No. _____

IN THE

Supreme Court of the United States

TERRY ANTONIO SMITH,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

PETITION FOR A WRIT OF CERTIORARI

THIS IS A CAPITAL CASE

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CAPITAL CASE

QUESTIONS PRESENTED

1. Does Florida's practice of allowing a medical examiner to testify to an autopsy he/she did not perform violate the Confrontation Clause when the medical examiner bases his opinion on observations of the absent medical examiner?

2. Does Florida's practice of allowing a medical examiner to testify to an autopsy he/she did not conduct violate the Confrontation Clause when the medical examiner introduces statements from the autopsy report which was not admitted into evidence?

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PARTIES TO THE PROCEEDINGS

Petitioner, **TERRY ANTONIO SMITH**, a death-sentenced Florida prisoner, was the appellant in the Florida Supreme Court. Respondent, the State of Florida, was the appellee below. Petitioner respectfully urges that this Honorable Court issue its writ of certiorari to review the judgment and decision of the Florida Supreme Court. *Smith v. State*, 330 So. 3d 867 (Fla. 2021).

CITATION TO OPINION AND RECORD BELOW

The decision of the Florida Supreme Court is reported at *Smith v. State*, 330 So. 3d 867 (Fla. 2021), and is attached to this petition as Appendix A. Petitioner's

Motion for rehearing was denied on December 10, 2021, and is attached to this petition as Appendix B.

The abbreviation "T." followed by the volume and page numbers will be used to refer to Petitioner's trial and "R." followed by the volume number and page number will be used to refer to the record on appeal for his direct appeal reported at *Smith v. State*, 139 So. 3d 839 (Fla. 2014). For example, T. 6: 318 would refer to Volume 6, page 318 of Petitioner's trial transcript. The abbreviation "PCR." followed by the volume and page numbers will be used to refer to the record on his postconviction appeal.

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for Writ of Certiorari to the Florida Supreme Court on the basis of 28 U.S.C. § 1257. The Florida Supreme Court issued an opinion denying relief on October 21, 2021, and denied rehearing on December 10, 2021.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment provides, in relevant part:

> No persons . . . shall . . . be deprived of life, liberty, or property, without due process of law.

The Sixth Amendment provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him.

The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment provides, in relevant part:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . .

PROCEDURAL HISTORY

Petitioner, Terry Smith, was indicted on three counts of first-degree murder on May 21, 2009. His trial began approximately twenty-one months later on February 28, 2011. (T. 10: 4.) The jury found him guilty on each count. (R. 4: 736-42.) The penalty phase was held on March 11, 2011. (T. 19: 1554-1706.) The same day, the jury rendered an advisory verdict, recommending death by a vote of 8 to 4 on Count I for the death of Berthum Gibson, recommending life without the possibility of parole on Count II for the death of Desmond Robinson, and recommending the death penalty by a vote of 10 to 2 on Count III for the death of Kennethia Keenan. Following a hearing held pursuant to *Spencer v. State*, 615 So. 2d 688, 690-91 (Fla. 1993) on April 15, 2011, the trial court sentenced Smith to death on counts I and III on May 12, 2011.

Petitioner appealed his conviction and sentence on direct appeal to the Florida Supreme Court. The following issues were raised on direct appeal: (1) the evidence was insufficient to support his convictions for the premeditated murder for the deaths of Berthum Gibson and Kennethia Keenan; (2) the trial court erred in giving additional weight to the felony murder circumstance on the basis that the murders were premeditated; (3) Smith's sentence is disproportionate; and (4) Florida's capital sentencing scheme is unconstitutional under *Ring v. Arizona,* 436 U.S. 534 (2002). As to Issue 1, the Florida Supreme Court found that Smith did not preserve the claim

for appellate review, but nonetheless there was sufficient evidence to support his convictions. As to Issue 2, the Court found that the amount of weight given to an aggravator is within the court's discretion. In addressing Issue 3 the Court found that Smith had not demonstrated that the trial court erred in weighing the mitigation and given the scant mitigation the sentence was proportional when weighed against the aggravators. As to Issue 4 the Court cited to its precedent in repeatedly holding that *Ring* is satisfied when the defendant has previously been convicted of a violent felony based on a contemporaneous murder. This Court denied certiorari review on December 1st, 2014. *Smith v. Fla.*, 135 S. Ct. 711 (2014).

On November 20, 2015, Petitioner filed a motion for postconviction relief under Fla. R. Crim. P. 3.851. (PCR. 265-462). The motion was amended four times prior to the evidentiary hearing: (1) January 25, 2017 (PCR. 606-624); (2) July 27, 2017 (PCR. 1:680-736); (3) November 22, 2017 (PCR. 790-803). An evidentiary hearing was held on Petitioner's guilt phase claims on December 5, 6, and 7, 2017. On September 20, 2018, the court denied relief on all guilt-phase claims but granted Petitioner a new penalty phase pursuant to *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). (PCR. 1790-1870).

Petitioner appealed the lower court's ruling to the Florida Supreme Court. Simultaneously, Petitioner filed a state court petition for writ of habeas corpus. The Florida Supreme Court affirmed the denial of Petitioner's postconviction motion. *Smith v. State*, 330 So. 3d 867 (Fla. 2021). The court denied rehearing on December 10, 2021.

Prior to issuing the opinion in this case, the Florida Supreme Court decided *Poole v. State*, 297 So. 3d 487 (Fla. 2020), "reced[ing] from *Hurst v. State* except to the extent it requires a jury unanimously to find the existence of a statutory aggravating circumstance beyond a reasonable doubt." *Id.* at 507.

On March 5, 2020, the State filed a Motion to Permit Cross Appeal and Supplemental Briefing in light of *Poole*. Petitioner filed a motion to strike on March 12, 2020. On April 1, 2020, the Florida Supreme Court issued a stay pending the disposition in *State v. Jackson*, 306 So. 3d 936 (Fla. 2020), and *State v. Okafor* 306 So. 3d 930 (Fla. 2020). *Okafor* and *Jackson* were decided on November 25, 2020. Subsequently, on February 16, 2021 the Florida Supreme Court denied the State's Motion to Permit Cross Appeal and Supplemental Briefing. The Florida Supreme Court denied any relief as to the guilt phase issues or the petition for writ of habeas corpus on October 21, 2021 and the motion for rehearing was denied December 10, 2021.

FACTS RELEVANT TO QUESTIONS PRESENTED

I. THE TRIAL

Petitioner, Terry Smith, was charged with armed robbery and three counts of premeditated murder. The State presented testimony from Breon Williams that he took Terry Smith to Desmond Robinson's house to buy drugs to re-sell. (T. 13: 627). Williams testified that he was counting out his money when he heard Smith say "Give it up" and then he heard gunshots. (T. 13:638-39). Williams saw Smith shooting at Desmond Robinson and he fled. (T. 13: 639-641). Williams never saw

what happened to Berthum Gibson or Kennethia Keenan, the other two victims in the case. (T. 13: 641-42). The State presented Ulysses Johnson who testified that Smith called him for a ride, and when they picked up Smith he allegedly said "he didn't know what he was doing.... Man, I think I just shot three people." (T. 14: 850-54). Jonathan Peterson, one of the people who rode with Ulysses Johnson to pick up Smith, identified Smith's weapon as a 10 mm gun. (T. 14: 903). Peterson stated "I know what type of gun it was because I seen [sic] Terry with it prior to the incident." (T. 14: 903).

A. The Substitute Medical Examiner's Testimony

Dr. Giles conducted the autopsy on victim Desmond Robinson and testified as to Robinson's injuries and cause of death. (T. 14: 823). He also testified as to the autopsy findings of Kennethia Keenan, which was performed by Dr. Margarita Arruza and the autopsy findings of Berthum Gibson, which was performed by Dr. Nicolaescu. (T. 14: 836). Dr. Giles gave an opinion that Keenan was not killed with a high velocity rifle, and he based that on her internal injuries despite the fact that Dr. Arruza had not taken photographs or X-rays of Keenan's internal injuries from which he could make that independent finding. (T. 14: 838) He also listed the injuries of Berthum Gibson and opined that Gibson would have been "bleeding slowly internally so he would have been able to carry on quite a bit longer than the others." (T. 14: 842).

B. Ballistics Testimony

The State called Detective Kicklighter to describe the scene of the crime and introduce photographs from the scene. (T. 13: 768). Det. Kicklighter testified that when she arrived victim Berthum Gibson had already been transported to the hospital. (T. 13: 775). Kicklighter testified that eleven 10 mm casings were recovered from the kitchen and living room area. (T. 13: 790-97). There were no 10 mm casings recovered from the bedroom where Keenan and Gibson were found, nor were there any 10 mm casings in the hallway leading to that bedroom. (T. 13: 797). Kicklighter testified that only casings for an AK-47 were found in the bedroom with the victims. (T. 13: 786). She also identified the AK-47 rifle that had been found at the scene and affirmed other officers' testimony that the AK-47 was taken from Gibson's hand where he was found in the bedroom. (T. 13: 789).

C. The State's Closing

In closing, the State recounted Dr. Giles' testimony as the surrogate medical examiner, and argued that Petitioner shot Gibson once and caused the internal injuries that led to Gibson bleeding to death. (T. 17: 1372). The State focused on that, and stated "he bled out a slow death." (T. 14: 1446). The prosecutor further argued that Dr. Giles had testified that all three of the victims' injuries were consistent with being from a 10 mm gun. (T. 17: 1374). "That's how you know that all three of these people were killed by the same person. While there was evidence of other gunfire in that home, Berthum Gibson trying to defend himself, none of the people were hit by his gun." (T. 17: 1374).

D. The Verdict

The jury found Smith guilty of the first-degree murder of Berthum Gibson and voted for the death penalty by a vote of 8 to 4. (T. 5: 878). The jury found Smith guilty of the first-degree murder of Desmond Robinson and voted for life imprisonment. (T. 5: 879). The jury found Smith guilty of the first-degree murder of Kennethia Keenan and voted for the death penalty by a vote of 10 to 2. (T. 5: 880).

III. THE POST-CONVICTION EVIDENTIARY HEARING

A. Trial Counsel

One ineffective assistance of counsel claim filed by Smith in his motion for postconviction relief was the failure of trial counsel to object on confrontation clause grounds to the testimony of substitute medical examiner Dr. Giles to the autopsy findings of two other medical examiners who were not called to testify at trial. At the evidentiary hearing in Smith's postconviction motion, trial counsel recalled there being three different medical examiners who performed the autopsies on the three victims. (PCR. 2400). He did not think he could have raised a confrontation clause objection as "when you have experts testifying about other experts' work it's not that unusual." (PCR. 2402). He acknowledged being familiar with *Melendez-Diaz v. Massachusetts*, 557 U. S. 305 (2009), and having used it in other cases. (PCR. 2403).

Trial counsel took no issue with Dr. Giles' testimony that all three victims were killed with a 10 mm gun. (PCR. 2403). Counsel thought this was consistent with his own assessment of the ballistics and said he never hired any ballistics expert, but relied on his investigator "a gun person" and his co-counsel to inform him about the evidence. (PCR. 2405). His investigator, however, testified that he did not have any

special firearms training, and never discussed the ballistics in this case with counsel. (PCR. 2428-30). Co-counsel also denied being an expert on firearms or crime scenes. (PCR. 2726)

B. Dr. Kathryn Pinneri

During the postconviction evidentiary hearing forensic pathologist Kathryn Pinneri was called to the stand by Smith. She opined that Keenan's documented wounds were consistent with being shot with an AK-47 rifle and that one would need to see a picture of the internal damage to make that determination with any certainty. (PCR. 2567). Dr. Pinneri testified that there were no X-ray scans or internal photographs taken of Keenan's wounds. (PCR. 2563, 2567). Dr. Pinneri testified that it is standard practice to take X-rays and photographs as stated in the practice guidelines of the National Association of Medical Examiners. (PCR. 2552). X-rays can help show if there are any retained bullet fragments. (PCR. 2553). They can also help determine what kind of ammunition was used as a pattern of the bullet trail can be identified in the X-ray. (PCR. 2553).

C. Chris Robinson

Chris Robinson, a ballistics and crime scene expert, testified for the defense at the postconviction evidentiary hearing about the bullet strikes on the walls of the house, the location of the casings, and the victims' locations. (PCR. 2583, 2592-97). He testified that based on the location where Keenan's body was found, and the lack of 10 mm bullet strike marks on the bedroom or hallway walls, she could not have been shot from the end of the hallway. (PCR. 2620). He opined that Gibson was shooting

the AK-47 when he himself was shot, and turned towards Keenan as he fell, shooting her in the chest. (PCR. 2622-2625).

FLORIDA SUPREME COURT'S RULINGS

I. As to the claim that Dr. Giles' testimony violated the Confrontation Clause because he offered testimony related to two autopsies he did not conduct, the Florida Supreme Court ruled that a medical expert may offer an opinion based on an autopsy conducted by a non-testifying expert without violating the Confrontation Clause. *Smith v. State*, 330 So. 3d 867, 884 (Fla. 2021). The court cited to three opinions of their own that allowed for a substitute medical examiner to testify to their opinion as to cause of death after reviewing the original medical examiner's reports and photographs.[1] The court found that Dr. Giles testified as to his own opinion after reviewing "technical facts" and photographs prepared by the absent medical examiners. *Id.* It noted that the autopsy reports were not admitted into evidence. *Id.* The court held that trial counsel was not ineffective as an objection based on the confrontation clause would have been "futile." *Id.* As to the claim that the photographs used by Dr. Giles violated the Confrontation Clause, the court found

[1] The court cited to two cases, Capehart v. State, 583 So.2d 1009, 1013-14 (Fla. 1991) and Geralds v. State, 674 So.2d 96, 100 (Fla. 1996) as authority for a substitute medical examiner's ability to testify to autopsies conducted by other medical examiners. Both of those cases predated this Court's decisions in Crawford, Melendez-Diaz and Bullcoming v. New Mexico, 564 U.S. 647 (2011). The court then used its Capehart and Geralds decisions as precedent to approve the use of a substitute medical examiner in Brooks v. State, 175 So.3d 204, 237 (Fla. 2015). This Court's Confrontation Clause jurisprudence was ignored.

that the claim was not properly developed. There was no discussion of waiver and there was no harmless error analysis. *Id.*

In the Motion for Rehearing Petitioner argued that at the time of trial in 2011 counsel could have made a reasonable argument utilizing *Crawford v. Washington*, 531 U. S. 36 (2004), and *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) as all of the Florida cases that dealt with the issue pre-dated *Crawford.* The Motion for rehearing was denied without an opinion. *Smith v. State,* No. SC18-1763 (Dec. 10, 2021).

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD REVIEW FLORIDA'S POLICY OF ALLOWING A SUBSTITUTE MEDICAL EXAMINER TO TESTIFY ABOUT AUTOPSIES THAT HE OR SHE DID NOT CONDUCT

A. Introduction

Florida's interpretation of the application of the Confrontation Clause does not conform with this Court's jurisprudence and is at odds with other states and federal circuits in violation of the Sixth Amendment to the United States Constitution.

In 2004, in *Crawford v. Washington, supra,* this Court held that a defendant must be allowed to confront his accuser "face to face" to satisfy the requirements of the Confrontation Clause found in the Sixth Amendment to the United States Constitution. *Id.* at 57. In *Crawford,* prosecutors offered the out-of-court statements of Crawford's wife, Sylvia Crawford, made to law enforcement officers in lieu of calling her as a witness at Crawford's trial for stabbing a man Crawford accused of trying to rape his wife. *Id.* at 38. Under Washington law, the marital privilege prevented the

state from calling Crawford's wife as a witness against him without his consent. *Id.* Instead, prosecutors offered her out-of-court statements in as admissions against her penal interests as she had taken Crawford to the victim's home and "facilitated" the attack. *Id.* at 40. This Court found that the use of Silvia Crawford's out-of-court statements to law enforcement against Crawford were akin to the use of affidavits that offended the Confrontation Clause. *Id.* at 51-55. This Court abrogated the long-standing "reliability" test set forth in *Ohio v. Roberts*, 448 U.S. 56 (1980) that permitted the use of firmly rooted hearsay exceptions that had "adequate indicia of reliability" and held that out-of-court testimonial statements against the accused are barred at trial under the Confrontation Clause unless the witness is unavailable and the defendant had a prior opportunity to cross-examine that witness. *Id.* at 40, 68. This Court found that the statements made by Sylvia Crawford to law enforcement officers were testimonial in nature because they were taken while she was in police custody for her own conduct and was told her release would be based upon how she answered their questions. *Id.* at 40, 51-52, 65-66.

In *Melendez-Diaz v. Massachusetts*, *supra*, this Court applied its holding in *Crawford* to the admission of certificates from crime laboratory analysts attesting to controlled substance test results at trial in lieu of calling the analyst at trial. This Court found that the certificates were testimonial statements as they were "quite plainly affidavits" that were "functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination." *Id.* at 310-11. Notably, this Court was concerned about the reliability of forensic testing, and stated:

> Nor is it evident that what respondent calls "neutral scientific testing" is as neutral or as reliable as respondent suggests. Forensic evidence is not uniquely immune from the risk of manipulation. According to a recent study conducted under the auspices of the National Academy of Sciences, "[t]he majority of [laboratories producing forensic evidence] are administered by law enforcement agencies, such as police departments, where the laboratory administrator reports to the head of the agency.

Id. at 318.

This Court held that use of the certificates without a showing that the witness was unavailable and that the defendant had a prior opportunity to cross-examine the witness violated the Confrontation Clause. *Id.* at 311. The State's arguments that the certificates fell within hearsay exceptions for business records was unavailing if "the regularly conducted business activity is the production of evidence for use at trial." *Id.* at 321.

This Court extended the *Crawford* and *Melendez-Diaz* rulings in 2011 in *Bullcoming v. New Mexico*, 564 U.S. 647, 662-68 (2011), in holding that the introduction into evidence of blood alcohol test results at trial by the prosecution through a substitute analyst violated the Confrontation Clause.

This Court has not addressed the specific issue here of whether the State must present the testimony of the medical examiner who conducted the autopsy at trial, but the Court's rulings in *Crawford*, *Melendez-Diaz* and *Bullcoming* dictate that outcome and several of the Circuit Courts have followed *Crawford* and its progeny in requiring the medical examiner who conducted the autopsy to testify to his or her findings.

In *United States v. Ignasiak*, 667 F.3d 1217, 1229-35 (11th Cir. 2012), the Eleventh Circuit, in a case out of the Northern District of Florida, applied the reasoning of *Crawford, Melendez-Diaz,* and *Bullcoming*, and found a violation of the Confrontation Clause for the admission of five autopsy reports through a surrogate medical examiner who had not conducted the autopsy, participated in them, or written the reports.

The court cited extensively to this Court's rulings in *Crawford* and *Bullcoming*, and quoted *Melendez-Diaz* as follows:

> Forensic reports constitute testimonial evidence. . . . As a result, and because scientific evidence is no more neutral or reliable than other testimonial evidence, confrontation serves to its accuracy by 'weeding out not only the fraudulent analyst, but the incompetent one as well.

Id. at 1230, quoting *Melendez-Diaz* at .

The court noted that the reports were generated for use at trial under Florida's medical examiner laws. It cited to Fla. Stat §406.02 that created the Florida Medical Examiners Commission within the control of the Florida Department of Law Enforcement. *Id.* at 1231. Finally, it cited to statutory language that required the medical examiner for each district "shall determine the cause of death" and "shall, for that purpose, make or have performed such examinations, investigations, and autopsies as he or she shall deem necessary or as shall be requested by the state attorney." *Id.* at 1231-32, quoting Fla. Stat. §§406.02 and 406.11. Those statutes were in effect at all material times in Smith's prosecution.

More recently, in *Garlick v. Lee*, 1 F.4th 122, (2nd Cir. 2021), *cert. denied*, 142 S.Ct. 1189 (U.S. Feb. 22, 2022), in a federal habeas corpus proceeding, the Second

Circuit held that admission of an autopsy report at the defendant's trial in New York state court violated the Confrontation Clause and was contrary to clearly established federal law. At trial, the autopsy report written by the doctor who conducted the autopsy was introduced through a surrogate medical examiner. *Id.* at 125-26.

The Florida Supreme Court ignored this Court's Confrontation Clause jurisprudence and affirmed the denial of Smith's ineffective assistance of counsel claims for trial counsel's failure to lodge a Confrontation Clause objection to a substitute or surrogate medical examiner's opinions based upon other medical examiner's findings and opinions with no showing of the unavailability of the two medical examiners who did not appear or that Smith had had the opportunity to cross-examine them.

The Florida Supreme Court affirmed the circuit court's denial of Smith's postconviction claim for failing to challenge the surrogate medical examiner's testimony about two autopsies he did not conduct using cases that predated *Crawford, Melendez-Diaz* and *Bullcoming*. The court reasoned that Dr. Giles reached independent opinions based upon his review of the reports and data generated by the absent medical examiners. *Smith* at 885. That reasoning overlooked at least two ways in which this practice can violate the Confrontation Clause: (1) When experts explain how they formed their opinion, they may cite the underlying data, generated by others, on which that opinion is based. In that instance, testimonial evidence (the data), that the defendant has no opportunity to cross-examine, is put before the jury; and (2) When experts do not cite to the underlying data, their opinion itself offends

the Confrontation Clause as that opinion "cannot truly be regarded as independent in a way that is meaningful under *Melendez-Diaz* and *Bullcoming*." *Ignasiak* at 1234.

The opinion in *Smith* emphasized the examiner's reliance on photographs and "technical facts." *Smith v. State*, 330 So. 3d 867, 884 (Fla. 2021). However, Dr. Arruza took no photographs or X-rays of internal injuries and all "facts" were based upon her subjective observations. The technical facts and observations testified to by Dr. Giles were derived from Dr. Arruza's report, subject to the same dangers and concerns this Court spoke of in *Crawford*, *Melendez-Diaz* and *Bullcoming*. The testimony by Dr. Giles was testimonial hearsay offered for its truth. As noted in *Ignasiak, supra*, the autopsies and reports were required by Fla. Stat. §§ 406.02 and 406.11.

The other Florida cases that the Florida Supreme Court relied upon predated *Crawford*, *Melendez-Diaz* and *Bullcoming* and assumed that a substitute medical examiner had examined objective photographs in forming their opinion. Other jurisdictions that uphold allowing a substitute medical examiner to testify to an independent opinion reference the objective materials that the substitute has reviewed. *See People v. Gonzales*, 34 Cal. App. 5th 1081 (2019); *People v. Merritt*, 411 P.3d 102, 2014; *Naji v. State*, 797 S.E. 2d 916 (2017); *State v. Bass*, 224 N.J. 285 (2016); *Christian v. State*, 207 So.3d 1207, 1213 (Miss. 2016).

It would be prudent policy for medical examiners to thoroughly document their observations during the autopsy with either internal photographs or scans to memorialize what they are observing. Photographs and scans are more objective

than a written description. They would illustrate internal injuries and could illustrate the methods being used by the examiner. This would allow the defendant to then confront the underlying data on which the substitute examiner is basing their opinion. That did not happen here as there were no objective records for Dr. Giles to rely upon in forming his independent judgment. As this Court stated in *Melendez-Diaz v. Massachusetts*, 557 U. S. 305, 320 (2009), "Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well."

B. Dr. Giles Testimony Relating to Kennethia Keenan

In Smith's case the three victims were autopsied by three different medical examiners. (T. 14: 836). Dr. Giles conducted the autopsy on Desmond Robinson. (T. 14: 823). Dr. Arruza conducted the autopsy on Kennethia Keenan, (T. 14: 836), and Dr. Nicolasecu conducted the autopsy on Berthum Gibson. (T. 14: 836). At the time of trial in 2011 Dr. Arruza had recently left the Medical Examiner's Office due to a medical condition. (PCR. 2478). While it was not stated explicitly at the evidentiary hearing, it is well known by the attorneys of the Fourth Judicial Circuit that she had been suffering from dementia for some time. (See Attachments 3-6.)

Trial counsel in this case acknowledged that he was aware of Dr. Arruza's issues, stating "I think there was an article that came out in the Daily Record or the Times Union apparently I was one of the first defense lawyers to be advised that she was having problems." (PCR. 2478). The State never asserted that Dr. Arruza was unavailable and the defense never objected on hearsay or confrontation clause

grounds. (PCR. 2402). Additionally, her deposition was never taken. (PCR. 2401). With regards to having a substitute medical examiner testify, trial counsel stated "It's not unusual in our circuit for that to happen, especially when Dr. Arruza had medical issues." (PCR. 2479).

The ballistics expert and forensic pathologist called by the defense at the postconviction evidentiary hearing both opined that Keenan could have been shot by Gibson with the AK-47 that he was still holding when he was found alive at the scene. The "Scene Investigation " done on the day of the crime, and attached to Dr. Arruza's autopsy report, stated that it was unknown whether Keenan was killed with the AK-47 or another firearm. (PCR. 1652) At trial it was noted that there were only casings for the AK-47 in the room where Keenan's body was found. (T. 13: 786). During the postconviction evidentiary hearing forensic pathologist Dr. Kathryn Pinneri opined that Keenan's documented wounds were consistent with an AK-47 and that one would need to see a picture of the internal damage looked to really make a determination. (PCR. 2567). Dr. Pinneri testified that there were no X-ray scans or internal photographs taken of Keenan in spite of X-rays being standard practice. (PCR. 2563, 2567, 2552). She noted that Dr. Giles, on the other hand, did take x-ray scans during his autopsy of Robinson. (PCR. 2552). Dr. Giles gave an opinion as to the weapon that killed. Keenan, in spite of the fact that there were no internal photographs or x-rays to review and he had not observed the internal wound to Keenan himself. (T. 14: 838). The direct examination by the State went like this:

Q: And after reviewing that photograph, are you able to determine if this is consistent with the caliber of weapon that was used on Mr. Robinson on his penetrating wounds?

A: Well, in the same general forensic, medium to large caliber. That's the best I can do.

Q: And would this be consistent from being caused from a high velocity rifle or an AK-47 or something like that?

A: You don't go on just the outside, it's the insides. The high velocity rifle causes an immense amount of damage on the inside, a big cavity, lots of destruction. She doesn't have that pattern. So I would answer, no, this is not a high velocity rifle, but not just based on the skin. (T. 14: 838)

Similar to Dr. Pinneri, Dr. Giles recognized the importance of assessing the *internal* injuries in making a determination as to the weapon. As there were no internal photographs or X-rays done of Keenan, Dr. Giles based his opinion entirely on Dr. Arruza's autopsy report. The autopsy report included a measurement of the hole in the victim's pericardial sac and a brief description of the path of the wound. (PCR. 1645-1648).

Smith's confrontation right was violated when he was unable to cross-examine Dr. Arruza as to her observations from the autopsy of Keenan. While Dr. Giles, the substitute examiner, was available for cross-examination he could not speak to the veracity of the observations and data collected by Dr. Arruza. His opinion on the type of weapon that killed Keenan was only as reliable as Dr. Arruza's observations. Reliance upon that underlying data is particularly suspect given Dr. Arruza's known memory issues at the time she conducted Keenan's autopsy.

C. Dr. Giles Testimony Relating to Berthum Gibson

As mentioned, Dr. Giles also testified to the autopsy of Berthum Gibson, that had been performed by Dr. Nicolaescu. In this testimony Dr. Giles read directly from the autopsy report, which was not introduced into evidence. Even those jurisdictions that allow a substitute medical examiner to testify to an autopsy they did not perform, draw the line at the verbatim introduction of hearsay from the autopsy report. *See Burns v. United States*, 235 A. 3d 758, 785-87 (D.C. 2020) (The Confrontation Clause was violated when a substitute medical examiner shared testimonial hearsay with the jury derived from the autopsy report); *State v. Lui*, 315 P. 3d 493, 494 (Wash. 2014) (Medical examiner who did not conduct testing or autopsy who stated facts from autopsy report violated the Confrontation Clause); *Wood v. State*, 299 S.W. 3d 200,208-212 (Tex. App. 2009) (Confrontation Clause was violated when substitute medical examiner read from another medical examiner's autopsy report); *State v. Navarette,* 294 P. 3d 435, 439 (N.M. 2013)("An out of court statement" that is disclosed to the fact-finder as the basis for an expert's opinion is offered for the truth of the matter assert, so the declarant must be subject to cross-examination). It is reasonable that where an autopsy report is testimonial and cannot be admitted without violating the Confrontation Clause, that same information cannot be read to the jury without also violating the Confrontation Clause.

When asked how long Gibson could have functioned with his injuries, Dr. Giles responded "just a moment, let me review real quick." (T. 14: 842). He then responded that Gibson's wound "went through the liver and the omentum and the inferior vena cava, which is a large vein inside the abdomen, and he was bleeding slowly internally

so he would have been able to carry on quite a bit longer than the others." (T. 14: 842). These facts came directly from the autopsy report and once again were based on the examining doctor's observations. There was no opportunity to cross-examine these facts when Dr. Giles testified to them, but did not make the observations himself. From those observations, Dr. Giles formed the opinion that Gibson's death would not have been instantaneous. This opinion was reiterated twice in the State's closing (T. 14: 1372, 1446). The trial court also referenced this opinion in the sentencing order stating that "Berthum Gibson suffered internal bleeding and died more slowly than Desmond Robinson." (R. 6: 1041).

Florida's interpretation of the Confrontation Clause does not conform with this Court's jurisprudence or that of many other states and federal courts.

CONCLUSION

Petitioner, Terry Antonio Smith, requests that certiorari review be granted.

Respectfully submitted,

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