to the record on appeal, including citations that pinpoint when and how the issues in the assignments of error were presented to the lower tribunal." Petitioner did not do this. Petitioner's appendix is merely the trial transcript. Petitioner's brief does not contain one single citation to his appendix, nor does it contain the applicable standard of review. As a result, not only does Petitioner's brief violate Rule 10, but the lack of citations and applicable legal authority also hinders meaningful review. Consistent with this Court's typical procedure to "not address issues that have not been properly briefed[,]" *State v. White*, 228 W.Va. 530, 541 n.9, 722 S.E.2d 566, 577 n.9 (2011), this Court should not address the arguments in Petitioner's brief.

Should the Court determine that it will address the merits of the appeal, though, Respondent addresses them below. All the arguments are meritless.

I. The State presented sufficient evidence for the jury to make a factual determination that Petitioner used or presented the firearm during the commission of a felony—a finding which is consistent with the United States Supreme Court's definition of the meaning of "use."

Petitioner argues that the evidence presented was insufficient to sustain a conviction for count three of the indictment, charging Petitioner with the use or presentation of a firearm during the commission of a felony. Pet'r's Br. 2. Petitioner argues that the statute unambiguously requires "use" or "presentation" of a firearm, and that mere possession is not enough. Pet'r's Br. 2.

West Virginia Code § 61-7-15a provides:

> As a separate and distinct offense, and in addition to any and all other offenses provided for in this code, any person who, while engaged in the commission of a felony, uses or presents a firearm shall be guilty of a felony and, upon conviction, shall be imprisoned in a state correctional facility for not more than ten years.

W. Va. Code § 61-7-15a.

Regarding the use or presentation of a firearm during the commission of a felony, the court gave the un-objected-to jury instruction that:

> The offense charged in Count III of the indictment is use of a firearm in the commission of a felony. One of two verdicts may be returned by you under this count of the indictment. They are, one, not guilty, or two, guilty of use of a firearm in the commission of a felony. A person commits use of a firearm in the commission of a felony when any person engaged in the commission of a felony uses or presents a firearm during the commission of that felony.

App. 160.

Just as the circuit court determined, whether Petitioner "used" or "presented" a firearm during the commission of his crimes is a factual question for the jury. Resp't App. 9. The parties argued that issue to the jury, and the jury determined the evidence satisfied this element beyond a reasonable doubt. The State presented evidence that Petitioner was wearing the fanny pack at Wal-

Mart. App. 52-53. Police knew that Petitioner was transporting the gun in the fanny pack at Wal-Mart alongside scales, empty baggies typically used to package drugs, fentanyl, and cocaine. App. 73-76. And Petitioner didn't just wear the fanny pack at Wal-Mart, as his phone also revealed pictures from several other occasions where he was wearing the fanny pack while it contained the gun and U.S. currency inside. App. 79. Additionally, photos from a different day, with Petitioner in different clothing, depicted him again wearing the fanny pack. App. 80. And in yet another incident on September 6, 2021, Petitioner was shown on video wearing the fanny pack. App. 82. Based on the evidence presented, Petitioner routinely carried this fanny pack along with drugs and other items used to sell drugs, sometimes with the cash proceeds from selling drugs, along with the firearm at issue. After hearing this evidence, the jury concluded that Petitioner used the firearm during the commission of a felony, and that felony was possession with intent to deliver cocaine and fentanyl.

In West Virginia, neither "use" nor "presentation" has been defined by this Court in this context. Petitioner argues for a cramped understanding of the term based on a single dictionary definition, Pet'r's' Br. 3, but the U.S. Supreme Court has already rejected the notion that the term should be construed too narrowly. In particular, in *Smith v. United States*, 508 U.S. 223, 230 (1993), the Supreme Court was asked to determine the meaning of "use." The Court reasoned:

> [i]t is one thing to say that the ordinary meaning of 'uses a firearm' includes using a firearm as a weapon, since that is the intended purpose of a firearm and the example of 'use' that most immediately comes to mind. But it is quite another to conclude that, as a result, the phrase also excludes any other use. Certainly that conclusion does not follow from the phrase "uses ... a firearm" itself. As the dictionary definitions and experience make clear, one can use a firearm in a number of ways. That one example of "use" is the first to come to mind when the phrase "uses ... a firearm" is uttered does not preclude us from recognizing that there are other "uses" that qualify as well.

Id.

In *Smith,* the Supreme Court affirmed John Smith's conviction after he offered to trade an automatic weapon to an undercover officer for cocaine and was charged with numerous firearm and drug trafficking offenses. *Smith,* 508 U.S. at 225. The Court looked to *Black's Law Dictionary* for the definition of use: "[t]o make use of; to convert to one's service; to employ; to avail oneself of; to utilize; to carry out a purpose or action by means of." *Id.* at 229. Ultimately the Supreme Court concluded "that using a firearm in a guns-for-drugs trade may constitute 'us[ing] a firearm . . . .'" *Id.* at 237. In this case, to apply the United States Supreme Court's reasoning in defining the word "use" would recognize that it has a broader definition than Petitioner's single *Meriam-Webster Dictionary* definition might suggest. *Cf. Glen Falls Ins. Co. v. Smith*, 217 W. Va. 213, 223, 617 S.E.2d 760, 770 (2005) (criticizing another court for taking a term out of context and "looking to dictionary definitions" alone to define a key term).

Other courts hold much the same. The Tenth Circuit, for instance, adopted a broader definition for deciding whether a firearm has been "used" in a drug trafficking charge. It held that: "a defendant 'uses' a firearm . . . when the firearm (1) is readily accessible, (2) is an integral part of the criminal undertaking, and (3) increases the likelihood that the criminal undertaking would succeed." *United States v. Hall*, 20 F.3d 1084, 1088-89 (10th Cir. 1994). Likewise, the Eighth Circuit has said that a jury "need[s] to find only 'a sufficient nexus between the gun and the drug trafficking offense'" to find that a defendant "used" the gun during that offense. *United States v. Lara-Ruiz*, 781 F.3d 919, 924 (8th Cir. 2015). Other state courts have also construed the term broadly. *See, e.g.*, *Garrett v. State*, 998 S.W.2d 307, 311 (Tex. Ct. App. 1999) ("'[U]sed ... during the commission of a felony offense' refers certainly to the wielding of a firearm with effect, but it extends as well to any employment of a deadly weapon, even its simple possession, if such possession facilitates the associated felony."); *cf. Fowler v. State*, 375 So. 2d 879, 880 (Fla. Dist. Ct. App. 1979) (treating being armed as synonymous with "use" of a weapon).[3]

Applying the analysis from *Smith* and *Hall* to this case, and viewing the evidence in the light most favorable to the State, the evidence was more than sufficient to sustain the "use" conviction. First, the evidence presented was that the loaded firearm was often, if not always, located in the fanny pack Petitioner was wearing, where it was readily accessible. Second, the firearm was always with the drugs, money, and packaging materials, showing it was an integral part of the criminal undertaking. Finally, using a commonsense approach, it is reasonable to believe the firearm increases the likelihood that the criminal undertaking would succeed while heightening the risk that the enterprise would end in violence.

Petitioner argues that to sustain the conviction for use and presentation of a firearm, the Court would need to read "possession" into the statute. Pet'r's Br. 3. But the Court need not decide that question here because Petitioner's actions qualify as "use" beyond mere possession. The firearm was more than incidentally present; it was a centerpiece of Petitioner's drug enterprise. Viewing all the evidence in the light most favorable to the prosecution, the jury made a correct factual determination that Petitioner used a firearm during the commission of a felony, and Petitioner's conviction should be affirmed.

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[3] To be sure, the U.S. Supreme Court also held in *Bailey v. United States*, 516 U.S. 137, 150 (1995), that "merely … storing a weapon near drugs or drug proceeds" is not use under 18 U.S.C. § 924(c). But that case is factually and legally distinguishable. Factually, the evidence here supported the inference that Petitioner kept the loaded weapon with him, on his person, while engaged in drug crimes. And legally, the Supreme Court adopted a narrower understanding of Section 924(c) in part because the statute separately criminalized "carrying" a weapon, too; the Court recognized that a "broad reading of 'use' undermines virtually any function for 'carry.'" *Id.* at 146. The West Virginia statute, however, does not include any "carrying" element, so no narrowing construction is required. (Similarly, the Court thought it important that Congress had variously distinguished between "use" and "intended use" of firearms, *id.* at 146, but there's no similar indication in the West Virginia Code.)

II. Blake Kinder's testimony did not violate the Confrontation Clause because he was a signatory to the lab report and independently identified the substances seized from Petitioner.

Petitioner argues that Mr. Kinder's testimony was a violation of the Confrontation Clause. Pet'r's Br. 5-7. Petitioner's argument fails because Mr. Kinder reviewed the report, independently determined that he agreed with it, and signed it. He was therefore entitled to testify about (and be cross-examined on) his own conclusions.

Petitioner cannot identify any confrontation-related error. In pressing for one, Petitioner relies on *Bullcoming v. New Mexico*. In *Bullcoming,* the State's forensic witness, Curtis Caylor, had been recently placed on unpaid leave. This disclosure was not made until the day of trial, so defense counsel objected. The State proposed to introduce Caylor's finding as a "business record" during the testimony of Gerasimos Razatos, a forensic scientist who had neither observed nor reviewed Caylor's analysis. 564 U.S. at 647. The lower court admitted this testimony and the New Mexico Supreme Court affirmed that ruling. Ultimately, the United States Supreme Court held that "surrogate testimony of that order does not meet the constitutional requirement. The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist." *Id.* at 647.

The concurrence in *Bullcoming* pointed out the witness the State used was not a "supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue." *Bullcoming*, 564 U.S. at 672 (Sotomayor, J., concurring in part). Instead, Razatos conceded on cross-examination that he played no role in producing the report and did not observe any portion of Curtis Caylor's conduct of the testing. *Id.* at 673. The concurrence noted that "[i]t would be a different case if, for example, a supervisor who observed an analyst conducting a test testified about the results or a report about such results." *Id.* at 673; *see also, e.g.*, *Grim v. Fisher*, 816 F.3d 296, 307 (5th Cir. 2016) ("[A]t most, *Bullcoming* holds that if scientist A performed the test, the prosecution cannot prove a particular fact contained in scientist A's testimonial certification by offering the in-court testimony of scientist B, *if scientist B neither signed the certification nor performed or observed the test*." (emphasis added)).

The *Bullcoming* concurrence's "different case" is exactly what occurred here. Mr. Kinder explained that, under the peer review process at the West Virginia State Police Crime lab, all case files are administratively and technically reviewed. He was the reviewer for Ms. Neu's report at the time it was completed. He signed it as a reviewer because he agreed with her that the substances analyzed were cocaine and fentanyl. App. 131, 134-137.

Petitioner also relies on *Melendez-Diaz v. Massachusetts,* 557 U.S. 305 (2009). Melendez-Diaz was charged with distributing cocaine and with trafficking in cocaine. *Id.* at 308. At trial, the prosecution placed into evidence the bags seized and submitted three "certificates of analysis" showing the results of the forensic analysis performed on the seized substances. *Id.* The certificates reported the weight of the seized bags, that the substance was cocaine, and they were sworn to before a notary public by analysts at the State Laboratory Institute of the Massachusetts Department of Public Health, as required under Massachusetts law. *Id.* at 309. Ultimately, the Court found that "[t]he Sixth Amendment does not permit the prosecution to prove its case via *ex parte* out-of-court affidavits, and the admission of such evidence against Melendez-Diaz was error." *Id.* at 329.

Melendez-Diaz has little relevance to this case, as the State here did not try to introduce a lab report with an expert "certification" and no witness. Petitioner had a live witness with whom to engage and cross-examine. So, *Melendez-Diaz*, which focuses on "forensic documentary hearsay," *Kennedy*, 229 W. Va. at 765, 735 S.E.2d at 914, is beside the point. *See, e.g.*, *Flournoy* *v. Small*, 681 F.3d 1000, 1005 (9th Cir. 2012) (describing how *Melendez-Diaz* "held only that a lab report could not be admitted without a witness appearing to testify in person" and did not address "the degree of proximity the testifying witness must have to the scientific test").

The United States Supreme Court most recently examined how the Confrontation Clause applies to analyst reports in *Smith v. Arizona,* 144 S. Ct. 1785, 1791 (2024). There, the Court analyzed the Sixth Amendment's Confrontation Clause under *Crawford v. Washington*, 541 U.S. 36, 53-54, (2004), and specifically forensic evidence under *Melendez-Diaz*, 557 U.S. at 307, 329. In *Smith,* Officers in Yuma County, Arizona executed a search warrant on the property of Jason Smith. 144 S. Ct. 1785 at 1795. In a shed, officers found what appeared to be drugs and drug-related items. *Id.* As a result, Smith was charged with possessing dangerous drugs (methamphetamine) for sale; possessing marijuana for sale; possessing narcotic drugs (cannabis) for sale; and possessing drug paraphernalia. *Id.* Between the time of the drug testing and trial, the initial forensic lab analyst who tested the drugs, Elizabeth Rast, stopped working at the lab, so the State chose not to rely on her as a witness. *Id.* Instead, the State called Greggory Longoni, a "substitute expert." *Id.* Longoni had "no prior connection" to the *Smith* case, and "the State did not claim otherwise." *Id.* Instead, he relied on solely Ms. Rast's report and came to the same conclusions. The Supreme Court decided that the State used Longoni to relay what Rast wrote down about how she identified the seized substances, which effectively made him Rast's mouthpiece. *Id.* at 1800-01. The Court held this was a violation of the Confrontation Clause because Smith would have had a right to confront the person who did the lab work, not a surrogate merely reading from her records. *Id.* at 1801.

The facts in *Smith* may be facially similar to this case, but a key fact distinguishes this case from that one—the forensic analyst here actually reviewed and signed the report at the time it was completed and was not merely a "surrogate" forensic scientist testifying to someone else's work. Indeed, Mr. Kinder's personal and substantive involvement is the important difference between this case and *all* those decisions—*Bullcoming, Melendez-Diaz,* and *Smith* alike. The State also did not try an introduce a lab report through a surrogate witness who had no knowledge of the report like in *Bullcoming* or *Smith*. Blake Kinder was not a "surrogate" who read from the lab records; instead, he was the reviewer of Ms. Neu's work at the time she completed it, and he reviewed every step of her process. Resp't App. 12-14. Mr. Kinder testified that his job duties are to "analyze . . . evidence for the presence of controlled substances and review other scientists' work." App. 123. In this case, he reviewed Ms. Neu's work and came to the same conclusions that she did, which was that the substances sent to the lab were cocaine and fentanyl. App. 131, 134-137. So even assuming the report was testimonial, no Confrontation Clause violation occurred here.

This case is unlike *Bullcoming* where the Supreme Court noted that if Caylor had been called as a witness, he could have been questioned about whether his incompetence, evasiveness, or dishonesty accounted for his removal from work. *Bullcoming*, 564 U.S. 647. In this case, Petitioner has not shown how it hampered the presentation of his case. In fact, he has not made any argument as to how his trial would have gone differently if Ms. Neu was the witness instead of Mr. Kinder. He was able to cross examine Mr. Kinder about his conclusions, and he has not identified any different strategies he would have used had he known Mr. Kinder would be testifying about the drug results. Viewing all this in the light most favorable to the State, the evidence was also sufficient to convict Petitioner of two counts of possession with the intent to deliver, thus, his conviction should be affirmed.[4] *Accord People v. Steppe*, 152 Cal. Rptr. 3d 827,

[4] It is not clear whether Petitioner also intends to argue on appeal that Mr. Kinder's testimony should have been excluded because his late disclosure as a witness. If he does, the argument fails. "The traditional appellate standard for determining prejudice for discovery violations under Rule

835 (Cal. Ct. App. 2013) (holding that "neither *Bullcoming* nor *Melendez-Diaz* required the trial court [ ] to sustain [the] defendant's [similar] objection" where a "reviewer" testified and "no report issued forth from the lab unless it had been checked by a reviewer and its conclusions concurred in by that reviewer").

CONCLUSION

For the foregoing reasons, the Respondent respectfully asks this Court to affirm Petitioner's convictions.

Respectfully submitted,

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16 of the West Virginia Rules of Criminal Procedure involves a two-pronged analysis: (1) did the non-disclosure surprise the defendant on a material fact, and (2) did it hamper the preparation and presentation of the defendant's case." Syl. pt. 2, *State ex rel. Rusen v. Hill*, 193 W. Va. 133, 454 S.E.2d 427 (1994). Petitioner cannot meet either of these factors. Shortly before trial, the State found out that Ms. Neu was no longer employed at the Crime Lab. App. 133. The Court exercised its discretion and found that because Mr. Kinder signed the report as a reviewer, and because the report had been provided to the Petitioner approximately two years prior, that the testimony of Mr. Kinder would be permitted. App. 133. Mr. Kinder testified to the same facts that Ms. Neu would have because they always had the same conclusions. App. 131. Thus, there was no surprise to Petitioner and his trial preparation was not hampered in any way. And Petitioner never even tried to establish prejudice (either here or below), as he mistakenly believed he did not need to do so. App. 133 (Petitioner's counsel: "I don't have to prove prejudice. That's a misstatement of the facts.").

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Appeal No. 24-102

STATE OF WEST VIRGINIA,

Respondent,

v.

JACQUAIN CRAWFORD,

Petitioner.

<u>CERTIFICATE OF SERVICE</u>

I, Jennifer Polk, do hereby certify that the foregoing Brief of Respondent is being served on counsel of record by File & ServeXpress this 11th day of September, 2024.

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