No. 23-

IN THE

# Supreme Court of the United States

ROLLO A. BARKER, A/K/A ROLLO NARKER,

*Petitioner,*

*v.*

STATE OF NEW JERSEY,

*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Does testimony from a lab analyst who ***did not perform*** the actual testing on Defendant's seized (alleged) contraband that was analyzed by a State Police Laboratory, and further ***cannot remember*** whether or not she supervised the non-certified analyst who performed the actual testing on said contraband, violate the United States Constitution's 6th Amendment confrontation clause, and therefore also *contra* to the tenets of *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) and its well-settled progeny.

## LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

## RELATED CASES

None.

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## PETITION FOR WRIT OF CERTIORARI

Rollo A. Barker, by and through his attorney, Daniel G.P. Marchese, Esq., respectfully petitions this court for a writ of certiorari to review the judgment of the New Jersey Appellate Division.

## OPINIONS BELOW

The Trial Court in *State v. Barker*, Indictment No. 18-04-000304-I, initially ruled on this issue prior to the conclusion of the case and decided against Mr. Barker. That decision is attached at Appendix C (17a to 22a). The unpublished decision by the New Jersey Appellate Division denying Mr. Barker's direct appeal is reported as *State v. Barker*, No. A-1512-19 (App. Div. Apr. 13, 2023). That decision is attached at Appendix B (2a to 16a). The New Jersey Supreme Court denied Mr. Barker's petition for certification on June 29, 2023 (as filed). That order is attached at Appendix A (1a).

## JURISDICTION

Mr. Barker's petition for hearing to the New Jersey Supreme Court was denied on June 29, 2023 (as filed). Mr. Barker invokes this Court's jurisdiction under 28 U.S.C. § 1257, having timely filed this petition for a writ of certiorari within ninety days (90) of the New Jersey Supreme Court's judgment.

## CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, *Amendment VI*, states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

## STATEMENT OF THE CASE[1]

A jury convicted Mr. Barker of possession of an illegal controlled dangerous substance (heroin) found (and "seized") in his car during a traffic stop, after trial in the Superior Court of New Jersey, Criminal Division, Morris-Sussex Vicinage, and he was subsequently imprisoned.[2] At trial, and over the Defense's objection, New Jersey State Police lab results (reporting) were admitted into evidence on testimony from a forensic scientist who allegedly supervised a non-certified technician's work to test the alleged controlled dangerous substance. That expert could not confirm that she actually monitored the non-certified

1. The transcript of the trial proceedings for citations to the Statement of the Case can be furnished if necessary, however, the same was not included here.

2. Mr. Barker ultimately served approximately three (3) years in New Jersey State Prison as a consequence of his conviction.

technician's testing, nor did she do the testing herself. Mr. Barker believes that this circumstance violates the Constitution's Sixth Amendment confrontation clause, and for sure runs afoul of well-settled U.S. Supreme Court jurisprudence.

At the trial of Mr. Barker's case, the State's third trial witness was Michele Agosta, a forensic scientist at the New Jersey State Police Lab, who testified as an expert "in the field of controlled dangerous substances." It should be noted that Ms. Acosta did not perform the testing on the alleged controlled dangerous substances found in Mr. Barker's vehicle during a traffic stop. In explaining the testing process, Ms. Acosta testified that once the lab received the substances, a trainee, Donald Brown, was the technician who actually carried out all the tests and recorded the results. The State did not call Mr. Brown to testify at trial, though he was included in the list of potential witnesses that the State had provided to defense counsel; however, after Ms. Agosta's testimony, the State represented that it had earlier notified defense counsel that only Ms. Agosta would be testifying about the drug tests and report.

The degree of Ms. Agosta's oversight over Mr. Brown's work was a primary theme of her testimony on both direct and cross-examination. Mr. Brown was the technician who performed the tests and wrote the report. Ms. Agosta testified that she "signed off" on Mr. Brown's report, which indicated that the samples taken from the substances seized from the center console were heroin, because Mr. Brown was not sufficiently trained to be able to confirm and sign the results himself. She also "reviewed all his data." Ms. Agosta stated that she was likely present in

the laboratory when Mr. Brown performed the tests, but that she was not sure whether she watched him perform the testing.

Ms. Agosta's testimony also concerned the amount of time it took for the lab reports to be created. About thirteen days elapsed from when the tests were completed to when the report was finalized. Ms. Agosta stated that the lab had a "backlog" and "sometimes things take a little bit longer." When the State moved to admit the report into evidence, defense counsel objected because "[Ms. Agosta] didn't do the testing." The court answered that "it doesn't matter if she did the testing or not," framing the "issue" as "whether or not [the report is] a business record and an exception to the hearsay rule" and noting that the State had not yet established the foundation for a business record's admission. The court gave the State another opportunity to lay that foundation.

After eliciting testimony from Ms. Agosta that the report was created in the normal course of business and reflected the test results, the State again moved to admit the report into evidence. The court noted that the State had still not justified admission because "there's more than one factor to be considered in laying a proper foundation." It gave the State a third chance to lay the foundation in a Rule "104 hearing."

The State asked Ms. Agosta to explain more details about how the report was produced in the normal course of business. After defense counsel declined to further cross-examine Ms. Agosta, the *court sua* sponte questioned her. Answering the court's questions, Ms. Agosta explained that when testing was conducted, reports were typically

created "shortly thereafter." Defense counsel then renewed his initial objection, arguing that the time elapsed between the tests' completion and the report's generation and the fact that Mr. Brown (a trainee) performed the testing and not Ms. Agosta prevented the report's admission as a business record.

The Trial Court ruled that the lab report was admissible as a business record. First, it stated that "[t]he testimony was that it was made in the regular course of business" without providing additional analysis. Second, it found that the report was made "at or near the time of the observation," "over a number of days." Third, it briefly discussed how Ms. Agosta "testified that she reviewed all the data" and "made sure all procedures were followed," rendering the report trustworthy. The trial court did not explicitly address Confrontation Clause issues, however, they were implicit in the defense's motion to bar the introduction of the test result report. The New Jersey Appellate did review the Confrontation Clause issues.

The New Jersey Appellate Division completely sidestepped the factual void concerning Agosta's admission that, 1) Brown was not qualified to test the contraband, and 2) she could not recall if she had or had not supervised his testing, but still held that:

> "although the State did not call Brown to testify at trial, it presented forensic scientist Agosta, who testified about the conclusions drawn in Brown's report. Agosta was responsible for overseeing and directly supervising other scientists in addition to her own case work. She had extensive familiarity with the drug testing

> process, recognized Brown's report as one she had reviewed, and opined the sample at issue contained heroin. Moreover, Agosta testified and was subjected to cross-examination."

The New Jersey Appellate Division then succinctly concluded that Defendant's confrontation rights were not violated simply because Brown did not testify. In so holding, the Appellate Court relied on the premise that "the Sixth Amendment's confrontation clause does not require that "every analyst involved in a testing process . . . testify in order to satisfy confrontation rights." *State v. Roach*, 219 N.J. 58, 77 (2014), further adding that "(a) defendant's confrontation rights are not violated if a forensic report is admitted at trial and only the supervisor/ reviewer testifies and is available for cross- examination, when the supervisor is knowledgeable about the testing process, reviews scientific testing data produced, concludes that the data indicates the presence of drugs, and prepares, certifies, and signs a report setting forth the results of the testing." *State v. Michaels*, 219 N.J. 1, 6 (2014).

The trial court authorized admission of the drug-test report as a business record and did not require the State to produce the trainee technician who performed the tests. That was error because the State failed to elicit testimony from Ms. Agosta (the supervisor and reviewer) that she indeed formed a truly independent conclusion. Such evidence was required for the introduction of the report through a surrogate witness's testimony to avoid violating the Confrontation Clause. The Trial Court actually performed a Confrontation Clause analysis (without stating as such), but solely focused the question

as concerning admission of a business record, without delving into the heart of the issue – that Mr. Brown was not qualified to perform the testing and Ms. Agosta did not actually remember supervising Mr. Brown's tests of the alleged contraband. Because the report was essential to the State's case against Mr. Barker, reversal of his drug-possession conviction was warranted.

Defendant does not dispute that Ms. Agosta was knowledgeable about the testing process or that she took steps to verify Mr. Brown's work, however, her testimony did not sufficiently demonstrate that she arrived at an independent conclusion, as would be required for the report to be admissible. Ms. Agosta testified that she "reviewed all [Mr. Brown's] data because he was not trained at the time and to make sure that he was following all of our procedures correctly and according to how I had trained him at that point." She could not confirm whether she "was watching him actually do every single step or . . . was comfortable enough that he was doing everything correctly that he was able to do a little bit more on his own independently." She stated that typically, "after any report is issued it moves on to a peer review process in which a different analyst reviews all the information in the packet to make sure that the manual is followed correctly and all the information is present to be able to issue this report correctly." After Mr. Brown provided her with the draft report, she "went through it to make sure that there were no errors [and] everything was okay." She did not explain exactly what the review entailed. Then, at trial, she testified that her "expert opinion" was that the sample "contains heroin."

## REASONS FOR GRANTING THE PETITION

Certainly, Mr. Barker's liberty should not have been given up for naught given these circumstances. Here, the issue of whether or not a forensic expert "supervisor" who did not perform testing on contraband and could not remember whether or not she oversaw an untrained and unqualified trainee while he performed the testing on the same, is one that should be further mined given the backdrop of *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) and *Bullcoming v. New Mexico*, 564 U.S. 647 (2011). Initially, the Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004) clarified the Confrontation Clause's scope and application. The Court held that testimonial statements made out of court are generally inadmissible unless the witness is unavailable, and the defendant had a prior opportunity for cross-examination. This landmark decision emphasized the centrality of cross-examination in the confrontation right. While the Confrontation Clause guarantees the right to confront witnesses, it does not create an absolute bar to the introduction of hearsay evidence.

*Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), reaffirmed the importance of the Confrontation Clause. The Court held that forensic laboratory reports are testimonial statements, and their admission without the presence of the analyst who prepared the report violated the defendant's confrontation rights. In *Bullcoming v. New Mexico*, 564 U.S. 647 (2011), the Supreme Court further expanded on the Confrontation Clause's application to forensic evidence. The Court ruled that a Defendant's right to confront witnesses extended to the specific analyst who prepared a forensic report, and it

was insufficient to merely present a surrogate witness. Building upon the precedent set in *Melendez-Diaz v. Massachusetts*, the Supreme Court reaffirmed that forensic laboratory reports are considered testimonial statements because they are prepared specifically for use in legal proceedings. The Bullcoming Court rejected the notion that another analyst familiar with laboratory procedures could substitute for the testimony of the actual analyst, holding that such surrogate testimony did not satisfy the defendant's right to confront the specific witness who conducted the test in question, thus violating the Confrontation Clause.

The decision in *Bullcoming v. New Mexico* clarified that when forensic evidence is introduced in a criminal trial, the defendant has the right to cross-examine the actual analyst who conducted the test. It is insufficient for the prosecution to present a different expert who is merely familiar with the laboratory's procedures. In summary, *Bullcoming v. New Mexico* reinforced the principles established in *Melendez-Diaz v. Massachusetts* by emphasizing that the Defendant's right to confront witnesses includes the right to cross-examine the specific analyst who conducted the forensic test and prepared the report. Here, Petitioner seeks to further confirm that the underlying Trial Court should not have admitted Ms. Agosta's testimony, warranting a reversal of Defendant's conviction on drug possession charges, though his unlawful time in New Jersey State Prison will never be erased from his memory.

## CONCLUSION

For the foregoing reasons, Mr. Barker respectfully requests that this Court issue a writ of certiorari to review the judgment of the New Jersey Appellate Division.

DATED this 28th day of November, 2023.

Respectfully submitted,

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# APPENDIX

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**APPENDIX A — ORDER OF THE SUPREME COURT OF NEW JERSEY, FILED JUNE 29, 2023**

SUPREME COURT OF NEW JERSEY
C-802 September Term 2022
088205

STATE OF NEW JERSEY,

*Plaintiff-Respondent,*

v.

ROLLO A. BARKER, A/K/A ROLLO NARKER,

*Defendant-Petitioner.*

**ORDER**

A petition for certification of the judgment in A-001512-19 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 27th day of June, 2023.

/s/
CLERK OF THE SUPREME COURT

**APPENDIX B — OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, DATED APRIL 13, 2023**

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-1512-19

STATE OF NEW JERSEY,

*Plaintiff-Respondent,*

v.

ROLLO A. BARKER, A/K/A ROLLO NARKER,

*Defendant-Appellant.*

December 13, 2022, Submitted
April 13, 2023, Decided

On appeal from the Superior Court of New Jersey, Law Division, Morris County, Indictment No. 18-04-0304.

Before Judges Gilson, Rose and Gummer.

PER CURIAM

During the afternoon of January 19, 2018, local police stopped a green Ford Explorer on Route 46 in Denville for motor vehicle infractions, including exceeding the speed limit by fifteen miles per hour. The car was driven by

defendant Rollo A. Barker; the sole passenger was known to police from prior drug arrests.

Both occupants appeared to be under the influence of narcotics. Denville Police Officer Douglas Large observed fresh track marks on defendant's arm and drug paraphernalia in plain view. Citing physical ailments, defendant told Large he was unable to complete the field sobriety tests. Defendant initially denied Large's ensuing request for consent to search the car. Large requested a K-9 unit respond to the scene; defendant gave consent while the unit was en route. Large did not find drugs when he initially searched the car; the K-9 unit thereafter alerted to the presence of drugs. Police seized heroin and drug paraphernalia from beneath the center console.

Following his arrest, defendant was charged by complaint-warrant with two disorderly persons offenses: unlawful possession of drug paraphernalia, N.J.S.A. 2C:36-2; and unlawful possession of a hypodermic syringe, N.J.S.A. 2C:36-6a. Police also issued summonses for various motor vehicle infractions. Thereafter, defendant was charged in a two-count Morris County indictment with third-degree possession of heroin, N.J.S.A. 2C:35-10(a)(1), and fourth-degree operating a motor vehicle with a suspended license, N.J.S.A. 2C:40-26(b).[1]

Prior to trial, defendant moved to suppress the evidence seized from the car. Large was the only witness

1. We glean from the record that the passenger was not charged with any offenses; she is not a party to this appeal.

called at the hearing. Following Large's testimony, defendant argued disparities reflected in the consent form regarding the time at which defendant signed the form rendered his consent invalid. The State attributed the disparities to a scrivener's error and, alternatively, argued police had probable cause to search the car under the automobile exception to the warrant requirement. The motion judge upheld the search under both theories.

The matter was assigned to another judge for trial. Defendant moved in limine to question Large about two different versions of the consent-to-search form. During the pretrial conference, the judge granted defendant's application, noting defendant could not otherwise challenge the motion judge's legal determination that the consent search was valid. Defense counsel made clear defendant did not intend to challenge the legality of the search.

At trial, the State presented the testimony of two law enforcement officers, including Large. The State also called Michele Agosta, a supervisory forensic scientist employed by the laboratory that tested the substances recovered from defendant's car. Defendant neither testified nor called any witnesses on his behalf.

The jury convicted defendant of both offenses charged in the indictment. The trial judge thereafter found defendant guilty of both disorderly persons offenses, and two of the five motor vehicle infractions: driving with a suspended license, N.J.S.A. 39:3-40; and operating a motor vehicle while possessing controlled dangerous substances, N.J.S.A. 39:4-49.1. Defendant was sentenced

to an aggregate prison term of five years with a parole disqualifier of two-and-one-half years.[2] In his counseled brief on appeal, defendant raises the following points for our consideration:

**POINT I**

**THE TRIAL COURT'S FAILURE TO REOPEN THE SUPPRESSION HEARING IN LIGHT OF THE SIGNIFICANT FACTUAL DIFFERENCE IN OFFICER LARGE'S TRIAL TESTIMONY WAS PLAIN ERROR. N.J. CONST. ART. I ¶ 7; U.S. CONST. AMEND. IV.**

(Not raised below)

**POINT II**

**THE TRIAL COURT ERRED BY ADMITTING THE DRUG-TEST REPORT THROUGH A SURROGATE WITNESS, DEPRIVING [DEFENDANT] OF HIS CONFRONTATION RIGHTS AND REQUIRING REVERSAL. N.J. CONST. ART. I, ¶ 10; U.S. CONST. AMEND. VI.**

[(Partially raised below).]

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2. Prior to sentencing, defendant pled guilty pursuant to a negotiated plea agreement to fourth-degree criminal mischief, charged in a separate indictment. Defendant was sentenced to time served on that charge. Defendant does not appeal from the dispositions on the disorderly persons and motor vehicle offenses in the present matter or the criminal mischief conviction under the separate indictment.

*Appendix B*

## POINT III

### THE STATE'S ELICITATION OF TRIAL TESTIMONY ABOUT THE CONSPICUOUSLY HIGH NUMBER OF POINTS ON [DEFENDANT]'S LICENSE WAS PROSECUTORIAL MISCONDUCT REQUIRING REVERSAL. N.J. CONST. ART. I, ¶ 1; U.S. CONST. AMEND. XIV.

In his pro se submission, defendant largely reiterates the arguments advanced by appellate counsel — without citation to the record or supporting authority. In essence, defendant contends: (1) he was stopped because police had prior encounters with his passenger; (2) the consent-to-search form was not completed at the scene; (3) the supervising forensic scientist could not recall observing the trainee test the drugs; and (4) the prosecutor misled the jury by claiming defendant owned the car.

Although defendant's four-paragraph pro se submission fails to comply with the mandates of *Rule* 2:6-2, we have considered the arguments and conclude either our disposition makes it unnecessary to address them or they lack sufficient merit to warrant discussion in a written opinion. *R.* 2:11-3(e)(2). We focus, instead, on the arguments raised by appellate counsel. Finding those arguments unavailing, we affirm for the reasons that follow.

*Appendix B*

**I.**

Defendant contends the trial judge failed, sua sponte, to reopen the pretrial suppression hearing following Large's trial testimony that he first observed the drug paraphernalia when he entered the car to search it — not when defendant exited the car as Large stated during the suppression hearing. Defendant belatedly contends: "If the version presented at trial were . . . believed," police lacked reasonable suspicion to seek defendant's consent or request the assistance of the K-9 unit. Because defendant did not raise this issue prior to trial, we view his contentions through the prism of the plain error standard. *R.* 2:10-2 (providing, in pertinent part, "the appellate court may, in the interests of justice, notice plain error not brought to the attention of the trial . . . court" but shall disregard any error unless it was "clearly capable of producing an unjust result").

During the suppression hearing, Large testified that upon approaching the vehicle, defendant exhibited "droopy eyelids, pinpoint pupils, a fresh injection mark, [and a] low, slow, slurred . . . raspy voice." Defendant produced his credentials, and Large determined his driver's license was suspended for driving while intoxicated (DWI). Defendant complied with Large's request to exit the vehicle. As defendant exited the car, Large observed "a small rubber band" and "Chore Boy" scouring pad on the driver's side floor. Based on his training and experience, Large was aware small rubber bands are "used in the packaging of heroin," and "small portions of metal" from Chore Boys are placed inside crack pipes so the drug stays in place and its impurities are removed.

*Appendix B*

In his counseled brief, defendant asserts Large testified at trial that he observed the drug paraphernalia as he entered the car — after defendant consented to the search. To support his argument, defendant cites the following testimony: "As I entered the vehicle, I located one small rubber band which is consistent with the packaging of heroin. I also observed numerous pieces of Chore Boy on the passenger side floor."

That testimony, however, was offered in response to the prosecutor's question about "what, if anything, . . . th[e] search yield[ed]"; not when the officer first observed the paraphernalia. Those observations were elicited earlier in the prosecutor's direct examination of Large:

> [PROSECUTOR]: Now, . . . after terminating the standard field sobriety tests what, if anything, occurred?
>
> [LARGE]: I spoke with [defendant] about conducting a consent search of the vehicle based on indications that I was seeing from him, as well as indications of drug paraphernalia inside the vehicle.

At trial, as he did during the suppression hearing, Large clearly testified that his observations of drug paraphernalia prompted him to request defendant's consent to search. Also at trial, the prosecutor asked Large to describe the location of the paraphernalia when he conducted the search. Unlike the circumstances at issue in *State v. Boston*, cited by defendant on appeal,

there were no new facts adduced at trial that were "not available to the judge at the suppression hearing." 469 N.J. Super. 223, 241, 263 A.3d 214 (App. Div. 2021). Because there was no discrepancy between Large's hearing and trial testimony, the trial judge had no basis to reopen the suppression hearing.

We turn to defendant's contention that the motion judge did not expressly determine Large had reasonable, articulable suspicion of criminal activity before requesting defendant's consent to search the car and the assistance of the K-9 unit. On this record, however, it does not appear defendant raised the issue before the motion judge. Accordingly, the issue was not preserved for our review. *See State v. Witt*, 223 N.J. 409, 419, 126 A.3d 850 (2015).

We nonetheless note the motion judge alternatively held police had probable cause to search the vehicle pursuant to the automobile exception to the warrant requirement and the Court's decision in *Witt*. *Id.* at 447 (holding "the automobile exception authorize[s] the warrantless search of an automobile only when the police have probable cause to believe that the vehicle contains contraband or evidence of an offense and the circumstances giving rise to probable cause are unforeseeable and spontaneous.")

The motion judge was satisfied the events "unfolded spontaneously" following the traffic stop. The judge credited Large's unrefuted testimony that defendant "exhibit[ed] signs of drug use," including "visible track marks on his right arm near his inner elbow." The judge also noted Large observed in plain view rubber bands and

the "Chore Boy," which also were indicative of drug use. The record supports the judge's findings. We therefore discern no error, let alone plain error, in the motion judge's decision denying defendant's suppression motion.

**II.**

In his second point, defendant contends the trial judge erroneously admitted the laboratory report, which confirmed the substances seized from the car tested positive for heroin. The tests were conducted and recorded in the report by Donald Brown, a forensic scientist trainee. Brown did not testify at trial. Instead, the State called Agosta, the forensic scientist who supervised Brown. Agosta was qualified, without objection, as "an expert in the field of controlled dangerous substances."

Agosta testified that after Brown "did all the analysis, [she] thoroughly reviewed this case . . . before it was submitted to the peer reviewer and administrative reviewer." Agosta "reviewed all [Brown's] data," signed the report, and drew her own conclusion "[t]hat the sample [Brown examined] contained heroin." In addition, Agosta initialed the bottom of each page within the report, indicating she confirmed the data's accuracy.

Over defendant's objection, the judge admitted the laboratory report as a business record exception to the hearsay rule under N.J.R.E. 803(c)(6). Defendant did not expressly assert Agosta's testimony violated his Sixth Amendment right of confrontation, but twice argued "the issue [wa]s that she didn't do the testing." During

the ensuing *Reyes*[3] motion, defendant argued Agosta's testimony was a net opinion because, among other things, she could not recall whether she observed Brown conduct the drug testing. In its responding brief on appeal, the State does not contend defendant waived his objection to Agosta's testimony.

Defendant now argues that even if the laboratory report were admissible as a business record under N.J.R.E. 803(c)(6), the trial judge erroneously admitted the report without conducting a confrontation-clause analysis under *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). In *Crawford*, the United States Supreme Court held "the admission of an out-of-court 'testimonial' statement permitted by state hearsay rules" unconstitutional "unless the person who made the statement is unavailable to testify at trial and the defendant had a prior opportunity to cross-examine that person." *State ex rel. J.A.*, 195 N.J. 324, 328, 949 A.2d 790 (2008). Nonetheless, the Sixth Amendment's confrontation clause does not require that "every analyst involved in a testing process . . . testify in or der to satisfy confrontation rights." *State v. Roach*, 219 N.J. 58, 77, 95 A.3d 683 (2014).

> [A] defendant's confrontation rights are not violated if a forensic report is admitted at trial and only the supervisor/reviewer testifies and is available for cross-examination, when the supervisor is knowledgeable about the testing process, reviews scientific testing data produced, concludes that the data indicates the

3. *State v. Reyes*, 50 N.J. 454, 458-59, 236 A.2d 385 (1967).

> presence of drugs, and prepares, certifies, and signs a report setting forth the results of the testing.

[*State v. Michaels*, 219 N.J. 1, 6, 95 A.3d 648 (2014).]

Defendant acknowledges Agosta was "knowledgeable about the testing process" and "took steps to verify Mr. Brown's work," but asserts she "did not sufficiently demonstrate that she arrived at an independent conclusion." We disagree.

Although the State did not call Brown to testify at trial, it presented forensic scientist Agosta, who testified about the conclusions drawn in Brown's report. Agosta was responsible for overseeing and directly supervising other scientists in addition to her own case work. She had extensive familiarity with the drug testing process, recognized Brown's report as one she had reviewed, and opined the sample at issue contained heroin. Moreover, Agosta testified and was subjected to cross-examination. We conclude defendant's confrontation rights were not violated simply because Brown did not testify.

**III.**

Lastly, we consider defendant's claims of prosecutorial misconduct. Prior to trial, the State redacted portions of defendant's driver's abstract "to eliminate any potential prejudice to . . . defendant." The redacted abstract reflected three DWI convictions. During direct examination of Large, however, the prosecutor elicited testimony that

defendant had accumulated fifty-two points against his driver's license. Defendant contends this extraneous evidence was prejudicial and deprived him of a fair trial. The State acknowledges the error, but counters it was not "clearly capable of producing an unjust result" under *Rule* 2:10-2.

To place the objected-to testimony in context, we recite the exchange that preceded it:

> [PROSECUTOR]: And did you check the status of [defendant's] license?
>
> [LARGE]: Yes.
>
> [PROSECUTOR]: And what did that check reveal?
>
> [LARGE]: That [h]is driving privileges were currently suspended.
>
> [PROSECUTOR]: And did they indicate why they were suspended?
>
> [LARGE]: At this point I was just notified that he was suspended with multiple points. We later learned that [defendant] was suspended for driving while intoxicated. . . .
>
> [PROSECUTOR]: Do you recall how many points were on the defendant's license at this time?

[LARGE]: I believe it was fifty-two.

Recognizing the impropriety of the prosecutor's final question in that line of inquiry, the trial judge sustained defendant's timely objection and immediately issued the following curative instruction:

> All right, ladies and gentlemen, the testimony in regard to the amount of points is to be disregarded by you. It is not to be considered by you. When you do begin your deliberations you're not to discuss it and the testimony is stricken.

The prosecutor's duty to ensure that justice is served is well established. *See State v. Smith*, 212 N.J. 365, 402-03, 54 A.3d 772 (2012). Even if the prosecutor exceeds the bounds of proper conduct, however, that finding does not end an appellate court's inquiry. "[I]n order to justify reversal, the misconduct must have been 'so egregious that it deprived the defendant of a fair trial.'" *State v. Smith*, 167 N.J. 158, 181, 770 A.2d 255 (2001) (quoting *State v. Frost*, 158 N.J. 76, 83, 727 A.2d 1 (1999)). "To justify reversal, the prosecutor's conduct must have been 'clearly and unmistakably improper,' and must have substantially prejudiced defendant's fundamental right to have a jury fairly evaluate the merits of his defense." *State v. Timmendequas*, 161 N.J. 515, 575, 737 A.2d 55 (1999) (quoting *State v. Roach*, 146 N.J. 208, 219, 680 A.2d 634 (1996)); *see also State v. McNeil-Thomas*, 238 N.J. 256, 276, 209 A.3d 845 (2019).

"In deciding whether prosecutorial conduct deprived a defendant of a fair trial, 'an appellate court must take into account the tenor of the trial and the degree of responsiveness of both counsel and the court to improprieties when they occurred.'" *State v. Williams*, 244 N.J. 592, 608, 243 A.3d 647 (2021) (quoting *Frost*, 158 N.J. at 83). Reviewing courts should consider the following factors: "(1) whether defense counsel made timely and proper objections to the improper remarks; (2) whether the remarks were withdrawn promptly; and (3) whether the court ordered the remarks stricken from the record and instructed the jury to disregard them." *Ibid.* (quoting *Frost*, 158 N.J. at 83).

"When inadmissible evidence is admitted in error by the trial court, a curative instruction may sometimes be a sufficient remedy." *State v. Prall*, 231 N.J. 567, 586, 177 A.3d 755 (2018). The Court has cautioned a curative instruction generally "must be firm, clear, and accomplished without delay" to alleviate potential prejudice from inadmissible evidence. *State v. Vallejo*, 198 N.J. 122, 134, 965 A.2d 1181 (2009). Those criteria were met here: The fleeting testimony was promptly objected to, and the trial judge issued a curative instruction.

Moreover, during his final charge to the jury, the judge instructed:

> Any testimony that I may have had occasion to strike is not evidence and shall not enter into your final deliberations. It must be disregarded by you. This means that even though you may

> remember the testimony you are not to use it in your discussion or your deliberations.

"We presume the jury followed the court's instructions." *Smith*, 212 N.J. at 409.

Affirmed.

**APPENDIX C — EXCERPT OF TRANSCRIPT OF THE SUPERIOR COURT OF NEW JERSEY LAW DIVISION, CRIMINAL PART, MORRIS COUNTY, FILED JANUARY 14, 2020**

[1]SUPERIOR COURT OF NEW JERSEY LAW
DIVISION, CRIMINAL PART
MORRIS COUNTY

INDICTMENT NO. 18-04-000304-I

A.D. NO. A-001512-19-T4

STATE OF NEW JERSEY,

vs.

ROLLO A. BARKER,

*Defendant.*

TRANSCRIPT OF TRIAL

Place: Morris Cty. Courthouse
Washington & Court St.
Morristown, NJ 07963

Date: June 17, 2019

BEFORE:

HONORABLE DAVID H. IRONSON, J.S.C. and a Jury

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*Appendix C*

[56]THE COURT: All right, we are back. The jury should be back momentarily. Let me rule on the motion that was filed by Mr. Marchese.

All right, as to the standard to be applied in determining the motion at the conclusion of the State's case we refer to the case of *State v. Reyes*, which is 50 N.J. 454, 458-459.

According to *Reyes*, the broadcast for determination of such an application is whether the evidence at that point is sufficient to warrant a conviction of the charge involved.

More specifically, the question the trial judge must determine is whether viewing the State's evidence in its entirety, be that evidence direct or circumstantial, and giving the State the benefit of all its favorable testimony as well as all the favorable inferences which reasonably could be drawn therefrom a reasonable jury could find guilt of the charge beyond a reasonable doubt. Thus, the motion must be granted if the State has failed to prove any one of the elements of the crime.

[57]Here, as a specific argument that was made and the first argument was that the State's expert, Miss Agosta, was not qualified. I went back, I listened to the tape twice, she was qualified.

MR. MARCHESE: I stand corrected, Judge, I apologize.

THE COURT: And just let me make sure that we're clear. Specifically, when the State moved her to be qualified I first said are there any objections and then I said is there any voir and Mr. Marchese said no voir dire and no objections. So, as a result she was qualified as an expert in the field of controlled dangerous substances with no objection.

MR. MARCHESE: I stand correct. I hope no offense was taken.

THE COURT: Not a problem at all.

MR. MARCHESE: Thank you, Judge.

THE COURT: Then the question was whether or not her testimony was a net opinion.

Rule 703 contemplates that an expert opinion will be based upon facts or data. Those facts or data may be inadmissible as long as they're the type reasonably relied upon by experts in the field. An expert's bare conclusions unsupported by factual evidence or other data are inadmissible as a net opinion. [58]That's *State v. Townsend*, 186 N.J. 473, pages 494 to 495, a 2006 case.

The rule requires that an expert is to give the why and wherefore of his or her opinion rather than just mere conclusions. That is *Rosenberg v. Tavorath*, 352 N.J. Super. 385 at page 401, App. Div. (2002).

So, the Court has to look to see whether or not these were bare conclusions that were given. Here, as I said, the expert was qualified in the field of controlled dangerous substances and the expert specifically went through the testing protocol. She indicated that or testified that there's a color test 1-1 she referred to. She referred to it as a marquis test, that the purpose was to determine the type of compound that it could be and that test would either be heroin or morphine, et cetera, she said.

That leads to another test and that test was the GPMS test and she testified that that test was conducted and she testified that the results of that test were heroin. She did indicate that with the GPMS test there has to be quality data and when it was first done it was an unidentified substance that was identified and as a result it was not used and the goal was to avoid any false positives, so it was done again and then it came back to be heroin.

[59]So, she went through what the testing protocol was and what took place and she did not just render a bare conclusion. She described the process involved.

She did testify that Mr. Brown did the testing. He was a trainee at the time and now he's an analyst but at the time he was a trustee. She did testify that a trainee is not certified but at one point she testified that she observed his tests. She testified that her initials were also on it and she reviewed the case herself and she signed off on it and that the conclusion was that the sample contained heroin.

So, I don't find, based upon those facts, that her testimony is just a bare conclusion. She supported it, she's given details, she's given facts and data as to how the testing was done and that she observed it. That's the actual testimony. She may have said other things along the way, as well, but of course the Court has to give all favorable inferences to the State on this type of motion.

So, as a result, the Court denies the motion. I'm not getting into the other elements of the crime that the State has to satisfy because that wasn't raised by Mr. Marchese. So, I mean, I'm happy to [60]address them and if it's easier, I certainly will, that the State, of course, has to show that S-2A is a controlled dangerous substance, that the defendant possessed or obtained the S-2A. Certainly, possession can be constructive and constructive possession means possession in which the possessor does not physically have the item on his person but is aware that the item is present and is able to and has the intention to exercise control over it.

Here, certainly, based upon the facts in the case, the testimony of Officer Large, he testified that Mr. Barker had droopy eyes, that he had a slow voice, that he saw fresh marks on his arm. He testified that these were all signs of narcotic use.

The jury could, based upon circumstantial evidence and on constructive possession, certainly find that Mr. Barker possessed these items.

*Appendix C*

The last item -- the last requirement is that the defendant acted knowingly or purposely in possessing the heroin or the controlled dangerous substance. Clearly, this is a state of mind. Typically, circumstantial evidence in this regard and based upon all the facts that have been set forth in the case a jury could come to that conclusion, giving all favorable inferences to the State.

[61]So, for those reasons, the defendant's motion is denied and we will go forward with the case.

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