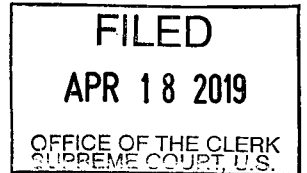


No 18-9428

ORIGINAL

IN THE  
SUPREME COURT OF THE UNITED STATES



ROBERT L. JENKINS

PETITIONER, PRO SE

V.

PELICIA HALL, COMMISSIONER  
MISSISSIPPI DEPARTMENT OF CORRECTIONS, ET AL.

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI  
TO THE FIFTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

This COURT's 2004 decision in Crawford v. Washington, 541 U.S. 36 (2004) clearly established that, pursuant to the Confrontation Clause of the Sixth Amendment to the United State Constitution, the testimonial statements of a declarant who is not ~~present~~ for for trial or expert testimonial report may be admitted into evidence for the purpose of proving the truth of the matter asserted [only] if the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the declarant. Five years later, in Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009), this COURT explicitly rejected the claim that the reports and statements of forensic scientists are somehow excepted from Crawford's unequivocal procedural rule. And in Bullcoming v. New Mexico, 564 U.S. 647 (2011), a majority of this COURT made clear that Crawford's procedural rule is not satisfied by providing a defendant an opportunity to cross-examine one forensic scientist about another forensic scientist's out-of-court testimonial report and statements.

SINCE THE SUPREME COURT'S 2004 DECISION IN "CRAWFORD," IT HAS BEEN CLEARLY ESTABLISHED THAT THE "[+]TESTIMONIAL STATEMENTS OF WITNESSES ABSENT FROM TRIAL [MAY BE] ADMITTED [ONLY] WHERE THE DECLARANT IS UNAVAILABLE, AND [ONLY] WHERE THE DEFENDANT HAS HAD A PRIOR OPPORTUNITY TO CROSS-EXAMINE." 541 U.S. AT 59 (EMPHASIS) ADDED). DESPITE THIS CLEARLY ESTABLISHED RULE, THE FIFTH CIRCUIT COURT OF APPEALS REGARDING REHEARING EN BANC, THE PANEL IN THIS CASE — RELYING ON A PRIOR PANEL DECISION IN GRIM V. FISHER, 816 F.3d 296 (5th CIR. 2016) — CONCLUDED THAT THE COURT'S 2011 DECISION IN "BULLCOMING" LEFT OPEN THE POSSIBILITY THAT A DIFFERENT RULE MIGHT APPLY TO THE TESTIMONIAL REPORT AND STATEMENTS OF SCIENTISTS. SPECIFICALLY, THE PANEL CONCLUDED THAT "BULLCOMING MIGHT PERMIT THE STATE TO ADMIT ONE SCIENTIST'S TESTIMONIAL REPORT AND STATEMENTS ABOUT A SCIENTIFIC TEST THROUGH ANOTHER SCIENTIST, SO LONG AS THE TESTIFYING SCIENTIST WAS SOMEHOW "INVOLVE[d]" IN THE RELEVANT TEST AND REPORT. OP. ID.<sup>1</sup>

BULLCOMING DID NO SUCH THING. IN FACT, BULLCOMING EXPRESSLY REJECTED THE NOTION THAT THE

CONFRONTATION CLAUSE might allow one scientist to act as a surrogate witness for another scientist's out-of-court testimonial statements, to the extent that "the scope of the Bullcoming holding is a question that has roiled federal courts," Op. 8, this is due almost entirely to Justice Sotomayor's concurring opinion. But as discussed below, Justice Sotomayor's concurring opinion did not state or limit the hold in Bullcoming. Nor did it create an exception to Crawford's clearly established rule.

ON PETITION FOR REHEARING EN BANC BEFORE JUDGES REAVLEY, EIROD, 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, 1/30/2019.

DESPITE THE APPARENT CLARITY OF THE RULE ESTABLISHED IN CRAWFORD V. WASHINGTON, 541 U.S. 36 (2004) AND APPLIED IN MELLENDEZ-DIAZ V. MASSACHUSETTS, 557, U.S. 305 (2009) AND BULLCOMING V. NEW MEXICO, 564 U.S. 647 (2011).

THE FIFTH CIRCUIT'S DECISION - WHICH REFLECTS A TREND AMONG FEDERAL AND STATE APPELLATE COURTS AS THEY INTERPRET AND APPLY BULLCOMING AND CRAWFORD'S CLEARLY ESTABLISHED RULE, - RAISES THE FOLLOWING QUESTIONS:

(1) WHICH SCIENTIFIC REPORTS ARE TESTIMONIAL, AND WHETHER THE STATE CAN EVADE THE REQUIREMENTS OF THE CONFRONTATION CLAUSE BY INTRODUCING SCIENTIFIC REPORTS FOR SOME PURPOSE OTHER THAN THE TRUTH OF THE MATTERS ASSERTED? SEE, E.G., WILLIAMS V. ILLINOIS, 567 U.S. 50 (2012). BUT WHEN - AS IN THIS CASE - A SCIENTIST'S REPORT AND STATEMENTS ARE (A) TESTIMONIAL, AND (B) INTRODUCED FOR THE TRUTH OF THE MATTERS ASSERTED, CRAWFORD AND BULLCOMING MAKE CLEAR THAT "[t]HE ACCUSED'S RIGHT IS TO BE CONFRONTED WITH THE ANALYST WHO MADE THE [STATEMENTS], UNLESS THAT ANALYST IS UNAVAILABLE AT TRIAL, AND THE ACCUSED HAD AN OPPORTUNITY, PRETRIAL, TO CROSS-EXAMINE THAT PARTICULAR SCIENTIST." BULLCOMING, 564 U.S. AT 652.

(2) WHETHER THERE MIGHT BE FORENSIC EVIDENCE

EXCEPTION TO CRAWFORD'S CLEARLY ESTABLISHED PROCEDURAL RULE THAT WOULD PERMIT ONE SCIENTIST TO INTRODUCE FOR THE ~~TRUTH~~ OF THE MATTER(S) ASSERTED A NON-TESTIFYING SCIENTIST [TESTIMONIAL] REPORT AND STATEMENTS ABOUT A SCIENTIFIC TEST, SO LONG AS TESTIFYING SCIENTIST WAS 'ACTIVELY INVOLVED IN THE PRODUCTION OF THE REPORT AND HAD INTIMATE KNOWLEDGE OF THE ANALYSES EVEN THOUGH [HE]... DID NOT PERFORM THE TEST FIRST HAND.' Id. AT 1069. "GROSS"

TECHNICAL REVIEWER, TIMOTHY GROSS LAB MANAGER

(3) WHETHER THE PANEL EN BANC REVIEW IN THIS CASE -RELYING ON A PRIOR PANEL DECISION IN GRIM V. FISHER, 816 F.3d 296 (5th Cir. 2016) - CONCLUDED THAT THE COURT'S 2011 DECISION IN BULLCOMING LEFT OPEN THE POSSIBILITY THAT A DIFFERENT RULE MIGHT APPLY TO THE TESTIMONIAL REPORTS AND STATEMENT OF SCIENTISTS? SPECIFICALLY, AND DESPITE THE SUPREME COURT'S 2004 DECISION IN CRAWFORD V. WASHINGTON, 541 U.S. AT 59 (EMPHASIS ADDED), REGARDING THIS CLEARLY ESTABLISHED RULE, THE PANEL CONCLUDED THAT BULLCOMING V. NEW MEXICO, 564 U.S. 647 (2011) MIGHT PERMIT THE STATE

to admit one scientist's testimonial report and statements about a scientific test through another scientist, so long as the testifying scientist was "involve[d]" in the relevant test and report.

## PARTIES TO THE PROCEEDING

THE PETITIONER IS ROBERT L. JENKINS

THE RESPONDENTS ARE PELIGIA HALL, COMMISSIONER  
OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS;  
RON KING, SUPERINTENDENT, CENTRAL MISSISSIPPI  
CORRECTIONAL FACILITY.

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2. THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE 3, SECTION 26 OF THE MISSISSIPPI

Constitution guarantee a criminal defendant the right to confront and cross-examine the witnesses against him . . . . . 13

3. Other federal and state appellate courts had allowed admission of absent witnesses' testimonial statements regarding forensic evidence. Now since the (2004) Crawford's clearly established rule Mississippi Supreme Court, Federal district court, and United States Court of Appeals for the Fifth Circuit reach the conclusion that there might be some sort of forensic evidence exception to this clearly establish rule . . . . . 14

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## Appendix

Appendix A. Order Denying Petition for Rehearing En Banc and Petition for Panel Rehearing by the Fifth Circuit Court of Appeals, *Jenkins v. Hall, et al.*, No. 17-60043 (5th Cir. January 30, 2019).

Appendix B. Opinion of the Fifth Circuit Court of Appeals, *Jenkins v. Hall*, 910 F.3d 828 (5th Cir. Dec. 13, 2018)

## Appendix

Appendix C, Opinion of the United States District Court for the Southern Division of Mississippi, JENKINS V. KING No. 1:15 CV 28-HSD-RHW, 2017 WL 27960 (S.D. Miss. JANUARY 3, 2017).

Appendix D, Opinion of the United States District Court for the Southern Division of Mississippi, JENKINS V. KING No. 1:15 CV 28-HSD-RHW, 2015 WL 12910717 (S.D. Miss. Nov. 4, 2015).

Appendix E, Opinion of the Mississippi Supreme Court, JENKINS V. STATE 102 So. 3d 1063 (Miss. Oct. 4, 2012) (Modified REHEARING DENIED DEC. 20, 2012 + Dissenting Opinion).

Appendix F, Transcripts of Timothy Gross's Testimony, Civil Action No. 1:15-CV 28-HSD-RHW (S.D. Miss. April, 1, 2015)

Appendix G, Multi Motions in Circuit Court of Harrison County Miss. 2 Judicial District CONFRONTATION Rights PRE TRIAL JENKINS V. STATE CAUSE No. B2402-08-18 (Miss. April 29, 2008) Also reproduced in RECORD EXCEPSTs, No. 2010-KA-00203-COA. Attached.

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## PETITION FOR CERTIORARI

PETITIONER ROBERT L. JENKINS RESPECTFULLY REQUESTS THAT THIS COURT ISSUE A WRIT OF CERTIORARI TO REVIEW THE FIFTH CIRCUIT COURT OF APPEAL'S JUDGEMENT THAT AFFIRMED THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI. SEE, JENKINS V. HALL, No. 17-60043, 910 F.3d 828 (2018, 5th Cir.), REHEARING EN BANC DENIED JANUARY 30, 2019.

### OPINIONS BELOW

THE FIFTH CIRCUIT COURT OF APPEAL'S JANUARY 30, 2019 PETITION FOR REHEARING EN BANC IS DENIED AND REPRODUCED IN APPENDIX A. THE OPINION, DECEMBER 13, 2018 OF THE FIFTH CIRCUIT COURT OF APPEALS AFFIRMANCE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI IS REPORTED AT JENKINS V. HALL 910 F.3d 828 (2018) AND REPRODUCED IN APPENDIX B. THE JAN., 3, 2017 MEMORANDUM OPINION AND ORDER ADOPTING THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATIONS [24] AND DENYING AMENDED PETITION FOR WRIT OF HABEAS CORPUS [5] IS REPORTED IN 2017 WL 27960 AND REPRODUCED IN APPENDIX C. THE NOVEMBER 4, 2015 REPORT AND RECOMMENDATIONS FOR THE UNITED STATES DISTRICT

COURT of Mississippi, Southern Division at Civil Action No. 1:15 CV 28-HSO-RHW, available at 2015 WL 12910717 and is reproduced in Appendix D. The December 20, 2012 Denial of Rehearing opinion of the Supreme Court of Mississippi is available at JENKINS v. STATE 102 So. 3d 1063 (2012), and reproduced in Appendix E. The April 1, 2015 Transcript of Timothy Gross's testimony at Court Reporter Civil Action No. 1:15 CV 28-HSO-RHW and reproduced in Appendix F

## Jurisdiction

This Court's jurisdiction is invoked pursuant to Fed. R. App. P. 35-4. The Fifth Circuit Court of Appeals entered its judgement for Petition for Panel Rehearing denying rehearing en banc January 30, 2019. Jurisdiction on writ of certiorari became a consideration governing review on Rule 10, Rule 13 and 28 U.S.C. 1746

CONSIDERATIONS FOR GOVERNING REVIEW ON CERTIORARI PURSUANT TO RULE 10 OF RULES OF THE SUPREME COURT OF THE UNITED STATES. ALSO SUPREME COURT RULE 13, (3). PETITIONER TIMELY FILED A PETITION FOR REHEARING EN BANC, WHICH WAS DENIED BY THE FIFTH CIRCUIT COURT OF APPEALS ON APRIL JANUARY 30, 2019 AND IS REPRODUCED IN APPENDIX A.

### CONSTITUTIONAL PROVISIONS INVOLVED

THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION  
"IN ALL CRIMINAL PROSECUTION, THE ACCUSED SHALL ENJOY THE RIGHT... TO BE CONFRONTED WITH THE WITNESSES AGAINST HIM..."

THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION PROVIDES, IN RELEVANT PART: "NO STATE SHALL ... DEPRIVE ANY PERSON OF LIFE, LIBERTY OR PROPERTY, WITHOUT DUE PROCESS OF LAW..."

THE MISS. CONST. ART. 3, § 26 ("IN ALL CRIMINAL PROSECUTIONS THE ACCUSED SHALL HAVE A RIGHT... TO BE CONFRONTED BY THE WITNESSES AGAINST HIM").

## STATEMENT OF THE CASE

### STATE COURT PROCEEDINGS

PETITIONER ROBERT JENKINS WAS CONVICTED BY HARRISON COUNTY, MISSISSIPPI JURY OF POSSESSION OF COCAINE IN AN AMOUNT OF 0.1 GRAM. HE WAS SENTENCED TO LIFE IN PRISON WITHOUT THE POSSIBILITY OF PAROLE AS AN HABITUAL OFFENDER UNDER MISS. CODE 99-19-83. SEE JENKINS V. STATE, 102 SO. 3D 1063 (2012), ATTACHED AS APPENDIX E.

JENKINS WAS INDICTED FOR POSSESSION OF COCAINE IN AN AMOUNT OF MORE THAN 0.1 GRAM BUT LESS THAN 2 GRAMS. MISS. CODE ANN. 41-29-139 (REV. 2009). DURING MR. JENKINS'S TRIAL, THE PROSECUTION INTRODUCED TWO OUT-OF-COURT TESTIMONIAL STATEMENT BY ALISON SMITH, "[T]HE LABORATORY ANALYST WHO DETERMINED THE WEIGHT AND IDENTITY OF THE SUBSTANCE." Op. 1. ~~AND~~. AND Op. 1. ~~THE~~ THE FIRST WAS SMITH'S STATEMENT IN HER LABORATORY REPORT THAT THE SUBSTANCE POSSESSED BY MR. JENKINS IS COCAINE. Op. 4. THE SECOND WAS SMITH'S STATEMENT IN HER REPORT THAT THE SUBSTANCE WEIGHS 0.1 GRAM, THE MINIMUM WEIGHT NECESSARY TO CONVICT

MR. JENKINS OF THE CHARGED OFFENSE. Op. 4. Although Smith's testimonial statements were introduced for the truth of the matters asserted, MR. JENKINS WAS NEVER GIVEN AN OPPORTUNITY TO CROSS-EXAMINE Smith, "PRETRIAL" that particular scientist and analyst who actually weighed the substance 0.1 gram. SEE RECORD EXCEPTS ~~ON~~ CIRCUIT COURT DISTRICT 2 CASE HISTORY B24020800018 STATE OF MISSISSIPPI VS ROBERT JENKINS PRETRIAL MULTI-MOTIONS RESERVATION OF CONFRONTATION RIGHTS REPRODUCE AT APPENDIX-F. Also the April 29, 2008 Filed pretrial motions is reproduced at Appendix-G. Op. 4. Instead, Smith's testimonial report and statements were introduced through a technical reviewer, Timothy Gross. Op. 4-5. MR. JENKINS CLAIMED THIS VIOLATED HIS CONSTITUTIONAL RIGHT TO CONFRONT HIS ACCUSERS. Op. 4-5.

MR. JENKINS'S CONVICTION WAS AFFIRMED BY THE MISSISSIPPI COURT OF APPEALS. JENKINS V. STATE, 102 So. 3d 273 (Miss. Ct. App. 2011). The Mississippi

SUPREME COURT GRANTED CERTIORARI TO ADDRESS HIS claim "that his SIXTH AMENDMENT RIGHT TO CONFRONTATION WAS VIOLATED BECAUSE HE WAS NOT PROVIDED AN opportunity to CROSS-EXAMINE THE ANALYST WHO... AUTHORED THE FORENSIC REPORT ADMITTED AS EVIDENCE AGAINST him." JENKINS V. STATE, 102 SO. 3d 1063, 1065 (MISS. 2012).

THE MISSISSIPPI SUPREME COURT FOUND THAT SMITH'S REPORT "IS 'TESTIMONIAL,'" AND THUS "IT IS THE TYPE OF DOCUMENT SUBJECT TO THE CONFRONTATION CLAUSE." *Id.* AT 1067, N.2. NONETHELESS, THE COURT RULED 5-4 THAT MR. JENKINS'S RIGHT TO CONFRONT HIS ACCUSERS WAS SATISFIED BECAUSE HE "HAD THE OPPORTUNITY TO CONFRONT AND CROSS-EXAMINE GROSS." *Id.* AT 1069. ACCORDING TO THE COURT, IT WAS PERMISSIBLE TO ADMIT SMITH'S TESTIMONIAL REPORT AND STATEMENTS THROUGH GROSS, BECAUSE GROSS "WAS 'ACTIVELY INVOLVED IN THE PRODUCTION OF THE REPORT AND HAD INTIMATE KNOWLEDGE OF THE ANALYSES EVEN THOUGH [HE...] DID NOT PERFORM THE

TEST FIRST HAND." Id. at 1069 (citation omitted). Among other things, Gross had "performed 'procedural checks' by reviewing all the data [generated by Smith's tests] to ensure that the data supported [Smith's] conclusions... in the report." Id. Gross also "signed the report as the technical reviewer." Id.

Justice Kitchens — joined by three other justices — dissented. The dissenting justices noted that "[t]he United States Supreme Court has made clear that the prosecution's use of one expert to admit the testimonial report of another implicates a criminal defendant's Sixth Amendment right to confront his accusers." Id. at 1070 (Kitchens, J., dissenting). Thus, they explained, "the admission of Smith's laboratory report via Gross's testimony, without a prior opportunity to cross-examine Smith, violated Jenkins's constitutional right to confrontation." Id. Also separate written opinion joined by Dickinson, P. J., Chandler and King, J.J. *Jenkins v. State* 102 So. 2d 1063 (2012)

## FEDERAL COURT PROCEEDINGS

AFTER THE UNITED STATE SUPREME COURT DENIED HIS PETITION FOR CERTIORARI, MR. JENKINS TIMELY FILED A HABEAS PETITION IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI. Op. 5. MR. JENKINS MAINTAINED THAT THE MISSISSIPPI SUPREME COURT'S DECISION WAS CONTRARY TO, OR INVOLVED AN UNREASONABLE APPLICATION OF, BULLCOMING V. NEW MEXICO, 564 U.S. 647 (2011).

Op. 5-6. IN BULLCOMING, THE SUPREME COURT HELD THAT WHEN THE PROSECUTION "INTRODUCE[S] A FORENSIC LABORATORY REPORT CONTAINING A TESTIMONIAL CERTIFICATION... MADE FOR THE PURPOSE OF PROVING A PARTICULAR FACT[, ]... [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," 564 U.S. AT 652. SEE Op. 8-9. IN SO HOLDING, THE BULLCOMING COURT REJECTED THE NOTION THAT CONFRONTATION CLAUSE PERMITS

ONE SCIENTIST TO SERVE AS A "SURROGATE" WITNESS FOR ANOTHER SCIENTIST'S TESTIMONIAL REPORT AND STATEMENTS. *Id.*

Justice Sotomayor joined the majority in Bullcoming, but also wrote separately to "emphasize the limited reach of the court's opinion," and to "highlight some of the factual circumstances that [Bullcoming] does not present." *Id.* at 668, 673 (Sotomayor, J., concurring in part). Among other things, Justice Sotomayor noted that 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," and added that "[w]e need not address what degree of involvement is sufficient because here [the testifying scientist] had no involvement whatsoever in the relevant test and report." *Id.* at 673.

While Mr. Jenkins's petition was pending in the district court, a three-judge panel of this court decided Grim v. Fisher, 816 F.3d 296 (5th Cir. 2016). See; Jenkins v. King, No. 15-cv-28-HSD-RHW (S.D. Miss. Jan. 3, 2017).

Grim applied Bullcoming to a case in which a scientist's report and statements were admitted into evidence through a supervisor's testimony, and held that there was no violation of clearly established law. Op. 6.

The Grim panel concluded:

Bullcoming does not clearly establish that, when the prosecution introduces a forensic laboratory report containing a testimonial certification — made for the purpose of proving a particular fact — the prosecution cannot do so through the in-court testimony of a technical reviewer who signed the report and was “more involved” in the testing and report preparation than was the witness in Bullcoming.

Grim, 816 F.3d at 310 (emphasis added). The panel:

“Justice Sotomayor’s concurring opinion in Bullcoming reinforces our reading of what (at most) the decision clearly establishes as federal law.” Id. at 308.

THE DISTRICT COURT SUBSEQUENTLY DENIED MR. JENKINS HABEAS PETITION "IN LIGHT OF THE... RESOLUTION OF GRIM." 22 RBA. 284. MR. JENKINS APPEALED, AND A THREE-JUDGE PANEL OF THIS COURT AFFIRMED. OP. 12, THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT PANEL STATED THAT IT COULD NOT CONCLUDE "THAT THE MISSISSIPPI SUPREME COURT'S DECISION WAS CONTRARY TO OR AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISH LAW." OP. 12, BECAUSE "AS GRIM OBSERVED, ... THE LAW DOES NOT CLEARLY ESTABLISH WHAT IS REQUIRED OF A TESTIFYING ANALYST WITH A CLOSER CONNECTION TO SUBSTANCE EXAMINATION THAN THE ANALYST HAD IN BULLCOMING," OP. 11. THE PANEL NOTED JUSTICE SOTOMAYOR'S OBSERVATION THAT THE TESTIFYING ANALYST IN BULLCOMING "HAD 'NO INVOLVEMENT WHATSOEVER IN THE RELEVANT TEST AND REPORT,'" AND FOUND "THAT IS NOT THE CONTEXT HERE, NOR WAS IT THE CONTEXT IN GRIM." OP. 9 (CITATION OMITTED). THE PANEL FOUND THAT "GROSS HAD THE SAME RESPONSIBILITIES AS [THE TESTIFYING WITNESS IN GRIM] INCLUDING NOTABLY, ENOUGH FIRST HAND INVOLVE-

ment that he signed the Report," Op. 10.

MR. JENKINS timely filed a petition for rehearing en banc, but that petition was denied on January 30, 2019. Order, attached as Append. A. MR. JENKINS NOW ASKS THIS COURT TO GRANT A WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS.

### REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT THE WRIT BECAUSE THE FIFTH CIRCUIT'S DECISION THAT THE CONFRONTATION CLAUSE MIGHT PERMIT THE STATE TO INTRODUCE ONE SCIENTIST'S OUT-OF-COURT "TESTIMONIAL" REPORT AND STATEMENTS REGARDING A SCIENTIFIC TEST THROUGH THE IN-COURT TESTIMONY OF ANOTHER SCIENTIST OR "SURROGATE WITNESS" SUCH AS A "TECHNICAL REVIEWER WHO[ONLY] REVIEW THE DATA OF A ANALYST TEST AND REPORT.

DESPITE THE APPARENT CLARITY OF THE RULE ESTABLISHED IN CRAWFORD V. WASHINGTON, 541 U.S. 36 (2004), AND APPLIED IN MELLENDEZ-DIAZ V. MASSACHUSETTS, 557 U.S. 305 (2009) AND BULLCOMING V. NEW MEXICO, 564 U.S. 647 (2001).

THE UNITED STATES SUPREME COURT HAS MADE CLEAR THAT THE PROSECUTION'S USE OF ONE EXPERT TO ADMIT THE TESTIMONIAL REPORT OF ANOTHER IMPLICATES A CRIMINAL DEFENDANT'S SIXTH AMENDMENT RIGHT TO CONFRONT HIS ACCUSERS. BULLCOMING V. NEW MEXICO - U.S. —, 131 S. CT. 2705, 2717, 180 L. ED 2D 610 (2011). GROSS, AS A "TECHICAL REVIEWER," WHO NEITHER OBSERVED NOR PARTICIPATED IN THE TESTING PROCESS, WAS INDEED A "SURROGATE WITNESS" FOR SMITH. *Id.* 131 S. CT. AT 2710. THUS, THE ADMISSION OF "SMITH'S" LABORATORY REPORT VIA "GROSS'S" TESTIMONY, WITHOUT A PRIOR OPPORTUNITY TO CROSS-EXAMINE SMITH, VIOLATED JENKINS'S CONSTITUTIONAL RIGHT TO CONFRONTATION, THEREBY IMPAIRING HIS RIGHT TO A FAIR TRIAL.

THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE 3, SECTION 26 OF THE MISSISSIPPI CONSTITUTION GUARANTEE A CRIMINAL DEFENDANT THE RIGHT TO CONFRONT AND CROSS-EXAMINE THE WITNESSES AGAINST HIM. BEFORE 2004, THE UNITED STATES SUPREME COURT HAD INTERPRETED THE FEDERAL CONFRONTATION CLAUSE

to allow admission of absent witnesses testimonial statements base on a judicial determination of reliability. Ohio v. Roberts, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980). However, in Crawford v. Washington, 541 U.S. 36, 61, 124 S. Ct. 1354, 158 L. Ed 2d 179 (2004), the justices held that "indicia of reliability" was not constitutionally sufficient, declaring that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." Id. 541 U.S. at 69, 124 S. Ct. 1354. Therefore, without exception, the Sixth Amendment's confrontation clause bars the admission of "testimonial" statements by a witness who did not appear at trial unless the witness is unavailable and the defendant has had a prior opportunity to cross-examine that witness Id. at 61, 124 S. Ct 1354.

Forensic laboratory reports created specifically to serve as evidence against the accused at trial belong to the "core class of testimonial statements" governed by

THE CONFRONTATION CLAUSE. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 2532, 174 L. Ed. 2d 314 (2009). THEREFORE, THE AUTHORS OF FORENSIC REPORTS SPONSORED BY THE PROSECUTION MUST BE MADE AVAILABLE FOR CONFRONTATION PURPOSES EVEN IF THEY POSSESS "THE SCIENTIFIC ACUMEN OF MME. CURIE AND THE VERACITY OF MOTHER TERESA." *Id.* AT 2537 N. 6.

IN Bullcoming 131 S. Ct. AT 2710, THE SUPREME COURT CLARIFIED THAT, WHEN A FORENSIC REPORT IS ADMITTED INTO EVIDENCE, "SURROGATE TESTIMONY" BY A SCIENTIST WHO NEITHER CONDUCTED NOR OVERSAW THE TESTING PROCESS IS INSUFFICIENT TO PASS SIXTH AMENDMENT SCRUTINY. AT Bullcoming's AGGRAVATED DUI TRIAL, THE PROSECUTOR CALLED A SUBSTITUTE ANALYST FROM THE CRIME LABORATORY TO VALIDATE THE FORENSIC REPORT PREPARED BY THE TECHNICIAN WHO HAD TESTED BULLCOMING'S BLOOD. *Id.* AT 2711-12. UNSWAYED BY THE SURROGATE WITNESS'S FAMILIARITY WITH THE LABORATORY'S PROCEDURES AND EXPERIENCE \*1071 WITH THE TESTING EQUIPMENT, THE SUPREME COURT HELD THE REPORT INADMISSIBLE, STRESSING THAT A DEFENDANT'S RIGHT TO CONFRONTATION CANNOT BE SWEEPED ASIDE BY A COURT'S BELIEF "THAT

QUESTIONING ONE WITNESS ABOUT ANOTHER'S TESTIMONIAL STATEMENTS PROVIDES A "FAIR ENOUGH" OPPORTUNITY FOR CROSS-EXAMINATION," *Id.* AT 2716 (EMPHASIS ADDED). THE OPINION REITERATED THAT "[T]HE TEXT OF THE SIXTH AMENDMENT DOES NOT SUGGEST ANY OPEN-ENDED EXCEPTIONS FROM THE CONFRONTATION REQUIREMENT TO BE DEVELOPED BY THE COURTS," *Id.* AT 2716 (QUOTING CRAWFORD, 541 U.S. AT 54, 124 S. CT. 1354).

THE MAJORITY HOLDS THAT JENKINS'S RIGHT TO CONFRONTATION WAS FULFILLED THROUGH THE CROSS-EXAMINATION OF GROSS. BUT LIKE THE SURROGATE WITNESS IN BULLCOMING, 131 S. CT. AT 2716, WHO DID NOT "PERFORM OR OBSERVE THE TEST REPORTED IN THAT CERTIFICATION." GROSS DID NOT OBSERVE SMITH CONDUCTING HER ANALYSIS, AND WAS THEREFORE UNABLE TO PROVIDE THE CALIBRE OF CONFRONTATION REQUIRED BY THE SIXTH AMENDMENT. SPECIFICALLY, GROSS COULD NOT TESTIFY WHETHER SMITH FOLLOWED PROPER PROTOCOL, NOR COULD HIS CROSS-EXAMINATION "EXPOSE ANY LAPSES OR LIES" ON SMITH'S PART, *Id.* AT 2715. ALSO SEE TRANSCRIPT OF CROSS-EXAMINATION ON GROSS PG. 63-20-23 GROSS DID YOU PARTICIPATE IN THIS TESTING AT ALL? GROSS [NO], I DID NOT. DID SHE (SMITH) WRITE A REPORT ON HER CONCLUSIONS? GROSS, NO.

Also pg. 63-26-29, (DEFENSE) question, so "THREE DAYS AFTER THE TEST WAS PERFORMED" WAS THE FIRST TIME THAT YOU LOOKED AT THE TEST RESULTS; IS THAT CORRECT? THAT WOULD SEEM ABOUT, (GROSS) I THINK THE DATE PG. 64-2-3. (DEFENSE) I HAVE 4/27, (GROSS) 4/27 THAT WOULD BE CORRECT THEN REGARDING MISS CRIME LAB REPORT. PG. 64, 4-5. (DEFENSE) question, OKAY AND SO YOU HAD NO PERSONAL INVOLVEMENT IN THE TEST? (GROSS) [No] I did not. REPRODUCE IN TRIAL TRANSCRIPT APPENDIX-H

ALTHOUGH HE TESTIFIED AT LENGTH ABOUT WHAT SMITH "WOULD HAVE" DONE, SUCH AS "VISUALLY EXAMIN[ING] THE EXHIBIT, OBTAIN[ING] THE WEIGHT OF THE EXHIBIT, OBTAIN[ING] THE SAMPLE OF THE EXHIBIT, AND THEN SUBJECT[ING] THAT SAMPLE TO THE EXAMINATIONS," GROSS HAD NO PERSONAL KNOWLEDGE WHETHER SMITH ACTUALLY DID THESE THINGS, AND HE DID NONE OF THESE THINGS HIMSELF. NOTABLY, THE CRIME FOR WHICH JENKINS WAS CONVICTED COULD HAVE BEEN CHARGED AS A MISDEMEANOR DEPENDING ON THE WEIGHT OF THE SUBSTANCE, THUS ~~FORECLOSING~~ JENKINS LIFE SENTENCE AS AN HABITUAL OFFENDER. MISS. CODE ANN. 41-29-139(C)(1)(A) (REV. 2009) (POSSESSION OF LESS THAN ONE-TENTH OF A GRAM MAY BE CHARGED AS A MISDEMEANOR OR FELONY). THE STATE'S PROOF OF THIS ESSENTIAL

ELEMENT WAS BEFORE THE JURY IN SMITH'S LABORATORY REPORT, BUT GROSS TESTIFIED, "I DIDN'T ACTUALLY WEIGH THAT THAT PARTICULAR SAMPLE."

THE MAJORITY RELIES ON Mc GOWEN V. STATE, 859 SO. 2D 320 (MISS. 2003), AND BULLCOMING, -U.S. 131 S. CT. 2705, 180 L. ED. 2D 610, TO APPROVE THE ADMISSION OF LABORATORY REPORTS "ON WHICH [OTHER WITNESSES] BASED THEIR OWN CONCLUSIONS" MAJ. OP. 18. HOWEVER, NEITHER CASE ADDRESSED OR "SETTLED" THIS EXACT ISSUE. MAJ. OP. 18.

Mc GOWEN, 859 SO. 2D AT 326, 338-40, DID NOT SAY THAT THE TESTIFYING WITNESS HAD RELIED ON THE REPORT TO FORM HER OWN, INDEPENDENT, EXPERT OPINION, OR THAT THE REPORT ITSELF HAD BEEN ADMITTED INTO EVIDENCE. IN BULLCOMING, 131 S. CT. AT 2722, JUSTICE SOTOMAYOR EXPLICITLY AND CORRECTLY NOTED THAT THE SUPREME COURT HAD NOT YET ADDRESSED WHETHER, IN AN INDEPENDENT OPINION, AN EXPERT WITNESS COULD TESTIFY ABOUT

THE LABORATORY REPORT AT ISSUE IN THIS CASE WAS NOT MERELY RELIED UPON BY GROSS TO FORM THE BASIS OF HIS OPINION. SMITH'S REPORT LISTED "ROBERT LEE JENKINS" AS THE "SUSPECT" AND CONCLUDED THAT

THE SUBSTANCE RECEIVED FROM THE BILOXI POLICE DEPARTMENT WAS "COCAINE, AMOUNT: 0.1 GRAM." THIS DOCUMENT, AS WERE THOSE ADMITTED AGAINST THE DEFENDANTS IN MELLENDEZ-DIAZ AND BULLCOMING, WAS RECEIVED INTO EVIDENCE, AND WAS "INCRIMINATING ON ITS FACE," THEREBY REQUIRING ITS AUTHOR TO BE PRESENT FOR CONFRONTATION PURPOSES AS IS CONSTITUTIONALLY MANDATED BY THE SIXTH AMENDMENT.<sup>4</sup> BECAUSE THE REPORT UNQUESTIONABLY BECAME TESTIMONIAL WHEN THE PROSECUTION ELECTED TO ADMIT IT INTO EVIDENCE, \*1072 SMITH, NOT GROSS, BECAME THE WITNESS WHOM JENKINS HAD A RIGHT TO CONFRONT, SEE BULLCOMING, 131 S. CT. AT 2718 ("[W]HEN THE STATE ELECTED TO INTRODUCE CAYLOR'S CERTIFICATION, CAYLOR BECAME A WITNESS BULLCOMING HAD A RIGHT TO CONFRONT. "OUR PRECEDENT CANNOT SENSIBLY BE READ ANY OTHER WAY." (EMPHASIS ADDED)).

THE MAJORITY REFERS TO SMITH AS THE "PRIMARY ANALYST" AND NOTES THAT "SOME TESTS INVOLVE MULTIPLE ANALYSTS."<sup>5</sup> BUT THE DRUG TESTING IN THIS CASE WAS PERFORMED BY ONE PERSON, AND THE REPORT WAS AUTHORED BY THAT SAME PERSON. OTHER FORENSIC TESTING, SUCH AS DNA ANALYSIS, IS MUCH MORE COMPLEX, AND COULD INVOLVE A "PRIMARY ANALYST."

SEE, GRAY V. STATE, 728 So. 2d, 36, 56-57 (Miss. 1998) (NOTING THAT, UNDER RULE 703 OF THE MISSISSIPPI RULES OF EVIDENCE, "THE OPINION OF THE NONTESTIFYING EXPERT WOULD SERVE SIMPLY AS A PREMISE SUPPORTING THE TESTIFYING EXPERT'S OPINION ON A BROADER ISSUE"). IN THOSE CASES, THE UNDERLYING REPORT MAY NOT BE "TESTIMONIAL" FOR CONFRONTATION CLAUSE PURPOSES. SEE, WILLIAM V. ILLINOIS, - U.S., 132 S. CT. 2221, 183 L. Ed. 2d 89 (2012).

I ALSO NOT THAT MCGOWEN WAS DECIDED BEFORE THE UNITED STATES SUPREME COURT SIGNIFICANTLY CHANGED ITS APPROACH TO THE CONFRONTATION CLAUSE, SEE, CRAWFORD, 541 U.S. 36, 124 S. CT 1354, 158 L. Ed. 2d 177, "OVERRULING" OHIO V. ROBERTS, 448 U.S. 56, 100 S. CT. 2531, 65 L. Ed 2d 597. BEFORE BULLCOMING, JUSTICE KENNDY OBSERVED THAT MCGOWEN MIGHT NOT WITHSTAND A POST-CRAWFORD ANALYSIS:

A fifth state, Mississippi, EXCUSES THE PROSECUTION FROM PRODUCING THE ANALYST WHO CONDUCTED THE TEST, SO LONG AS IT PRODUCES SOMEONE

COMPARE BARNETTE V. STATE, 481

So. 2d 788, 792 (Miss. 1985) (cited) by the COURT), with Mc GOWEN v. STATE, 859 So. 2d 320, 339-40 (Miss. 2003) (the Sixth Amendment does not require confrontation with the particular analyst who conducted the test). It is possible that neither Mississippi's practice nor the burden-shifting statutes [of other states] can be reconciled with the Court's holding.

MELLENDEZ-DÍAZ, 129 S. Ct. at 2558 (KENNEDY, J., dissenting). Despite the majority's protests to the contrary, Justice Kennedy was correct in suggesting the Mc GOWEN was not entirely consistent with this Court's holding in BARNETTE v. STATE, 481 So. 2d 788, 791 (Miss. 1985), "that it was reversible error to admit, over the objection of [the defendant], the certificate of the analysis into evidence without the testimony of 'the analyst who prepared such.'" (Emphasis added.) See also, KETTLE v. STATE 641 So.

2d 746, 750 (Miss. 1994) ("WE hold that when someone other than "the person who conducted the laboratory test" attempts to testify in a cocaine possession or sale case over the objection of the defense that in doing so his Sixth Amendment right to confrontation is violated." (emphasis added)). In distinguishing BARNETTE and KETTLE, McGOWEN relied on Adams v. State, 794 So. 2d 1049, 1057-58 (Miss. Ct. App. 2001); but, even in Adams, 794 So. 2d at 1057, the testifying witness was a laboratory supervisor who had "supervised, witnessed, and checked the tests performed by his technician."

Finally, the majority notes that Smith's absence from trial was an unfortunate fact of life, but finds that there was "a constitutionally recognized alternative" for \*1073 submitting her testimonial statements Maj. Op. 19. There was no such alternative. The application of the Confrontation Clause to forensic evidence is "unbending" and it "may not be disregarded at our convenience." Bullcoming, 131 S. Ct. at 2717-18.

The state "could have avoided any confrontation

CLAUSE problem by asking [GROSS] to retest the sample, and then testify to the results of his retest rather than to the results of a test he did not conduct or observe." *Id.* At 2718. The substance seized from Jenkins was not destroyed by Smith's testing, and the state, as the party bearing the burden of proof, easily could have requested a retest by an analyst available for cross-examination.

Jenkins's cross-examination of Gross was not equivalent to a cross-examination of Smith, and the admission of Smith's report denied Jenkins his Sixth Amendment right to confront a witness against him. See also, Miss. Const. Art. 3, § 26 ("[I]n all criminal prosecutions the accused shall have a right... to be confronted by the witnesses against him"). For this reason, the judgment of conviction should be reversed. (Kitchens, Justice, dissenting) with Dickinson, P.J., Chandler and King, J.J., join this opinion. *Jenkins v. State*, 102 So. 3d 1063 (2012).

Jenkins was never given the opportunity to test the reliability of Smith's testimonial statements "in the crucible of cross-examination." Crawford, 541 U.S. at 61.

GIVEN THE CLEAR RULE ESTABLISHED IN THE SUPREME COURT OF THE UNITED STATES 2004 DECISION IN CRAWFORD V. WASHINGTON, 541 U.S. 36 (2004), AND APPLIED IN THE MELLENDEZ-DIAZ V. MASSACHUSETTS 557 U.S. 305 (2009), ALSO BULLCOMING V. NEW MEXICO, 564 U.S. 647 (2011).

THE EN BANC PANEL DECISION IN JENKINS WAS RULED ON ACCORDING TO THE DECISION IN THE PANEL'S REGARDING GRIM V. FISHER, 816 F.3d 296 (5th Cir. 2016). FOR THE SAME REASONS, THE MISSISSIPPI SUPREME COURT'S DECISION MR. JENKINS'S CASE WAS CONTRARY TO CLEARLY ESTABLISHED LAW, AND HE IS ENTITLED TO A WRIT OF CERTIORARI.

GROSS ADMITTED HE "NEVER OBSERVED NOR PARTICIPATED IN THE TESTING PROCESS," MAKING HIM A "SURROGATE WITNESS" FOR SMITH THE ANALYST. WHEN SMITH'S OUT-OF-COURT TESTIMONIAL STATEMENTS WERE INTRODUCED FOR THE TRUTH OF THE MATTER ASSERTED, SMITH "BECAME A WITNESS [MR. JENKINS] HAD A RIGHT TO CONFRONT." BULLCOMING, 564 U.S. AT 662.

CONCLUSION

*FOR THE FOREGOING REASONS,*

The petition for a writ of certiorari should be granted.

Respectfully submitted,

*Robert Jenkins*

Date: *April 18, 2019*