IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-60043

ROBERT L. JENKINS,

Petitioner - Appellant

v.

PELICIA HALL, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS; RON KING, Superintendent, Central Mississippi Correctional Facility,

Respondents - Appellees

Appeal from the United States District Court
for the Southern District of Mississippi

ON PETITION FOR REHEARING EN BANC

(Opinion 12/13/18, 5 Cir., _____, _____ F.3d _____)

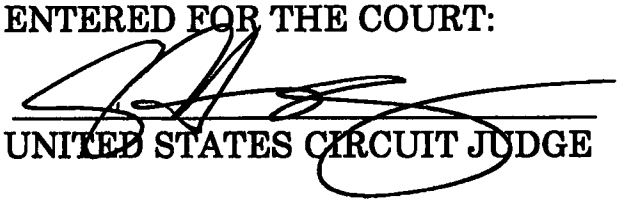
Before REAVLEY, ELROD, and HIGGINSON, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:



UNITED STATES CIRCUIT JUDGE

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*Judges GRAVES and SOUTHWICK did not participate in the consideration of the rehearing en banc.

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FILED
December 13, 2018
Lyle W. Cayce
Clerk

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Appeal from the United States District Court
for the Southern District of Mississippi

Before REAVLEY, ELROD, and HIGGINSON, Circuit Judges.

STEPHEN A. HIGGINSON, Circuit Judge:

Robert L. Jenkins appeals the district court's denial of his 28 U.S.C. § 2254 petition for writ of habeas corpus. The State of Mississippi indicted Jenkins for possessing a substance weighing more than 0.1 gram but less than 2 grams and containing a detectable amount of cocaine. The laboratory analyst who determined the weight and identity of the substance (Alison Smith) was unavailable to testify at trial, so her manager and technical reviewer (Timothy Gross) testified about the test results. Jenkins objected that he had a Sixth Amendment right to confront Smith. The trial court overruled his objection,

and Jenkins was convicted by a jury. Pursuant to Mississippi's habitual offender statute, Jenkins was sentenced to life imprisonment without the possibility of parole. After exhausting his state court remedies, Jenkins filed a § 2254 petition, which the district court denied. We affirm.

BACKGROUND[1]

I. Arrest and Evidence Seizure

On January 27, 2007, close to midnight, a state police officer named Michael Brennan observed Jenkins staggering as he walked along a roadway in Biloxi, Mississippi. Officer Brennan stopped Jenkins to check his sobriety and detected a slur in his speech, the odor of alcoholic beverages on his breath, watery and bloodshot eyes, and that his balance was unsteady. When Officer Brennan attempted to take Jenkins into custody for public intoxication, he noticed a white tissue in Jenkins's mouth. Officer Brennan ordered Jenkins to remove the tissue and Jenkins complied, placing it on the hood of the patrol car. At that point, a white, rock-like substance rolled out of the tissue. Jenkins grabbed the rock, threw it in his mouth, and swallowed it. When Officer Brennan checked Jenkins's mouth, it was no longer there. But Officer Brennan discovered two more rocks in the tissue.

Officer Brennan placed those rocks into an evidence bag. He heat-sealed the bag and wrote the date, his initials, and the case number on it. Later that night, he placed the bag into a vault that is accessible only to narcotics investigators.

II. Crime Lab Examination

Approximately three months later, the Mississippi Crime Laboratory (the "Crime Lab") examined the rocks. The Crime Lab Report (the "Report")

[1] The following narrative traces testimony offered by the State at trial because Jenkins presented no affirmative case. Except where indicated, none of these facts is disputed.

listed the specific tests performed as: "Chemical Test" and "Gas Chromatography/Mass Spectrometry." The Report concluded that the bag contained "Cocaine, Amount: 0.1 Gram." It was certified and signed by both Alison Smith as "Case Analyst" and Timothy Gross as "Technical Reviewer."

Smith is also known as a "technician." Her job is to visually examine evidence, weigh it, obtain a sample of it, and then subject that sample to chemical tests.

Gross is Smith's manager. He oversees the general operations of the Crime Lab and serves as technical and administrative reviewer on some cases. As a technical reviewer, it is Gross's job to review the data in a case file to ensure that it supports the analyst's conclusion on the report. The administrative review assesses the accuracy of basic information like dates and initials and whether proper procedures were followed. Gross was the technical and administrative reviewer in Jenkins's case. In that capacity, he did not observe or participate in Smith's testing of the substance, but he did review the data that Smith placed on her worksheet and the mass spectrometry data in the case file in order to ensure that they supported her conclusions in the Report.[2]

As mentioned above, Smith performed two tests to determine the substance's identity: a "Chemical Test" and a "Gas Chromatography/Mass Spectrometry." The chemical test was a "cobalt thiocyanate test," which involves placing a small amount of the sample in a test tube with cobalt thiocyanate solution to observe color change. The "Gas Chromatography/Mass Spectrometry" is used to separate different components in a sample.

[2] Smith's worksheet is not in the record, nor is any of the raw data that the case file contained.

After the Report was issued, a Mississippi grand jury indicted Jenkins for possession of a controlled substance and the case proceeded to trial.

III. Jury Trial

At the time of trial, Smith was unavailable due to extended medical leave. Accordingly, the State called Gross to testify about the results of the Crime Lab examination. Jenkins objected. Outside the presence of the jury, the trial court heard Gross's testimony and then ruled: "[I]n light of [the] fact that Mr. Gross participated in the analysis of the subject testing in the capacity as technical reviewer[, his testimony] does not violate the defendant's 6th Amendment right, and as such the objection is overruled and the witness will be able to testify in an expert capacity as to the results of the crime lab."

During trial, the court admitted Gross to testify as an expert in "narcotics analysis." He began his testimony by describing his duties at the Crime Lab. Then he presented chain-of-custody evidence, noting Smith's initials on the evidence bag. Next, Gross explained the examinations that were performed: the cobalt thiocyanate test and the gas chromatography/mass spectrometry. He did not explain how the weight of the substance was determined. When asked whether there was "any data generated from Ms. Smith's analysis," Gross answered, "Yes." The State then asked Gross to identify "State's Exhibit Number 5" (the Report) and Gross did so, describing it as "a report that was issued [in this case]" that "states the results of the analysis." The following exchange then occurred between the prosecutor and Gross:

> **Q.** And in this case the results of analysis are what, Mr. Gross?
> **A.** The results of the analysis were th[at] evidence submission number one contained cocaine in the amount of 0.1 gram.

Q. So the total weight is 0.1 gram; is that correct?
A. Yes.

The prosecutor concluded direct examination by asking whether, in Gross's review, there was "any indication that anything was wrong," to which Gross responded, "No."

Jenkins's cross-examination focused only on the possibility that "the amount of cocaine in th[e] substance could [have been] less than .1 gram[]," even if the weight of the entire mixture had been 0.1 gram.[3] Jenkins's trial counsel never attempted to cross-examine Gross about how the substance was weighed.

The jury found Jenkins guilty. At sentencing, the trial court adjudicated him a habitual offender pursuant to Miss. Code Ann. § 99-19-83 and sentenced him to life imprisonment without the possibility of parole. Jenkins appealed, arguing that the trial court violated the Confrontation Clause by allowing Gross to testify in place of Smith.

The Mississippi Court of Appeals affirmed, *Jenkins v. State*, 102 So. 3d 273, 276 (Miss. Ct. App. 2011), as did a divided Mississippi Supreme Court, *Jenkins v. State*, 102 So. 3d 1063, 1064 (Miss. 2012), *as modified on denial of reh'g* (Dec. 20, 2012). Having exhausted his state court remedies, Jenkins filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Southern District of Mississippi. On habeas, Jenkins urged that the Mississippi Supreme Court's decision in his case was

[3] That inquiry was misguided. The statute under which Jenkins was convicted provides: "The weight set forth refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance." Miss. Code. Ann. § 41–29–139(c). Therefore, as long as the "mixture or substance" weighed at least 0.1 gram, and cocaine was detectable therein, the weight of actual cocaine within the 0.1 gram substance is irrelevant.

contrary to, or involved an unreasonable application of, *Bullcoming v. New Mexico*, 564 U.S. 647 (2011).

While Jenkins's petition was pending in the district court, the Fifth Circuit decided *Grim v. Fisher*, 816 F.3d 296 (5th Cir. 2016). *Grim* applied *Bullcoming* to a case in which a crime laboratory supervisor, rather than an analyst, testified at trial, and held that such testimony did not violate clearly established law. *Id.* at 301, 310–11. Following supplemental briefing, the district court concluded that *Grim* barred Jenkins from habeas relief. Jenkins appealed to this court. We affirm.

STANDARD OF REVIEW

"In a habeas corpus appeal, we review the district court's findings of fact for clear error and its conclusions of law *de novo*, applying the same standards to the state court's decision as did the district court." *Lewis v. Thaler*, 701 F.3d 783, 787 (5th Cir. 2012) (quoting *Busby v. Dretke*, 359 F.3d 708, 713 (5th Cir. 2004)).

Under the Antiterrorism and Effective Death Penalty Act of 1996, "a federal court may grant a state prisoner's application for a writ of habeas corpus if the state-court adjudication pursuant to which the prisoner is held 'resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" *Howes v. Fields*, 565 U.S. 499, 505 (2012) (quoting 28 U.S.C. § 2254(d)(1)).

"[A] state court decision is contrary to . . . clearly established [federal law] if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases or if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [its] precedent." *Lockyer v.*

Andrade, 538 U.S. 63, 73 (2003) (internal quotation marks omitted). "It is an unreasonable application of Supreme Court precedent 'if the state court identifies the correct governing legal rule from [the] Court's cases but unreasonably applies it to the facts of the particular state prisoner's case.'" *Salts v. Epps*, 676 F.3d 468, 473–74 (5th Cir. 2012) (alteration in original) (quoting *Williams v. Taylor*, 529 U.S. 362, 407 (2000)).

To obtain habeas relief under § 2254, "a state prisoner must show that the state court's ruling on the claim . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *White v. Woodall*, 572 U.S. 415, 419–20 (2014) (quotation omitted). "If this standard is difficult to meet, that is because it was meant to be." *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

ANALYSIS

Jenkins argues that his case is materially indistinguishable from *Bullcoming v. New Mexico*, and that the Mississippi Supreme Court's decision rejecting Jenkins's Sixth Amendment claim is contrary to, or an unreasonable application of, that clearly established federal law. He acknowledges that *Grim v. Fisher* addressed a similar issue but argues either that his case is distinguishable from *Grim* or that *Grim* was wrongly decided.

Bullcoming involved the crime of "driving a vehicle while 'under the influence of intoxicating liquor' ("DWI")." 564 U.S. at 652 (quoting N.M. Stat. Ann. § 66–8–102 (2004)). When Bullcoming was arrested, he "refused to take a breath test, [so] the police obtained a warrant authorizing a blood alcohol analysis." *Id.* Pursuant to the warrant, his blood was drawn and the sample was sent to a crime laboratory for gas chromatography analysis. *Id.* at 652, 654. The lab produced a report stating that Bullcoming's blood alcohol

concentration ("BAC") was 0.21, which was sufficiently high to prosecute him for an aggravated DWI. *Id.* at 655.

Bullcoming's case proceeded to a jury trial. *Id.* On the first day of trial, the State announced that it would not call Curtis Caylor, the forensic analyst who had tested the blood sample, because he had been put on leave for an unexplained reason. *Id.* at 653, 655. Instead, the State would introduce the lab report through Gerasimos Razatos, a "scientist who had neither observed nor reviewed Caylor's analysis," but who "qualified as an expert witness with respect to the gas chromatograph machine" and "was available for cross-examination regarding the operation of the . . . machine, the results of [Bullcoming's] BAC test, and the [lab's] established laboratory procedures." *Id.* at 655–57. Defense counsel objected under the Confrontation Clause. *Id.* at 655–56. The trial court overruled the objection, the jury convicted Bullcoming, and the New Mexico Supreme Court affirmed. *Id.* at 656–57. Bullcoming filed a direct appeal to the United States Supreme Court, which reversed his conviction.

The scope of the *Bullcoming* holding is a question that has roiled federal courts. *See, e.g.*, *Grim*, 816 F.3d at 309 (noting "[w]idespread disagreement among courts regarding *Bullcoming*"). In the introduction to *Bullcoming*, the Court described the "question presented" as "whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification—made for the purpose of proving a particular fact—through the in-court testimony of a scientist *who did not sign* the certification or perform or observe the test reported in the certification." 564 U.S. at 652 (emphasis added). The Court answered that question in the negative and explained, "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.* As Justice Sotomayor noted in her concurrence, *Bullcoming* was "not a case in which the person testifying [was] a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue." *Id.* at 672.[4] Razatos had "no involvement whatsoever in the relevant test and report." *Id.* at 673. As described above, that is not the context here, nor was it the context in *Grim*.[5]

Grim presented a set of facts remarkably similar to the instant case. Frederick Dennell Grim was convicted in Mississippi state court of selling cocaine and sentenced as a habitual offender to life imprisonment without parole. 816 F.3d at 299. The trial judge permitted Erik Frazure, "a technical reviewer who had neither observed nor participated in the testing of the substance," to testify about the results of the controlled substance analysis. *Id.* Gary Fernandez, "the analyst who performed the testing and generated the report . . . did not testify." *Id.* Grim objected under the Confrontation Clause that Frazure's review of Fernandez's "work packet and report" supplied an insufficient basis for confrontation. *Id.* at 299-300. The trial court overruled the objection, concluding that "Frazure had enough dealings with the technical review of the cocaine to be allowed to testify." *Id.* at 299–300. Grim appealed his conviction through the state courts and eventually, on habeas, to the Fifth Circuit. Like Jenkins, he argued that the Mississippi Supreme Court's affirmance of his conviction violated *Bullcoming*. *Id.* at 302.

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[4] We do not suggest that Justice Sotomayor's concurrence constitutes clearly established law. *Carey v. Musladin*, 549 U.S. 70, 74 (2006) (reminding that the phrase "clearly established Federal law" refers to "the holdings, as opposed to the dicta, of [United States Supreme Court] decisions" (quoting *Williams v. Taylor*, 529 U.S. 362, 412 (2000))).

[5] It is incumbent on trial lawyers, alert to this issue, to clarify the level of involvement and the precise data that a testifying scientist reviews.

Our opinion in *Grim* began by interpreting the bounds of what *Bullcoming* clearly established:

> In *Bullcoming* the Court did not clearly establish the categorical rule . . . that when the prosecution introduces a forensic laboratory report containing a testimonial certification—made for the purpose of proving a particular fact—the *only* witness whose in-court testimony can satisfy the Confrontation Clause is the analyst who performed the underlying analyses contained in the report.
>
> . . .
>
> [A]t most, the holding of *Bullcoming* clearly establishes that, when one scientist or analyst performs a test reported in a forensic laboratory report containing a testimonial certification—made for the purpose of proving a particular fact—and the prosecution introduces the report and certification to prove that particular fact, the Confrontation Clause forbids the prosecution from proving that particular fact through the in-court testimony of a scientist or analyst who neither signed the certification nor performed or observed the test reported in the certification.

Id. at 307. *Grim* then applied the holding of *Bullcoming* to its own facts:

> In the present case, Frazure examined the analyst's report and all of the data, including everything the analyst did to the item of evidence; ensured that the analyst did the proper tests and that the analyst's interpretation of the test results was correct; ensured that the results coincided with the conclusion in the report; agreed with a reasonable degree of scientific certainty with the examinations and results of the report; and signed the report. Grim cannot [show that he is entitled to habeas relief] because *Bullcoming* does not address this issue, i.e., it does not address the degree of involvement that Frazure had.

Id. at 310. The court held, accordingly, that Grim had not shown a violation of clearly established law. *Id.* The same logic applies here because Gross had the same responsibilities as Frazure including, notably, enough first-hand involvement that he signed the Report.

Jenkins attempts to distinguish his case from *Grim* by urging that Gross could not have offered a genuine analytical opinion with respect to the substance's weight because "Smith's weighing of the substance did not generate any data to review." That argument asks this court to discredit Gross's testimony that, "*based on* [his] review of Ms. Smith's analysis," he concluded "that the exhibit was weighed at 0.1 gram at least." Our review is "limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). Because Smith's worksheet is not in the record, we cannot know what data Gross used to form his conclusion about the substance's weight. We note that none of the state courts to examine this case made a finding that no weight data existed for Gross to review. *See Jenkins v. State*, 102 So. 3d 1063, 1064–65 (Miss. 2012), *as modified on denial of reh'g* (Dec. 20, 2012) ("Gross reviewed all of the data submitted and the report generated by Smith to ensure that the data supported the conclusions contained in Smith's laboratory report."); *Jenkins v. State*, 102 So. 3d 273, 278 (Miss. Ct. App. 2011) (noting that Gross's conclusion was "based on his review of the data contained in the file"); Transcript of Trial at 214, Robert L. Jenkins v. State of Mississippi, 2010-KA-00203 (finding that Gross "did verify the results"). At this stage of review, without Smith's worksheet in the record, we decline to find as a fact that no raw data existed to support Gross's conclusion about the substance's weight.

Moreover, as *Grim* observed, and as still holds true, the law does not clearly establish what is required of a testifying analyst with a closer connection to substance examinations than the analyst had in *Bullcoming*. Indeed, this uncertainty has been noted by United States Supreme Court Justices on multiple occasions. *See, e.g.*, *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 335 (2009) (Kennedy, J., dissenting) ("Today's decision demonstrates that even in

the narrow category of scientific tests that identify a drug, the Court cannot define with any clarity who the analyst [that must be confronted] is."); *Williams v. Illinois*, 567 U.S. 50, 141 (2012) (Kagan, J., dissenting) ("What comes out of four Justices' desire to limit *Melendez–Diaz* and *Bullcoming* in whatever way possible, combined with one Justice's one-justice view of those holdings, is—to be frank—who knows what."); *Stuart v. Alabama*, 139 S. Ct. 36, 37 (2018) (Gorsuch, J., dissenting from the denial of certiorari) ("Respectfully, I believe we owe lower courts struggling to abide our holdings more clarity than we have afforded them in this area.").

Therefore, we cannot say that the Mississippi Supreme Court's decision was contrary to or an unreasonable application of clearly established law. The district court's judgment is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

ROBERT L. JENKINS # 38083 **PETITIONER**

v. **Civil No. 1:15cv28-HSO-RHW**

RON KING and MARSHALL L. FISHER **RESPONDENTS**

MEMORANDUM OPINION AND ORDER ADOPTING THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATIONS [24] AND DENYING AMENDED PETITION FOR WRIT OF HABEAS CORPUS [5]

BEFORE THE COURT is the Report and Recommendations [24] of United States Magistrate Judge Robert H. Walker, recommending that the Court deny Petitioner Robert Jenkins' ("Petitioner") Amended Petition [5] for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254. The Report and Recommendations [24] was entered on November 4, 2015. Petitioner filed Objections [25] to the Report and Recommendations, Respondents filed an Opposition to [26] Petitioner's Objections, and Petitioner filed a Reply [27]. The parties also submitted supplemental briefing on November 30, 2016. *See* Resp't Suppl. Br. [31]; Pet'r Suppl. Br. [32].

Having considered the Report and Recommendations [24] and conducted a de novo review of the portions to which Petitioner objects, the Court finds that Petitioner's Objections [25] should be overruled. The Report and Recommendations [24] will be adopted as the finding of the Court in light of the resolution of the appeal of the judgment of the district court in *Grim v. Epps*, No. 3:14–CV–00134–DMB–DAS, 2015 WL 5883163 (N.D. Miss. Oct. 8, 2015). On March 8, 2016, the

United States Court of Appeals for the Fifth Circuit reversed the district court's judgment granting habeas relief, and the Supreme Court of the United States denied the petition for a writ of certiorari on October 3, 2016. *Grim v. Fisher*, 816 F.3d 296 (5th Cir. 2016), *cert denied*, No. 16-5253, 2016 WL 4083026 (U.S. Oct. 3, 2016). In light of the Fifth Circuit decision in *Grim v. Fisher*, Petitioner's request for habeas relief pursuant to 28 U.S.C. § 2254 will be denied and the Amended Petition [5] will be dismissed with prejudice.

I. BACKGROUND

Following a jury trial in the Circuit Court of Harrison County, Mississippi, Petitioner Robert Jenkins was found guilty of possession of cocaine in an amount of more than 0.1 gram but less than 2 grams, in violation of Miss. Code Ann. § 41-29-139. *Jenkins v. State*, 102 So. 3d 1063, 1064 (Miss. 2012). Petitioner was classified as a habitual offender and sentenced to life imprisonment. *Id.* at 1065.

At Petitioner's trial, the State introduced a forensic laboratory report confirming that the substance Petitioner possessed was cocaine and that it weighed 0.1 gram—the minimum weight in the statutory range for the charged offense. Obj. [25] at 1. The technician from the Mississippi Crime Laboratory who tested and weighed the substance, Alison Smith ("Smith"), was unavailable to testify at trial because she was on extended medical leave. *Id.*; R. & R. [24] at 3. Instead, the lab report was introduced through the testimony of a supervisor, Timothy Gross ("Gross"), who oversaw the overall operation of the lab and had signed the report as a technical and administrative reviewer. R. & R. [24] at 3.

Gross reviewed the data from the cobalt thiocyanate test and the gas chromatography mass spectroscopy test performed by Smith, and he reached an independent conclusion from his analysis of the examination data that the substance tested was cocaine. *Id.* Gross also testified that the report indicated that the substance weighed at least 0.1 gram, but Gross did not personally weigh the sample. Pet'r Suppl. Br. [32] at 8. The policy of the lab was not to report any weight less than one tenth of a gram, but to round it to the lowest tenth of a gram in the report. *Id.* A sample reported to weigh 0.1 gram could thus weigh anywhere between 0.10 and 0.19 grams. *Id.* The weight of the substance was an issue of significance at trial; at the close of the State's evidence, Petitioner's counsel moved for a directed verdict on grounds that the State had not specifically proven that the weight of the substance was 0.1 grams. R. [16-4] at 79–80. This motion was overruled, and the jury found Petitioner guilty.

After exhausting his remedies in state court, Petitioner filed a Petition [1] for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 in this Court on December 16, 2014, as well as an Amended Petition [5] on January 20, 2015. Petitioner claims that his Sixth Amendment right to confront the witnesses against him was violated when the trial court permitted the supervisor, Gross, to present testimonial evidence in place of the analyst, Smith, who actually performed the tests and weighed the sample. Pet. [1] at 5–6; Am. Pet. [5] at 6. Specifically, Petitioner argues that the Supreme Court of Mississippi's decision that his Sixth Amendment right was not violated was an unreasonable application of clearly established

federal law as determined by the Supreme Court in *Bullcoming v. New Mexico*, 564 U.S. 647, 652 (2011) (holding that "[t]he 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"). Mem. Supp. Pet. [2] at 1–2.

Respondents filed an Answer [15] to the Amended Petition [5] on April 1, 2015. Petitioner filed a Rebuttal [17] on April 10, 2015. Respondents then filed an additional Response in Opposition to Petitioner's Rebuttal [18] and Petitioner filed a Reply to the Response [20]. Petitioner also filed a Supplemental Reply to Respondents' Answer [22] on October 9, 2015, to notify the Court of new persuasive authority from the United States District Court for the Northern District of Mississippi, *Grim v. Epps*, in which the district court granted habeas relief under circumstances similar to the present case. No. 3:14–CV–00134–DMB–DAS, 2015 WL 5883163 (N.D. Miss. Oct. 8, 2015). On October 22, 2015, Respondents filed a Response to Petitioner's Supplemental Briefing [23], arguing that the Court should await a decision in the *Grim* case, which had been appealed to the Fifth Circuit. Suppl. Resp. [23] at 3.

On November 4, 2015, the Magistrate Judge entered a Report and Recommendations [24], recommending that the Court deny habeas relief.[1]

[1] The Report and Recommendations [24] also included a recommendation that the Court deny Petitioner's Motion [19] to Strike Respondents' Response in Opposition to Petitioner's Rebuttal [18]. Petitioner did not object to this recommendation, and the Court previously

Petitioner filed Objections [25] to the Report and Recommendations [24] as to the Magistrate's recommendation that habeas relief be denied. Respondents filed a Response [26] in Opposition to Petitioner's Objections [25]. Petitioner filed a Reply [27] on November 30, 2015.

In an Order [28] dated January 7, 2016, the Court stayed this matter pending the ultimate resolution of the appeal of the judgment of the district court in *Grim v. Epps*, No. 3:14–CV–00134–DMB–DAS, 2015 WL 5883163 (N.D. Miss. Oct. 8, 2015). On March 8, 2016, the Fifth Circuit issued an opinion reversing the district court's judgment granting habeas relief, and the Supreme Court denied Petitioner's petition for a writ of certiorari on October 3, 2016. *Grim v. Fisher*, 816 F.3d 296 (5th Cir. 2016), *cert denied*, No. 16-5253, 2016 WL 4083026 (U.S. Oct. 3, 2016). On November 16, 2016, this Court lifted the stay of this case and indicated that it would accept supplemental briefing from the parties in light of the outcome of the appeal in *Grim*. Order [30]. Supplemental briefing was submitted by Petitioner and Respondents on November 30, 2016. Resp't Suppl. Br. [31]; Pet'r Suppl. Br. [32].

II. DISCUSSION

A. Legal Standard

Pursuant to 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure 72(b)(3), the district judge must "determine de novo any part of the magistrate judge's disposition that has been properly objected to." FED. R. CIV. P. 72(b)(3). However, the district court need not "reiterate the findings and conclusions of the

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adopted the Report and Recommendations [24] in part and denied Petitioner's Motion [19] to Strike Respondents' Response in Opposition [18] in an Order [28] dated January 7, 2016.

magistrate judge." *Koetting v. Thompson*, 995 F.2d 37, 40 (5th Cir. 1993). Nor must it consider "[f]rivolous, conclusive or general objections." *Battle v. U.S. Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987). When there has been no objection to a magistrate judge's ruling, a clearly erroneous, abuse of discretion, and contrary to law standard is appropriate. *United States v. Wilson*, 864 F.2d 1219, 1221 (5th Cir. 1989). After conducting the required review, the district judge "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge [and] may also receive further evidence or recommit the matter to the magistrate judge with instructions." 28 U.S.C. § 636(b)(1) (2012).

In so reviewing Petitioner's Objections [25], the Court is mindful that Congress, through the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2241, *et seq.*, has restricted federal court review of habeas petitions filed on behalf of persons in state custody. *Burt v. Titlow*, 134 S. Ct. 10, 16 (2013) ("AEDPA erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court."). 28 U.S.C. § 2254(d) provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> (1) resulted in a decision that was *contrary to, or involved an unreasonable application of, clearly established Federal law*, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d) (2012) (emphasis added).

"A decision is contrary to clearly established federal law under § 2254(d)(1) if the state court (1) arrives at a conclusion opposite to that reached by the Supreme Court on a question of law; or (2) confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and reaches an opposite result." *Simmons v. Epps*, 654 F.3d 526, 534 (5th Cir. 2011) (quotations omitted). A decision involves "an unreasonable application of clearly established federal law" under § 2254(d)(1) "if the state court (1) identifies the correct governing legal rule from the Supreme Court's cases but unreasonably applies it to the facts; or (2) either unreasonably extends a legal principle from Supreme Court precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Id.* (quotations omitted). A state court's application of law to facts is unreasonable only if it is "objectively unreasonable," not merely "incorrect or erroneous." *Id.* The state court's factual determinations are presumed correct pursuant to § 2254(e)(1) and may only be rebutted by clear and convincing evidence. *Id.*

"Section 2254(d) sets forth a 'highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt.'" *Miller v. Thaler*, 714 F.3d 897, 901 (5th Cir. 2013) (quoting *Cullen v. Pinholster*, 563 U.S. 170, 171 (2011)). "As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was

an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

B. Recommendation to Deny Habeas Relief

The Supreme Court of Mississippi evaluated the merits of Petitioner's Sixth Amendment claim and concluded that his Confrontation Clause right was not violated. *Jenkins v. State*, 102 So. 3d 1063 (Miss. 2012). Petitioner argues that habeas relief is warranted on the grounds that the Supreme Court of Mississippi's decision rejecting his Sixth Amendment claim and affirming Petitioner's conviction was contrary to, and an unreasonable application of, clearly established precedent in *Bullcoming v. New Mexico*, 564 U.S. 647 (2011). Am. Pet. [5] at 6.

In *Bullcoming*, the prosecution introduced a forensic laboratory report certifying the results of a blood-alcohol concentration analysis during Bullcoming's trial on charges of driving while intoxicated. *Bullcoming*, 564 U.S. at 651. The analyst who personally performed the analysis and signed the certification did not testify at trial. *Id.* Instead, a different laboratory analyst who "was familiar with the laboratory's testing procedures, but had neither participated in nor observed the test on Bullcoming's blood sample" testified about the report. *Id.*

The New Mexico Supreme Court held that the testimony of the surrogate analyst satisfied the Confrontation Clause. *Id.* The Supreme Court disagreed:

> The question presented is whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification—made for the purpose of proving a particular fact—through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification.

> We hold 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 652. Petitioner argues that, under *Bullcoming*, his Sixth Amendment right was violated when the trial court permitted the laboratory report to be introduced and allowed Gross to testify as to the nature and weight of the controlled substance because Petitioner did not have the opportunity to cross-examine Smith, the analyst who actually performed the tests and prepared the report. Am. Pet. [5] at 6.

In the Report and Recommendations [24], the Magistrate Judge concluded that the state court decision was not contrary to and did not involve an unreasonable application of clearly established federal law as stated in *Bullcoming*. R. & R. [24] at 8. The Magistrate Judge found that this case was factually materially distinguishable from *Bullcoming* because the witness in Petitioner's trial, Gross, signed the lab report himself and testified as to his independent conclusions based on his own extensive experience as a drug analyst. *Id.* at 7. Gross was the manager of the regional crime laboratory responsible for overseeing its operations and was the administrative and technical reviewer of cases within his expertise. *Id.* at 3.

While Gross did not personally observe the testing, he was Smith's supervisor and had reviewed Petitioner's entire case file. *Id.* at 3. Gross "performed procedural checks by reviewing all of the data submitted to ensure that the data supported the conclusions contained in the report" and "had 'intimate knowledge' of

the underlying analysis and the report prepared by the primary analyst." *Id.* at 7-8 (quoting *Jenkins v. State*, 102 So. 3d 1069 (Miss. 2012)). In contrast, the witness who testified at trial in *Bullcoming* had not performed, observed, or reviewed the testing, did not sign the certification, and did not testify regarding his independent opinion concerning the lab results. *Id.* at 7; *Bullcoming,* 564 U.S. at 655; 662.

The Magistrate Judge cited as persuasive authority Justice Sotomayor's concurring opinion in *Bullcoming* that emphasized "the limited reach of the Court's opinion" because *Bullcoming* was "not a case in which the person testifying is a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue." R. & R. [24] at 7 (quoting *Bullcoming*, 564 U.S. at 672 (Sotomayor, J., concurring in part)). Finding that the holding of *Bullcoming* did not necessarily extend to cases where the testifying witness was a supervisor or reviewer with a personal connection to the testing, the Magistrate Judge concluded that *Bullcoming* did not "clearly establish" the principle that testimony from anyone other than the individual who actually performed the testing on a substance would be a violation of the Confrontation Clause. *Id.* at 7-8 (citing *United States v. Johnson*, 558 F. App'x 450, 453 (5th Cir. 2014) (recognizing that the law is unclear whether the testimony of a lab analyst's supervisor would constitute a violation under *Bullcoming*)). Accordingly, the Magistrate Judge recommended that the request for habeas relief be denied. *Id.* at 8.

C. Petitioner's Objections [25]

Petitioner objects to the Report and Recommendations [24] on three grounds: (1) the state court decision was contrary to clearly established federal law because it confronted facts that were materially indistinguishable from *Bullcoming* but reached an opposite result; (2) the state court unreasonably applied the clearly established federal law of *Bullcoming* to Petitioner's case; and (3) the Magistrate Judge erred in concluding that there is uncertainty whether the *Bullcoming* holding created clearly established federal law that applied to the facts of Petitioner's case. *See* Obj. [25].

First, Petitioner contends that the Supreme Court of Mississippi's decision was contrary to clearly established federal law under § 2254(d)(1) because the Court confronted facts that were materially indistinguishable from relevant Supreme Court precedent in *Bullcoming* but reached the opposite conclusion. *Id.* at 4. Petitioner argues that this case is not materially distinguishable from *Bullcoming* because, in both cases, the prosecution introduced laboratory reports containing testimonial statements of one analyst through the in-court testimony of a second scientist who had neither performed nor observed the testing. *Id.* at 9. Petitioner claims that *Bullcoming* thus clearly established that he had a right to confront the analyst who actually performed the testing when her out-of-court testimonial report was introduced as evidence at trial. *Id.*

Petitioner also argues that the Magistrate Judge erroneously concluded that Gross testified as to his independent conclusions regarding both the nature and the

weight of the substance based on his own experience as a drug analyst. *Id.* at 14. Petitioner argues that even if Gross' testimony concerning his own independent opinion of the data with regards to the nature of the substance did not violate the Confrontation Clause, there is nevertheless "no basis for concluding that Gross is a constitutionally adequate surrogate witness regarding Smith's out-of-court testimonial declaration that the substance weighed 0.1 gram." *Id.* at 10.

Petitioner contends that Gross did not weigh the substance, did not observe the weighing, and could not possibly have conducted any technical review of raw data upon which to base an independent opinion as to the weight of the sample apart from relying solely on the conclusion in Smith's report. *Id* at 10-11. Petitioner points out that the Supreme Court of Mississippi did not find that Gross had formed an independent opinion as to the weight of the substance, but found only that "[b]ased on the data reviewed, Gross reached his own conclusion that the substance tested was cocaine." *Id* at 14-15 (quoting *Jenkins*, 102 So. 3d at 1069).

Petitioner further objects that the Supreme Court of Mississippi unreasonably applied *Bullcoming* to the facts of Petitioner's case when it concluded that his Confrontation Clause right had not been violated, in light of the alleged lack of material distinctions between the two cases. *Id.* at 16. Finally, Petitioner objects to the Magistrate Judge's position that the breadth of the holding of *Bullcoming* is unclear. *Id.* at 16. The Magistrate Judge was "unpersuaded that *Bullcoming* has 'clearly established' that testimony from anyone other than the analyst who performed the testing on a controlled substance would violate the right

of confrontation." R. & R. [24] at 8. Petitioner avers that *Bullcoming* clearly established that defendants have a Sixth Amendment right "to be confronted with the analyst who made the certification, unless the analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist." Obj. [25] at 16 (quoting *Bullcoming*, 564 U.S. at 652).

In light of the Fifth Circuit resolution of *Grim v. Fisher*, 816 F.3d 296 (5th Cir. 2016), *cert denied*, No. 16-5253, 2016 WL 4083026 (U.S. Oct. 3, 2016), this Court concludes that Petitioner's Objections [25] should be overruled.

D. *Grim v. Fisher*

Grim was convicted of selling cocaine, and his conviction and sentence were affirmed on appeal. *See Grim v. State*, 102 So. 3d 1123 (Miss. Ct. App. 2010). During his trial, the prosecution offered a Mississippi Crime Laboratory analysis of a substance reported as cocaine, introduced through the testimony of a technical reviewer who had signed the report instead of the analyst who personally performed the test. *Grim v. State*, 102 So. 3d 1073, 1077 (Miss. 2012). The witness who actually testified at trial had neither performed nor observed the analysis, but had reviewed the report to ensure that the analyst had followed the proper procedure to obtain the result. *Id.* Following the *Bullcoming* decision, the Supreme Court of Mississippi granted a writ of certiorari "to examine whether the trial court erred by allowing a laboratory supervisor, who neither observed nor participated in the testing of the substance, to testify in place of the analyst who had performed the testing." *Id.* at 1075.

In a decision that mirrors the reasoning in *Jenkins v. State*,[2] the Supreme Court of Mississippi concluded in *Grim* that it was permissible to introduce the laboratory report without violating the Confrontation Clause, even though Grim did not have an opportunity to cross-examine the analyst who actually tested the substance, because the reviewer who testified was sufficiently involved in the preparation of the report. *Id.* at 1081. The Supreme Court of Mississippi held that

> a supervisor, reviewer, or other analyst involved may testify in place of the primary analyst where that person was 'actively involved in the production of the report and had intimate knowledge of analyses even though [he or] she did not perform the tests first hand.' *McGowen* [*v. State*, 859 So.2d 320, 340 (Miss. 2003)]. [The technical reviewer] met this standard, and the trial court did not abuse its discretion by allowing him to testify. Grim had the opportunity to confront and cross-examine [the technical reviewer] at trial, which satisfied his Sixth Amendment right to confront the witness against him.

Id. Finding no violation of the Confrontation Clause, the judgments of the Court of Appeals and the Circuit Court were affirmed. *Id.*

The United States District Court for the Northern District of Mississippi granted Grim habeas relief, finding that the Supreme Court of Mississippi's decision was contrary to clearly established federal law because *Bullcoming* had clearly established a criminal defendant's "right to confront the analyst who performed the underlying analyses." *Grim v. Epps*, No. 3:14–CV–00134–DMB–DAS, 2015 WL 5883163, at *1 (N.D. Miss. Oct. 8, 2015). Acknowledging that the technical reviewer in *Grim* had more significant personal involvement in the testing

[2] *Jenkins v. State* was decided on October 4, 2012, and *Grim v. State* was decided on October 18, 2012.

than did the witness in *Bullcoming*, the district court nevertheless found that *Grim* fell within "*Bullcoming's* doctrinal reach." *Id.* at *11. The district court concluded that Grim's right to confrontation was violated when the testifying reviewer "had absolutely no firsthand knowledge regarding what [the testing analyst] knew or observed during the course of his examination of the evidence." *Id.* at *12.

On appeal, the Fifth Circuit reversed the district court, holding that the law was not clearly established as to whether the Confrontation Clause was violated by the introduction of the laboratory analysis through the in-court testimony of the technical reviewer who had neither performed nor observed the analysis. *Grim v. Fisher*, 816 F.3d 296 (5th Cir. 2016), *cert denied*, No. 16-5253, 2016 WL 4083026 (U.S. Oct. 3, 2016). The Fifth Circuit's analysis in reaching this conclusion is relevant to Petitioner's Objections in this case:

> [A]t most, the holding of *Bullcoming* clearly establishes that, when one scientist or analyst performs a test reported in a forensic laboratory report containing a testimonial certification—made for the purpose of proving a particular fact—and the prosecution introduces the report and certification to prove that particular fact, the Confrontation Clause forbids the prosecution from proving that particular fact through the in-court testimony of a scientist or analyst **who neither signed the certification** nor performed or observed the test reported in the certification. *Bullcoming* does not clearly establish what degree of involvement with the forensic testing, beyond what was present in *Bullcoming*, is required of a testifying witness. In other words, at 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. But *Bullcoming* does not hold that scientist B cannot testify even if he has a sufficient degree of involvement with the forensic testing.

Id. at 307 (emphasis added).

The Fifth Circuit distinguished the degree of the witness's involvement in the forensic analysis in *Grim* from *Bullcoming*, in which the testifying witness played no role at all in performing the analysis, did not review or observe the testing, and did not sign the analysis certification. *Id.* at 307-08. The testifying technical reviewer in *Grim* had instead

> examined the analyst's report and all of the data, including everything the analyst did to the item of evidence; ensured that the analyst did the proper tests and that the analyst's interpretation of the test results was correct; ensured that the results coincided with the conclusion in the report; agreed with a reasonable degree of scientific certainty with the examinations and results of the report; and signed the report.

Id. at 310. The court concluded that *Bullcoming* did not clearly establish that the Confrontation Clause is violated when a testimonial laboratory report is introduced through the in-court testimony of a technical reviewer who both "signed the report and was more involved in the testing and report preparation than was the witness in *Bullcoming*." *Id.*

While recognizing that Justice Sotomayor's concurring opinion in *Bullcoming* is not clearly established federal law, the Fifth Circuit found that her opinion "provides support for [the] conclusion that *Bullcoming* does not clearly establish what degree of involvement with the forensic testing, beyond what was present in *Bullcoming*, is required of a testifying witness." *Id.* at 308 n.6; *see Bullcoming*, 564 U.S. at 671 (Sotomayor, J., concurring in part) ("We need not address what degree of involvement is sufficient because here [the testifying witness] had no involvement whatsoever in the relevant test and report."). The court noted that "[w]idespread

disagreement among courts regarding *Bullcoming* further supports the conclusion that the Supreme Court has not clearly established what degree of involvement with the forensic testing is required of an in-court witness." *Grim*, 816 F.3d at 309. Because the law regarding the scope of *Bullcoming* was not clearly established, the Fifth Circuit concluded that the decision of the Supreme Court of Mississippi was neither contrary to nor an unreasonable application of clearly established federal law, and therefore Grim was not entitled to habeas relief. *Id.* at 310.

The only significant factual difference between *Grim* and the instant case is that the weight of the substance was not at issue in the prosecution of Grim, whereas in Petitioner's case, the testimonial laboratory report concerned not only the nature of the substance but also its weight. Am. Pet. [5] at 6. The testifying witnesses in both cases were supervisors who performed procedural checks, conducted technical reviews, and had the same level of involvement in the analyses and preparation of the reports. *Compare Jenkins*, 102 So. 3d at 1069, *with Grim*, 816 F.3d at 310. Because Gross was "a technical reviewer who signed the report and was more involved in the testing and report preparation than was the witness in *Bullcoming*," the Court concludes that the Fifth Circuit's analysis in *Grim* applies to both the testimony concerning the nature of the controlled substance as well as the testimony concerning its weight, and that the facts of the case are much closer to *Grim* than to those in *Bullcoming*. *Grim*, 816 F.3d at 310.

III. CONCLUSION

After conducting a de novo review of the record in light of Petitioner's Objections [25] and Supplemental Brief [32], the Court is of the opinion that the facts of *Grim v. Fisher* are sufficiently similar to the instant case such that Petitioner is not entitled to habeas relief in light of the Fifth Circuit's resolution of that appeal. 816 F.3d 296 (5th Cir. 2016); *see also Williams v. Vannoy*, No. 14-31067, 2016 WL 5376202, at *1 (5th Cir. Sept. 26, 2016) (finding that the Confrontation Clause was not violated when "the supervisor of the DNA laboratory testified as an expert who had a personal connection to the scientific testing and actively reviewed the results of the forensic analyst's testing and signed off on the report").

The Court agrees with the Magistrate Judge that the facts of *Bullcoming* are materially distinguishable from the instant case, in which the testifying supervisor Gross reviewed the testing analyst's work, signed the laboratory report himself, and formed independent conclusions based on his own knowledge of the laboratory's procedures and his extensive experience as a drug analyst. *See* R. & R. [24] at 7. Because the law is not clearly established as to whether the degree of involvement between the testifying witness in this case, Gross, and the forensic analysis introduced at Petitioner's trial violates the Confrontation Clause, the Court finds that the decision of the Supreme Court of Mississippi was not contrary to clearly established federal law, nor was its application of the law objectively unreasonable.

Petitioner's Objections [25] will be overruled and the Court will adopt the Magistrate Judge's recommendation that habeas relief be denied.

IT IS, THEREFORE, ORDERED AND ADJUDGED that, Petitioner's Objections [25] to the Report and Recommendations [24] of Magistrate Judge Robert H. Walker are **OVERRULED**, and the Report and Recommendations [24] is **ADOPTED** as the finding of the Court, along with the additional findings made herein.

IT IS, FURTHER, ORDERED AND ADJUDGED that, Petitioner Robert Jenkins' Amended Petition for Writ of Habeas Corpus [5] filed pursuant to 28 U.S.C. § 2254 is **DENIED**, and this case will be dismissed with prejudice. A separate judgment will be entered in accordance with this Order as required by Federal Rule of Civil Procedure 58.

SO ORDERED AND ADJUDGED, this the 3rd day of January, 2017.

s/ Halil Suleyman Ozerden
HALIL SULEYMAN OZERDEN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

ROBERT L. JENKINS # 38083 **PETITIONER**

V. **CIVIL ACTION NO. 1:15cv28-HSO-RHW**

RON KING and MARSHALL L. FISHER **RESPONDENTS**

REPORT AND RECOMMENDATIONS

Before the Court are [1] the December 16, 2014 Petition for Writ of Habeas Corpus filed by counsel on behalf of Robert L. Jenkins pursuant to 28 U.S.C. § 2254, and [15] Respondents' April 1, 2015 response to the petition. Having considered the pleadings, exhibits, records on file, briefs and arguments of the parties, and the relevant legal authority, the undersigned United States Magistrate Judge is of the opinion that Petitioner's request for federal habeas relief should be denied and the petition, dismissed.

Preliminary Matters

Plaintiff has moved to strike [18] Respondents response in opposition to his traverse on grounds that the Rules Governing Section 2254 Cases contains no provision for such a pleading. Alternatively, Plaintiff asks the Court to consider his reply to [18]. Striking pleadings is a drastic remedy to be used only when the purposes of justice so require. Because the undersigned perceives no prejudice from the response to the traverse, and has considered [20] Plaintiff's reply in determining this matter, the undersigned will recommend that the motion to strike be denied.

Facts and Procedural History

Robert L. Jenkins is presently confined at Central Mississippi Correctional Facility (CMCF) in Pearl, Mississippi where Ron King is superintendent. Marshall L. Fisher is the Commissioner of the Mississippi Department of Corrections (MDOC). Jenkins is in custody of

the MDOC serving a life sentence as a habitual offender for conviction of possession of more than 0.1 gram but less than 2.0 grams of cocaine. Jenkins was indicted for the offense on January 7, 2008 by an indictment which charged him as a habitual offender under Miss. Code Ann. § 99-19-81. [16-1, pp. 16-17] The indictment was subsequently amended to charge Jenkins as a habitual offender under § 99-19-83.[1] [16-2, pp. 66-67] A Harrison County Circuit Court jury found Jenkins guilty on September 16, 2009, based upon the testimony of four witnesses as summarized below, and physical exhibits received into evidence.

At approximately 11:38 p.m. on January 27, 2007, Biloxi Police Patrol Officer Michael Brennan saw Jenkins with three Hispanic males at Esters Boulevard and Nixon Street near Bush Park in Biloxi. When the four saw Brennan's police car they separated, the Hispanic males going into the park and Jenkins staggering along Esters Boulevard. Brennan stopped Jenkins for a sobriety check, while fellow Officer Palmer checked out the Hispanic males walking through the park. Brennan found Jenkins had slurred speech, smelled of alcohol, his eyes were watery and bloodshot and his balance, unsteady. As Brennan attempted to take Jenkins into custody for public intoxication, he saw a white tissue in Jenkins' mouth, and ordered him to remove it and place it on the hood of the patrol car. When Jenkins did so, a white rock-like substance rolled out of the tissue. Jenkins grabbed the substance, threw it in his mouth and swallowed it. Brennan seized two more of the "crack rocks"[2] from inside the tissue on the hood of the car, and completed his arrest of Jenkins. Officer Palmer, having concluded his contact with the Hispanic males, had come to assist Brennan, and the two officers were speaking about whether Jenkins was perhaps selling the substance, when Jenkins interjected, "How do you know I was selling to

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[1]Under § 99-19-81, the sentence to be imposed is the maximum term provided by statute for the crime committed, without parole; under § 99-19-83, the sentence to be imposed is life imprisonment without parole.

[2]In motion hearings in the case, Brennan testified he field tested the substance which was positive for cocaine. [16-3, p. 59]

them, maybe I bought from them, maybe they selling." [16-4, p. 27-38] Jenkins was transported to Biloxi Police Department, and Narcotics Investigator Lance Chisum was notified of the arrest.

When Chisum arrived to interrogate Jenkins, he advised Jenkins of his Miranda rights, and Jenkins signed the rights form at 1:33 a.m., January 29, 2007. Jenkins told Chisum about the "dope," stating some of the cocaine he got was good and some bad, and that he bought what he had on him from a Hispanic male.[3] [16-4, p. 38-50] Investigator Michael Mason took the drugs confiscated from Jenkins to the Mississippi Crime Laboratory for analysis. [16-4, p. 51-55]

Crime Lab analyst Alison Smith tested the substances, performing a cobalt thiocyanate test and a gas chromatography mass spectroscopy. These tests produced data from which Smith concluded the substance contained cocaine. Smith was unavailable to testify at trial, as she was on extended medical leave from the Crime Lab having been diagnosed with stage-4 cancer, so the State called Smith's supervisor Timothy Gross as a witness. Gross, a 28 year employee of the Mississippi Crime Lab, is Associate Director of the Mississippi Crime Lab and manager of the Gulf Coast Regional Lab. He oversees the overall operation of the Gulf Coast Lab and technically and administratively reviews cases, particularly drug cases. Gross testified he has analyzed drugs approximately 100,000 times. In accordance with the standard operating procedure of the Mississippi Crime Lab, Gross technically reviews cases within his area of expertise, and has testified as an expert about 250 times. Gross reviewed the entire case file including the data from the tests performed, and concluded on his own that the substances tested contained cocaine. Gross testified the weight of the exhibit was at least 0.1 gram. [16-4, pp. 67-79] Both Smith and Gross signed the Crime Lab report. Jenkins called no witnesses and did not testify. After the jury found him guilty, the trial court found Jenkins was a habitual offender

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[3]The jury heard Jenkins' entire statement which was introduced into evidence at trial.

under § 99-19-83, and sentenced him to serve life imprisonment without parole.

On appeal, Jenkins asserted his constitutional right to confront the witnesses against him was violated by the trial court's allowing Gross to testify in place of Smith who performed the substance testing. The Mississippi Court of Appeals rejected the argument and affirmed Jenkins conviction and sentence on September 13, 2011. *Jenkins v. State*, 102 So.3d 273 (Miss. App. 2011), *rehearing denied*, January 17, 2012. The appellate court expressly distinguished the facts of Jenkins' case from both *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), and *Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011), and held Jenkins had waived his Confrontation Clause issue by failing to move in limine to prevent Gross's testifying, or to make contemporaneous objections to the testimony; the appellate court further held that even if the matter had been preserved for appellate review, the trial court committed no abuse of discretion in allowing Gross to testify, since Gross testified to his own independent, expert opinion. *Jenkins*, 102 So.3d at 282-84.

Jenkins petitioned the Mississippi Supreme Court for *certiorari* on the same grounds, violation of his right of confrontation. The Mississippi Supreme Court granted *certiorari* "to examine whether the trial court erred by allowing a laboratory supervisor to testify regarding the results of substance testing, where the supervisor reviewed and verified the results, but another analyst actually performed the tests." *Jenkins v. State*, 102 So.3d 1063, 1064 (Miss. 2012), *as modified on denial of rehearing* December 20, 2012. After noting that issues regarding admission or exclusion of evidence are reviewed for abuse of discretion, while constitutional issues are reviewed *de novo*, the Mississippi Supreme Court disagreed with the appellate court's conclusion that Jenkins' Confrontation Clause issue was procedurally barred. The Mississippi Supreme Court addressed the merits of Jenkins' Sixth Amendment claim, and concluded

Jenkins' right of confrontation was not violated by Gross's testifying in lieu of Smith.

The United States Supreme Court denied Jenkins' petition for *certiorari* June 24, 2013. [15-3] On February 6, 2014, the Mississippi Supreme Court denied his July 30, 2013 application for leave to file a post-conviction motion in which he claimed three of his court-appointed attorneys provided ineffective assistance of counsel because they failed to challenge the prior convictions used to charge him as a habitual offender [16-9, beginning at page 6], finding his ineffective assistance of counsel claims failed to meet the standard of *Strickland v. Washington*, 466 U.S. 668, 687 (1984). [15-4], [16-9, p. 2] There is no ineffective assistance of counsel issue in the habeas petition before this Court.

Law and Analysis

In his habeas petition filed in this Court on December 16, 2014, Jenkins again urges that his constitutional right of confrontation was violated by the trial court's allowing Gross to testify in place of the testing analyst, and that the rejection of his arguments to that effect by the Mississippi Supreme Court was contrary to and an unreasonable application of the U.S. Supreme Court decision in *Bullcoming v. New Mexico*, 131 S.Ct. 2705, 2710 (2011). Since the Mississippi Supreme Court considered and denied Jenkins' Confrontation Clause claim on the merits, the Antiterrorism and Effective Death Penalty Act of 1996 precludes this Court from granting his petition for habeas relief unless the State court's adjudication on the merits:

> (1) resulted in a decision that was contrary to or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Jenkins' claim is governed by § 2254(d)(1), which applies to questions of law or mixed questions of law and fact. *Morris v. Cain*, 186 F.3d 581 (5th Cir. 2000).

A state court decision is contrary to federal law only if it reflects a conclusion opposite to one reached by the United States Supreme Court on an issue of law, or reaches a conclusion different from the Supreme Court's on materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 364-65 (2000). A state court decision involves an unreasonable application of federal law if it identifies the correct governing principle, but unreasonably applies the principle to the facts of the prisoner's case; this must be an objectively unreasonable application of federal law, not merely an erroneous or incorrect application. *Williams*, 529 U.S. at 365; *see also Ramdass v. Angelone*, 530 U.S. 156, 157 (2000). Sate court factual findings are presumed correct unless there is such an unreasonable application, and the burden is on the petitioner to prove, with clear and convincing evidence, that the facts were determined unreasonably. *Knox v. Johnson*, 224 F.3d 470 (5th Cir. 2000); *Miller v. Johnson*, 200 F.3d 274, 281 (5th Cir. 2000); 28 U.S.C. § 2254(e)(1). Jenkins has made no showing of any unreasonable determination of the facts of his case, so the only issue before this Court is whether the state court holding that his right to confront witnesses was not violated by Gross's testimony in lieu of Smith's was contrary to or involved an unreasonable application of clearly established Federal law.

On June 23, 2011, the United States Supreme Court decided *Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011). After he rear-ended another motor vehicle, Bullcoming was arrested for driving while intoxicated (DWI). He failed field sobriety tests, and refused a breath test, so officers obtained a search warrant for a blood-alcohol analysis. Bullcoming's blood was drawn at the hospital and delivered to the state Scientific Laboratory Division (SLD) for testing. SLD analyst Caylor tested the blood sample by gas chromatograph machine, and recorded that it was 0.21 grams per hundred milliliters, which resulted in Bullcoming's being charged with aggravated DWI. After trial began, the prosecution announced, without elaboration, that Caylor had recently been put on "unpaid leave" and would not be testifying, but never asserted that

Caylor was unavailable. The prosecution called another SLD analyst, "who had neither observed nor reviewed Caylor's analysis" and had no independent opinion concerning Bullcoming's BAC, to introduce Caylor's report as a business record, all over the objection of the defense. The jury convicted Bullcoming, and the state supreme court affirmed. The U.S. Supreme Court reversed, holding Caylor's report contained a testimonial certification, made to prove a fact at Bullcoming's trial, and its introduction through in-court testimony of an analyst who did not sign the certification or personally perform or observe the testing reported in the certification violated Bullcoming's right of confrontation.

Respondent argues, and the undersigned agrees, that Jenkins' case is not factually "materially indistinguishable" from *Bullcoming*. Justice Sotomayor concurring in part in *Bullcoming*, emphasized "the limited reach of the Court's opinion" in that case stating *Bullcoming* "is not a case in which the person testifying is a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue." *Id.*, 131 S.Ct. at 2722. Gross's testimony establishes that Jenkins *is* such a case. Gross was Smith's supervisor and the technical reviewer of her work; he is an experienced, expert drug analyst himself, and testified as to his independent conclusions that the exhibit contained cocaine and weighed at least 0.1 gram, which concurred with Smith's report; and both he and Smith signed the lab report. Smith was unavailable due to illness, and defense counsel had been apprised of that fact days before Jenkins' trial began. On *certiorari*, the Mississippi Supreme Court recognized the importance of these distinctions, holding in Jenkins:

> the testifying witness was the laboratory supervisor. While Gross was not involved in the actual testing, he reviewed ... and signed the report as the "case technical reviewer." ... Gross was able to explain competently the types of tests that were performed and the analysis that was conducted. He performed procedural checks by reviewing all of the data submitted to ensure that the data supported the conclusions contained in the report. Based on the data reviewed, Gross reached his own conclusion that the substance tested was cocaine. His

> conclusion was consistent with the report, and he signed the report as the technical reviewer. Gross...had "intimate knowledge" about the underlying analysis and the report prepared by the primary analyst.
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> The primary analyst in this case was unavailable to testify because she had taken an indefinite leave of absence after being diagnosed with stage-four cancer. ... A supervisor, reviewer, or other analyst involved may testify in place of the primary analyst where that person was "actively involved in the production of the report and had intimate knowledge of the analyses even though [he or] she did not perform the tests first hand." *McGowen [v.State*, 859 So.2d 320 (Miss. 2003)] at 340. Gross met this standard and the trial court did not abuse its discretion by allowing him to testify. Jenkins had the opportunity to confront and cross-examine Gross at trial, which satisfied his Sixth Amendment right to confront the witness against him.

Jenkins, 102 So.3d at 1069. The undersigned is unpersuaded that *Bullcoming* has "clearly established" that testimony from anyone other than the analyst who performed the testing on a controlled substance would violate the right of confrontation. Indeed, the Fifth Circuit has recognized, in an unpublished opinion, that it remains unclear whether testimony of a supervisor working in the same lab with the testing analyst would constitute such a violation. *United States v. Johnson*, 558 Fed.Appx. 450, 453 (5th Cir. 2014), *cert. denied*, 135 S.Ct. 278 (2014). This, in addition to the factual distinctions between Jenkins' case and *Bullcoming*, leaves the undersigned unable to find that the state court decision is contrary to, or involved an objectively unreasonable application of, clearly established federal law in Jenkins' case. *See Flournoy v. Small*, 681 F.3d 1000, 1005 (9th Cir. 2012) (involving testimony of an analyst who performed a technical review of the testing analyst's case file).

RECOMMENDATION

Based upon the foregoing, the undersigned recommends that the motion to strike [18] the response to Jenkins' traverse be denied, and that Robert L. Jenkins' petition for habeas corpus relief be denied.

NOTICE OF RIGHT TO APPEAL/OBJECT

Parties have 14 days after being served a copy of this Report and Recommendation to serve and file written objections to it. Objections must be filed with the clerk of court, served upon the other parties and submitted to the assigned District Judge. Within seven days of service of the objection, the opposing party must either serve and file a response or notify the District Judge that he does not intend to respond to the objection. An objecting party must specifically identify the findings, conclusions, and recommendations to which he objects; the District Court need not consider frivolous, conclusive, or general objections. A party who fails to timely file written objections is barred, except on grounds of plain error, from attacking on appeal any factual finding or legal conclusion accepted by the District Court to which he did not object. *Douglass v. United Services Automobile Association*, 79 F.3d 1415, 1428-29 (5th Cir. 1996).

Signed, this the 4th day of November, 2015.

/s/ *Robert H. Walker*

ROBERT H. WALKER
UNITED STATES MAGISTRATE JUDGE

Additional material from this filing is available in the Clerk's Office.