No. 25-6885

IN THE

Supreme Court of the United States

JEFFREY DALE BUSBY,

Petitioner,

v.

MISSISSIPPI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF OF *AMICUS CURIAE* DUI DEFENSE LAWYERS ASSOCIATION FILED IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE DUIDLA[1]

The DUI Defense Lawyers Association (DUIDLA) is a nonprofit professional organization of lawyers with approximately 850 members throughout North America. DUIDLA has a strong interest in the promulgation and enforcement of fair and constitutional laws governing impaired-driving and drug prosecutions that protect public safety while steadfastly preserving the civil liberties of every person accused of a crime. Its mission is to protect and ensure by rule of law those individual rights guaranteed by the United States Constitution in cases involving forensic evidence such as DUI and drug cases. Its mission is to resist the constant efforts made to curtail these rights and to encourage cooperation among lawyers engaged in the furtherance of these objectives. DUIDLA fulfills this mission through educational programs, scholarship grants for advanced DUI defense training, and by serving as the Constitution's first and last line of defense for those accused of impaired driving and drug-related offenses.

DUIDLA is particularly concerned with the erosion of Fourth, Fifth, and Sixth Amendment rights that occurs when the government uses forensic evidence as the cornerstone of a criminal prosecution without affording the accused the full panoply of constitutional protections

1. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than Amicus and their counsel made a monetary contribution to the preparation or submission of this brief. Notice to both parties of intent to file this brief was provided in accordance with the requirements of Rule 37.

to which they are entitled. DUI and drug prosecutions share a common evidentiary foundation: both rise or fall on laboratory-generated proof of scientific testing conducted by the government. Scientific evidence is uniquely powerful in the eyes of a jury, and it is uniquely susceptible to error, manipulation, and misrepresentation. When the State is permitted to introduce such evidence without meaningful accountability including the right to confront and cross-examine those responsible for its collection, analysis, and certification, the constitutional guarantees that define our system of justice are reduced to formalities. The problem is not confined to any single category of prosecution. It recurs wherever the government relies on forensic science to establish a dispositive fact.

DUIDLA submits this brief to assist the Court in ensuring that all citizens accused of crimes are afforded the complete constitutional protections to which they are entitled at trial, and to resist any rule that would permit the government to insulate forensic evidence from the scrutiny demanded by the Fourth, Fifth, and Sixth Amendments.

SUMMARY OF ARGUMENT

Prior to this Court's decision in *Smith v. Arizona*, 602 U.S. 779 (2024), trial courts across the country permitted juries in DUI and drug cases to consider scientific testimony from an unseen, unchallenged, and unknown witness, through a surrogate witness, who provided hearsay in the form of an independent opinion. In what presents a minor wrinkle in the application of *Smith*, the Mississippi Supreme Court in the instant matter established another "*Smith* bypass" by finding that if one

simply reads *Smith* as an anecdote to *Williams v. Illinois*, 567 U.S. 50 (2012), *abrogated by Smith v. Arizona*, 602 U.S. 779 (2024), curing only the instance where independent experts convey testimonial evidence to support an independent opinion, then there is no Confrontation Clause violation. In its opinion, the Mississippi Supreme Court reasoned that the report reviewing witness was capable of rendering an "independent opinion" despite having no personal knowledge of the actual testing procedures and results of this unique case. She was being used as a mere conduit to admit the absent analyst's conclusions as planned and executed by the State of Mississippi. This determination by the Mississippi Supreme Court was based on nothing more than her familiarity with generic testing procedures at the lab as to what should have been done for accurate testing rather than what was actually done in this case. The testifying witness reviewed the written reports after the testing was completed. She merely added her signature to the report despite having no first-hand knowledge of the information contained in the report. The technical reviewer in this case fulfilled the same testimonial purpose as Gregory Longoni did in *Smith*, merely restating the observations, actions, and conclusions of the absent testing analyst by reviewing the reports after the testing was completed.

The Sixth Amendment affords citizens the right to confront the witnesses against them. It is well-established that the Sixth Amendment extends its protections to testimonial laboratory reports involved in the prosecution of citizens arrested for DUI and drug cases. *Bullcoming v. New Mexico*, 564 U.S. 647 (2011). Were the Mississippi Supreme Court's ruling to stand, any lab report would be able to come into evidence through a technical reviewer

without the criminal defendant being able to ask questions about how any of the critical facts in the report—what *Smith* referred to "basis testimony"—were determined. Such a practice was rejected by this Court in *Smith*, declaring that what Arizona was attempting there was to "end run all we have held the Confrontation Clause to require." *Smith, supra.*

This Court's Confrontation Clause jurisprudence governing forensic testimony has evolved through three decisive cases, each closing a different unconstitutional route for surrogate analysts. In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), this Court held that certificates of drug analysis are "testimonial" within the meaning of *Crawford v. Washington*, 541 U.S. 36 (2004), because they are made under circumstances objectively indicating that a primary purpose of the statement is to be used at trial. 557 U.S. at 310-11. A drug analysis certificate is, by design, created to prove a fact at trial which is the identity and quantity of a controlled substance. *Id.* Accordingly, in order to admit the certificate, the prosecution must produce the actual analyst who prepared and signed the certificate. *Id.* at 311.

Two years later, *Bullcoming v. New Mexico*, *supra*, addressed the State's next attempt at an end-run: admitting a lab report through a "surrogate" analyst who had not performed or observed the tests. New Mexico conceded that the report was testimonial under *Melendez-Diaz* but argued that a colleague who was "familiar with the lab's procedures" and could "attest" to the report could satisfy the Confrontation Clause. 564 U.S. at 651. This Court unanimously rejected that argument. The "surrogate" analyst "could not convey what [the

certifying analyst] knew or observed about the events his certification concerned." *Id.* at 661. The Confrontation Clause demands the actual analyst "be made available for cross-examination" so that the defendant can probe "the testing analyst's proficiency, the condition of the [testing] instruments, and the care the analyst took in performing the tests." *Id.* at 659 n.6. Critically, *Bullcoming* reaffirmed that this right extends even to analysts whose reports are merely "certified" or "co-signed" which is part of the very argument Mississippi now advances for Ms. Cothern. The co-signature of a person who never personally tested the substance cannot convert that person into the "witness against" the defendant whom the Confrontation Clause permits to be produced in place of the testing analyst by reviewing the documents after the tests are completed. *Id.* at 662-63. That is precisely what the Mississippi Supreme Court condoned in the instant case. This Court should reject this approach.

The testimonial character of Ms. Roy's statements embedded in the lab report and relayed through Ms. Cothern is clear under *Crawford* and *Melendez-Diaz*. Ms. Roy's recorded observations including what tests she ran, what the instrumentation produced, and what quantities she measured were made for no purpose other than to serve as evidence in a future prosecution. They are quintessential testimonial statements. *Crawford*, 541 U.S. at 51-52; *Melendez-Diaz*, 557 U.S. at 310-11. The Mississippi Supreme Court's "intimate knowledge" test does not alter this analysis nor does its reliance on its own unconstitutional precedence. Whether Ms. Cothern was "familiar" with the lab's generic procedures of what should have been done does nothing to change the fact that Ms. Roy's specific observations—her assessments of

this sample, on this day, using this instrument—remain out-of-court testimonial statements that Ms. Cothern never witnessed and cannot verify. Cross-examining Ms. Cothern about Ms. Roy's work is no more constitutionally adequate than cross-examining New Mexico's surrogate about the certifying analyst's report in *Bullcoming*. In both cases, the defendant had no opportunity to confront the declarant who actually created the testimonial evidence. Cross-examining the analyst about extremely important details of the proper procedures and protocols can demonstrate that the analyst is incompetent or dishonest. Cross-examining Ms. Cothern would not help the jury determine if Ms. Roy was an excellent or an incompetent expert.

The Mississippi Supreme Court's reliance on Justice Sotomayor's *Bullcoming* concurrence is misplaced. The court below read Justice Sotomayor's observation—that *Bullcoming* did not present a case involving "a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test," 564 U.S. at 672 (Sotomayor, J., concurring in part)—as affirmative permission to allow technical reviewer testimony. But a single Justice's concurrence identifying what a case does not decide cannot expand the established rule. A concurrence noting a question left open is not precedent for resolving that question in favor of the State. The majority's command admits no exception because only cross-examination of the testing analyst can expose whether her methodology was sound, her training adequate, her instruments calibrated, and her conclusions untainted by bias, error, or misrepresentations.

This Court should grant Mr. Busby's Petition for Certiorari for two reasons: first to correct the decision below, which contravenes this Court's holding in *Smith*. Second, the petition should be granted because this Court should stop this government attempt to circumvent the Confrontation Clause. This will continue in state courts until this Court addresses this deviation of *Smith*. Otherwise, this holding by the Mississippi Supreme Court would reduce this Court's prior decisions from *Melendez-Diaz v. Massachusetts*, *supra*, *Bullcoming*, *supra*, and *Smith*, *supra*, to dead letter law, and allow the Confrontation Clause to be circumvented through the legal fiction of a technical reviewer's testimony as an independent opinion.

ARGUMENT

I. *SMITH v. ARIZONA* MUST BE EXTENDED TO CLOSE THE "TECHNICAL REVIEWER" EXCEPTION: PERMITTING CO-SIGNER SURROGATE TESTIMONY VIOLATES THE CONFRONTATION CLAUSE AND PRESENTS A QUESTION THIS COURT HAS NOT YET DIRECTLY ANSWERED.

From the record before this Court, it is clear that Ms. Cothern, testifying in a technical reviewer capacity without ever even seeing the tested substance, mimics the testimony of Mr. Longoni in the *Smith* case. Ms. Cothern testified that Camille Roy, a co-worker, had been the person who:

(a) Opened the evidence bag;

(b) Inspected the substances;

(c) Determined which tests were appropriate to run; and

(d) Performed those tests.

Ms. Cothern also testified that she never ran a test herself, nor did she even see the suspected substance. She did not observe the tests being conducted, nor was she present when the samples were prepared for testing. Her involvement in the preparation of the report was limited to adding her signature to it after only reviewing the final written reports. Ms. Cothern could not testify that she had reviewed the testing process, as she did not observe any aspect of the testing to determine if it was done correctly or incorrectly.

In its review of this case, the Mississippi Supreme Court's decision was premised on two points. It relied heavily on its own pre-*Smith* precedent that is largely unconstitutional. It engaged in a narrow reading of *Smith*, finding it to be applicable only when an independent expert conveys testimonial evidence in support of an opinion, and second, because Ms. Cothern had signed the report, she could testify about its contents.

A. THIS CASE PRESENTS A DISTINCT AND UNANSWERED QUESTION: WHETHER THE "TECHNICAL REVIEWER" CO-SIGNATURE IS A CONSTITUTIONALLY SUFFICIENT SUBSTITUTE FOR CONFRONTATION OF THE TESTING ANALYST.

While *Smith* is controlling authority that compels reversal, this case presents a constitutionally distinct question that *Smith* did not fully answer. Does a surrogate analyst who *co-signed* the lab report rather than merely reviewing it after the fact satisfy the Confrontation Clause? In *Smith*, Gregory Longoni was a wholly independent expert who had zero connection to the lab report at issue. He was called purely to relay and endorse another analyst's conclusions. 602 U.S. at 790. Ms. Cothern's situation carries an additional wrinkle that numerous state courts have seized upon as a distinction to avoid confrontation of the analyst. Ms. Cothern co-signed the forensic report as "technical reviewer." Mississippi argues that this administrative act of co-signing transforms her from a surrogate into a co-author with constitutionally adequate personal knowledge because she is also familiar with the laboratory and how the test should have been conducted. The Mississippi Supreme Court accepted this argument based on its own precedent, and courts across the country are now divided on whether it is correct. See *Busby v. State*, 422 So.3d 974 (Miss. 2025) (permitting co-signer testimony); *Commonwealth v. Gordon*, 266 N.E.3d 369 (Mass. 2025) (prohibiting the testimony of a reviewing witness); *United States v. Seward*, 135 F.4th 161, 168 (4th Cir. 2025) (technical reviewer without hands-on involvement insufficient). This is precisely the kind of

unresolved, recurring, nationally important question that warrants this Court's review. This Court should extend *Smith* to close the loophole that state courts have allowed the government to exploit in *Smith*'s wake.

A co-signature on a forensic report does not confer personal knowledge of the unique testing process in this particular case. Ms. Cothern's own testimony confirms that she never saw the substance, never observed the instrumentation run, never witnessed any step of Ms. Roy's analysis. Pet. App. ¶5. What the co-signature confers is accountability for the report's administrative accuracy assuming many things unknown to the reviewer. It is the kind of supervisory "familiarity with the lab's procedures" that this Court specifically identified in *Smith* as something a surrogate *may* testify about from personal knowledge of laboratory practices generally, but not as a substitute for the absent analyst's testimony about *this* specific test. 602 U.S. at 800. A surrogate may say "our lab follows these procedures." A surrogate may not say "those procedures were followed in this case," because she does not know. Second, permitting co-signers to testify as surrogates provides states a perverse structural incentive to manufacture confrontation workarounds by instituting "technical reviewer" programs. The sole purpose is to create a surrogate witness for trial. If the administrative act of co-signing a report is sufficient to satisfy the Confrontation Clause, the requirement of confrontation becomes a formality that any government laboratory can adopt to do the end run Arizona unsuccessfully attempted in *Smith*.

It is clear from the record that the basis of Ms. Cothern's testimony was based upon Ms. Roy's work

and all her specific tasks conducted in the analysis. Ms. Cothern's signature on the report doesn't exempt her from the Confrontation Clause analysis set forth in *Smith* simply because her name appears next to the testing analyst's name.

In *Smith*, this Court took Arizona to task for allowing Mr. Longoni to opine about the nature and identity of several substances (marijuana, methamphetamine, and cannabis) only because "he accepted the truth of what [Ms.] Rast had reported about her work in the lab." *Smith*, at 798. That was not an independent opinion, and the one offered in the instant case relies completely on the analysis conducted by Ms. Roy.

"On [Arizona's] view, a surrogate analyst can testify to all the same substance—that is, someone else's substance—as long as he bases an "independent opinion" on that material. And [according to Arizona] that is true even if, as here, the proffered opinion merely replicates rather than somehow builds on, the testing analyst's conclusions. . . . Properly understood, the Clause still allows forensic experts like Longoni to play a useful role in criminal trials. Because Longoni worked in the same lab as Rast, he could testify from personal knowledge about how that lab typically functioned—the standards, practices, and procedures it used to test seized substances, as well as the way it maintained chains of custody."

Smith, at 798-799.

The facts in *Busby* virtually mimic those in *Smith*—a decision implausibly distinguished by the Mississippi Supreme Court, who pronounced Ms. Cothern to be in

possession of "intimate knowledge" regarding the tests she never observed, performed on substances she never saw, knowledge that was contrary to her own testimony. By placing a premium on Ms. Cothern's technical reviewer status, the Mississippi Supreme Court has carved out an exception to *Smith* that this Court did not.

In *Smith*, Mr. Longoni: (1) reviewed reports and notes created by the testing analyst, Ms. Rast; (2) never personally performed or observed any testing; (3) formed what Arizona characterized as an "independent opinion" based on that review; and (4) testified at trial as a surrogate for Ms. Rast. 602 U.S. at 790-91. This Court unanimously held that arrangement violated the Confrontation Clause. *Id.* at 798-800. In *Busby*, Ms. Cothern: (1) reviewed the work packet created by the testing analyst, Ms. Roy; (2) never personally performed or observed any testing; (3) formed what Mississippi characterizes as an "independent opinion" based on that review; and (4) testified at trial as a surrogate for Ms. Roy. The only material distinction Mississippi has identified is that Ms. Cothern co-signed the report. But a co-signature is precisely what this Court held insufficient in *Bullcoming*. 564 U.S. at 662-63. The Confrontation Clause does not turn on the administrative act of co-signing a report; it turns on whether the defendant had the ability to cross-examine the person who actually conducted the detailed analysis that generated the testimonial evidence. Mr. Busby never had that opportunity. That is the constitutional deficiency, and Mississippi's label of "technical reviewer" cannot cure it.

B. PERMITTING AN EXCEPTION FOR TECHNICAL REVIEWER TESTIMONY DOES NOT SATISFY THE CONFRONTATION CLAUSE.

Even prior to *Smith*, several states had rejected the idea that a technical reviewer or supervisor was permitted to testify in a surrogate capacity. In *New Mexico v. Navarette*, 571 U.S. 939 (2013), the court held the testimony of a supervising medical examiner was insufficient to meet the guarantees of the Confrontation Clause when that investigator did not participate in testing. In *State v. Frazier*, 735 S.E.2d 727 (W.Va. 2012), West Virginia held the same, noted that a supervising medical examiner could not testify based on the autopsy report of another examiner, even when the report wasn't offered into evidence.

Most recently, and subsequent to the *Smith* decision, the Appellate Court of Illinois, Second District, rejected the State's attempt to distinguish the use of a "peer-reviewer" from the requirements of the *Smith* holding, noting that the witness had not participated in any of the testing that was done, and that there was no way for the "peer-reviewer" to become aware of any issues involved with the testing process. As such, the Confrontation Clause was not satisfied. *People v. Holmes*, 2025 IL App (2d) 240194.

Simply put, by slapping the technical reviewer label on anyone with laboratory credentials who can interpret a scientific report, the substance of any document could be admitted through a purported "independent opinion" without the rigorous scrutiny that the Confrontation

Clause envisions. As *Smith* noted, had Ms. Rast lied about everything, Mr. Longoni's "independent opinion" would have been for naught, and the jury would have been grossly misled, and "in no position to convict." *Smith, supra.*

Since the situation in *Busby* is similar to the one in *Smith*, the Confrontation Clause violation is evident, and Mississippi's "*Smith* bypass" cannot stand.

II. ALLOWING 'PEER-REVIEWED' TESTIMONY FOSTERS AN ATMOSPHERE THAT SHIELDS THE INCOMPETENT OR FRAUDULENT ANALYST AND ENCOURAGES A COVER UP.

There are more than 1.5 million DUI arrests every year[2]. There are many arrests for possession of illegal drugs every year. In the vast majority of those cases, the scientific evidence is the forensic testing used to support the State's case. By allowing the Mississippi Supreme Court's rule to stand, this Court will open the door that *Smith* (and *Bullcoming*) closed, and allow surrogate analysts, now with the title of technical reviewer to testify to toxicological results that they themselves did not obtain or observe.

By removing the analyst from cross-examination, the Mississippi Supreme Court's rule would foster an atmosphere where fraudulent or incompetent analysts would be shielded from cross-examination. An honest analyst looking to expose the problematic laboratory practices could also be sidelined.

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2. https://www.nhtsa.gov/sites/nhtsa.gov/files/a20guide2.pdf

A. LAB SCANDALS ARE PERVASIVE AND ONGOING DESPITE MEDIA COVERAGE; "PEER-REVIEWER" TESTIMONY WOULD NOT UNCOVER SUCH PROBLEMS.

In what is easily the most well-known lab scandal, a Boston, Massachusetts lab technician named Annie Dookhan admitted to "dry-labbing" and falsifying results (by changing negatives into positives) for years, allegedly testing more than 40,000 samples. Ms. Dookhan ultimately pleaded guilty to multiple charges and went to prison in 2013.

At the time Ms. Dookhan was involved in producing fraudulent and deceptive crime laboratory reports, Massachusetts had an evidentiary scheme that allowed the laboratory reports to be admitted mostly unchallenged. No one could tell by looking at her reports that she had not done the testing or that she had lied about her results. Had the technical reviewer testimony rule been in place, no one would have been able to tell what Ms. Dookhan had done (or not done, in most cases). Her paperwork was impeccable, and even if it wasn't admitted, anyone basing an independent opinion on it would be providing false information to the jury. This Dookhan case shows 40,000 perfect examples of the inadequacies of the review done in the instant case.

Ms. Dookhan is far from a lone wolf. Recently, the Denver Police Department reported in January of 2025 that it will now review more than 420 cases going back to 2013 that were handled by Yvonne Woods, a former forensic scientist at the Colorado Bureau of Investigation

(CBI) crime lab[3]. Ms. Woods was charged with 102 separate crimes, including forgery[4]. The investigation revealed that Ms. Woods allegedly deleted and altered DNA evidence, concealing DNA and/or possible contamination and falsely reporting no male DNA in sexual assault cases where trace amounts were later determined to be present. Additionally, Ms. Woods altered mathematic calculations to support her declarations of "no male DNA."

B. A TECHNICAL REVIEWER RULE COULD ENCOURAGE A COVER UP.

Ms. Woods was employed at CBI for nearly thirty years. She was considered "a star in the profession."[5] In the internal affairs report outlining the Woods investigation, at least one of Woods' colleagues reported seeing her throw evidence in the trash, and did not report it because of Woods' favored status.[6] The report also revealed that Woods was accused of data manipulation in 2018, and removed from casework, but no one told the laboratory leadership and she was reinstated. *Id.* Whether anyone at the crime lab told the district attorneys or the appropriate defense bar remains unknown.

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3. https://www.coloradopolitics.com/2025/08/22/denver-police-crime-lab-triples-number-of-cases-under-review-in-cbi-scandal/

4. https://cbi.colorado.gov/sections/administration/media-relations/yvonne-missy-woods-investigation

5. https://www.cpr.org/2025/01/22/former-cbi-forensic-scientist-yvonne-woods-charged-over-100-felonies/

6. https://gazette.com/2024/06/05/state-crime-lab-debacle-had-earlier-warnings-of-misconduct-from-golden-child-dna-scientist/

It is not hard to imagine a setting where a favored analyst, one who is considered a star, would be permitted to perhaps arrive a few minutes late at work without any penalty, and anyone else at the lab would be reluctant to bring it up. But in Woods' case, her star status was so pervasive that her known malfeasance was concealed from the leadership of CBI for five years, until she was caught doing it again.

Both Ms. Woods and Ms. Dookhan serve as stark reminders of what can happen if Mississippi's technical reviewer rule were to be permitted. In Woods' case, her colleagues did report her, and although she was temporarily removed, she was later reinstated and allowed to keep doing what she had been doing, without anyone in leadership being informed. The crime lab scandals make it clear that there should never be such an exception to the Confrontation Clause, and that Mississippi's decision would permit countless cases to be presented to juries with a wink and nod instead of the having the evidence withstand the crucible of cross-examination.

The problem is not limited to DUI and drug investigations. Mississippi itself provides the starkest example of what unchecked forensic testimony without cross-examination of the actual analyst produces. For nearly two decades, Dr. Steven Hayne performed approximately 80% of all autopsies in Mississippi, routinely testifying to conclusions—including in capital cases—while lying about his credentials and qualifications under oath. When his misconduct was finally exposed in 2008, review of his cases revealed incorrect and misleading testimony in numerous convictions, with

thousands of additional cases yet to be examined. Among those wrongly convicted on the basis of his testimony was Levon Brooks, who served sixteen years in prison for a crime he did not commit. Had cross-examination been available and directed at the actual analyst who performed the work—not a surrogate reviewer reading from the same flawed reports—Hayne's fabrications would have been discoverable far sooner. A technical reviewer's "independent opinion" based on Hayne's reports would have been no opinion at all; it would have simply laundered his misconduct past the jury.

The scale of forensic error is not anecdotal. A 2023 study by the National Institute of Justice examined 732 cases drawn from 34 forensic disciplines and found that a staggering 86% contained errors. National Inst. of Just., U.S. Dep't of Just., The Impact of False or Misleading Forensic Evidence on Wrongful Convictions (2023). The National Academy of Sciences has similarly concluded that, aside from nuclear DNA analysis, no forensic method has been rigorously shown capable of consistently and reliably connecting evidence to a specific individual or source. National Rsch. Council, Strengthening Forensic Science in the United States: A Path Forward 7 (2009). These failures are not self-correcting. They come to light through the adversarial process: through cross-examination of the analyst who actually performed the work. Mississippi's technical reviewer rule eliminates the only constitutional mechanism designed to expose these failures before a conviction is obtained rather than decades later. The Confrontation Clause does not exist to correct wrongful convictions after the fact; it exists to prevent them in the first place. *Crawford*, 541 U.S. at 61 (the Confrontation Clause "commands not that evidence

be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination").

III. PERMITTING TECHNICAL REVIEWER TESTIMONY IGNORES THE TRUTH BEHIND SCIENTIFIC TESTING IN DUI AND DRUG CASES.

In DUI and drug cases, where the scientific test results are many times crucial in the government's case, permitting technical reviewer testimony would ignore the truth behind scientific testing. From the moment blood is drawn to the moment the test result is revealed, the process is controlled by humans and presents a significant risk for error. In drug cases, the substances are confiscated by the police officers and a process begins that is also dependent on the humans involved. Were anyone to testify based on an assessment of previously prepared paperwork from another person, there would be no way for the jury to assess whether the result was trustworthy, reliable, and honest.

A. Chromatography is a complex scientific process and the risk of human error is significant.

The process of testing blood for a prohibited alcohol concentration is done using a scientific process called chromatography. Chromatography is a laboratory technique by which the volatile elements in the blood are separated, identified, and measured, using special equipment and procedures.

Prior to opening any evidence associated with a case, a testing analyst will prepare a set of vials to serve as the

calibrators and controls for the particular "batch run," a term used to describe a grouping of cases that are tested together. The analyst usually prepares several calibrators and controls for the batch run, each one involving precise measurements of liquid using known quantities of ethanol, or other volatile alcohols.

The first procedure that the testing analyst will complete in a subject case is to open and review the blood evidence. Usually, this is a cardboard box, sealed and labeled with a case number, a suspect's name, and the date of the blood draw, containing two tubes of blood, again labeled with the case number, the suspect's name, and the date of the blood draw. The testing analyst will examine the evidence, looking for any issues associated with tampering with the sample, such as checking the box for tears or cuts in the seal, or leaks in the blood tubes.

Assuming there are no identifiable issues with the blood tubes, the analyst will then select one tube and remove a portion of the blood inside for testing. That entails opening the tube, removing some blood, portioning out a certain amount of the blood into a device called an auto-pipetter/diluter, and then pipetting out a very precise amount of blood that has been diluted with a precise amount of a solution of deionized water and n-propanol into a small glass vial. This process is completed twice for each case, and a typical batch run can include 40 subject cases at a time.

The analyst then places the calibrators, controls, and subject vials on to designated locations on the chromatograph in a precise order before finally beginning the analysis. Given the precision required, the multitude

of steps involved, and the focus necessary to be able to complete the process accurately, no mere review of paperwork would be sufficient to generate an opinion about whether the result obtained was reliable or valid.

Additionally, when the results are printed, a document known as a chromatogram, there are often unidentified substances that are revealed in the subject samples, as well as the controls. The testing analyst would be uniquely able to identify any causes for these unidentified substances, such as issues with the preparation of the vials, issues with the machine, issues with the blood test kit, and so on. Again, no mere review of the paperwork would be able to reveal the cause for such problems.

All a technical reviewer witness would be able to do is look at the result provided and assume everything was done correctly. Since the testing analyst (or in this case, Ms. Roy) was not present to testify, there is no way to assess the skills and qualifications of the person who performed that test or obtained the result. The reliability of the basis testimony cannot and should not be presumed. Just as in *Smith*, a citizen accused of DUI or a drug offense must be permitted to challenge the reliability of the scientific evidence being offered to the jury as evidence of guilt.

B. The qualifications of the testing analyst are required foundational evidence to evaluate any basis testimony.

As this Court noted in *Smith*, a surrogate analyst testifying to an "independent opinion" based upon the testing analyst's conclusions is an end-run around the

Confrontation Clause. But Mississippi's "*Smith* by-pass" rule has the potential to be a shrewd semantic method to evade the protections of the Sixth Amendment. Allowing such a rule would permit the State to weave the unavailable testing analyst's statements into the "independent opinion" even by mere allusion.

Were such a practice allowed to stand, the jury would be deprived of knowing basic information about the procedures in the case:

- Whether the analyst had an independent recollection of testing the sample, or whether the analyst would be relying only on the paperwork;

- Whether the analyst saw any evidence of tampering or contamination in the sample;

- Whether there have been any historical issues with the instrument prior to testing;

- Whether the instrument was properly calibrated, the method and laboratory procedures properly followed, and whether precautions were taken to reduce errors.

Consider what such a practice would do, in terms of qualifying an expert. It would prevent the jury from knowing:

- Where the analyst went to college;
- What the analyst's grades were in organic chemistry;
- How many times, if any, has the analyst had to have remedial training;
- How many prior errors have been made by the analyst while conducting tests;
- Whether the analyst was ever reprimanded at work for poor performance;
- Whether there has ever been a corrective action report caused by the analyst;
- Whether the analyst was ever pressured to provide certain results in cases.

There is too great a risk for error, and too great a chance for mishandling of scientific evidence to allow for a conviction based on hearsay, even if it is dressed up as a technical reviewer's independent opinion. At no point in history has a mere signature at the bottom of a document been sufficient in and of itself to provide a human with the intimate knowledge of how the details in that document came to be. Without the ability to cross-examine the author of the basis testimony, the defendant is left without one of the most cherished rights that any accused citizen

is afforded—a meaningful opportunity to put on a full and complete defense.

Taken together, the holdings of *Crawford*, *Melendez-Diaz*, *Bullcoming*, and *Smith* establish a clear and consistent constitutional rule: Forensic drug testing reports are testimonial; testimonial statements require the declarant to appear and be cross-examined; and surrogate witnesses are not a permissible substitute regardless of their title. Mississippi's "technical reviewer" doctrine violates all three of these principles simultaneously. It admits testimonial statements without confrontation. It substitutes a co-signer for the declarant. And it ratifies exactly the "end run" that *Smith* forbade. 602 U.S. at 799. With millions of cases per year that depend on the laboratory results of forensic analysis as evidence, the constitutional question presented here touches hundreds of thousands of Americans annually. This Court should grant certiorari, reverse the Mississippi Supreme Court, and make clear that the Confrontation Clause means what it says: the accused has the right to confront the witnesses against him—not a reviewer who reviewed the paperwork and had to trust it without verification to form an opinion.

CONCLUSION

To permit the Mississippi's Supreme Court's decision to stand would be to reduce the protections of the Sixth Amendment Confrontation Clause and evade its provisions by "having a note-taking policeman recite the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition." *Davis v. Washington*, 547 U.S. 813, 826 (2006). The testimony permitted in the case below is in direct contradiction of this Court's decision in *Smith v. Arizona*, and certiorari should be granted to stop another government attempt to create an unconstitutional exception.

Respectfully submitted,

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