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 IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under this Court's precedents, the Confrontation Clause generally bars the admission at trial of testimonial hearsay against a criminal defendant. In this case, an expert witness testified that forensic drug testing—performed by an analyst who did not testify at trial—showed that a substance sold by petitioner was 2.84 grams of methamphetamine. In upholding petitioner's conviction for selling a controlled substance, the Mississippi Supreme Court ruled that the expert's testimony and the underlying forensic-testing report were not hearsay—and so the Confrontation Clause is not implicated—because the witness examined the report's results and formed her own opinion based on them. Does that decision conflict with this Court's precedent establishing that out-of-court statements are hearsay when an expert witness presents them at trial for their truth?

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The Mississippi Supreme Court's opinion affirming petitioner's conviction and sentence (Petition Appendix (App.) 1a-23a) is reported at 422 So. 3d 974.

JURISDICTION

The Mississippi Supreme Court's judgment was entered on November 13, 2025. App.1a. On January 30, 2026, Justice Alito extended the time to file a petition for certiorari to February 25, 2026. The petition was filed on February 19, 2026. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

STATEMENT

1. The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI; *see id.*, amend. XIV, § 1. Under this Court's precedents, the Clause generally bars the admission of testimonial hearsay at a criminal trial unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. *See Crawford v. Washington*, 541 U.S. 36, 68 (2004).

That prohibition applies to statements in lab reports. In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), this Court held that "certificates of analysis"—affidavits stating the results of lab tests performed on a substance—are testimonial and thus subject to the Confrontation Clause. *Id.* at 307, 308, 329. In *Bullcoming v. New Mexico*, 564 U.S. 647 (2011), this Court held that the Clause bars prosecutors from introducing lab reports with "testimonial certification[s]" to prove facts at trial without presenting the testimony of the person who made the certifications. *Id.* at 651-52. And in *Smith v. Arizona*, 602 U.S. 779 (2024), this Court held that prosecutors

"cannot introduce an absent laboratory analyst's testimonial out-of-court statements to prove the results of forensic testing" through a "surrogate analyst who did not participate in [the statements'] creation." *Id.* at 783, 802-03.

2. In June 2021, law-enforcement officers used a confidential informant to conduct a controlled buy of narcotics from petitioner Jeffrey Dale Busby. App.2a; *see* Clerk Papers (CP) 12. Before the transaction, officers searched the informant and equipped her with a concealed camera and $80 in cash. App.2a. The informant met with petitioner and returned without the cash but with a cigarette package containing what appeared to be methamphetamine. *Ibid.* Video footage and still images captured the exchange. App.3a.

Law enforcement submitted the substance to the Mississippi Forensics Laboratory for analysis. *See* App.3a. According to the testimony of Charlotte Cothern, a forensics scientist with the Laboratory, that analysis involved two steps. *Ibid.* First, a forensics analyst—Camille Roy—"opened the evidence bag, examined the substance, determined what tests to perform, and then ran the tests." *Ibid.* Second, a technical reviewer—Cothern—reviewed the "work packet" that "Roy created" from the testing results. *Ibid.* The packet included "the weight of the substance, the [substance's] physical description, the type of tests performed, and the details from the instrumentation." *Ibid*. Cothern "reviewed th[e] data to make sure the findings ... were correct" and (along with Roy) "co-signed the forensics report." *Ibid.* That report stated that the substance recovered from petitioner was 2.84 grams of methamphetamine. *Ibid.* Cothern never saw the substance and "did not run [any of] the tests" on it. *Ibid.*; *see* App.13a-14a (concurring opinion).

3. A grand jury indicted petitioner for selling 2.84 grams of methamphetamine, a Schedule II controlled substance. App.2a-3a; *see* Miss. Code Ann. § 41-29-139(a)(1). He was tried in January 2024. *See* CP 112, 113.

At trial, the State presented the "video and still shots from the hidden camera" worn by the informant, which showed petitioner "exchanging [a] cigarette package for ... cash." App.3a. The informant and the officers who oversaw the controlled buy each testified that the package contained methamphetamine. *Ibid.*

The State also called Cothern as an expert in forensic drug analysis. App.1a, 3a. Cothern testified that she "performed the technical review of the analysis of the substance recovered from the cigarette pack." App.3a. As noted, she did not test the substance. Instead, she reviewed the data contained in the testing analyst's (Roy's) report, verified the findings based on that data, and co-signed the report with Roy. *Ibid.* Cothern said that, based on the data in the report, she formed an "independent opinion" that the substance recovered from petitioner was 2.84 grams of methamphetamine. *Ibid*. Roy did not testify.

Based on Cothern's testimony, the State sought to admit the report. App.1a, 3a. The trial court admitted the report over petitioner's objection. App.3a.

On January 9, 2024, the jury found petitioner guilty of selling a Schedule II controlled substance. App.4a; *see* CP 112, 113. The next day the trial court sentenced him to 40 years' imprisonment as a repeat offender. App.4a; *see* CP 113-14.

4. Petitioner appealed. Invoking *Smith v. Arizona*—which was decided in June 2024, after petitioner was convicted—he argued that admitting Cothern's testimony and the forensics report violated the Confrontation Clause because Cothern neither

performed nor observed the forensic testing of the substance recovered from petitioner. App.4a. In response, the State did not argue that admitting Cothern's testimony comported with the Confrontation Clause. Instead, the State argued that, although petitioner objected to admitting the forensics report at trial, he did not object to Cothern's testimony and thus waived the issue. *See* App.19a-20a (concurring opinion); Appellee's Br. 5-7, *Busby v. State*, No. 2024-KA-00482-SCT (Jan. 31, 2025). The State also argued that any Confrontation Clause error was harmless given the uncontroverted testimony of several other witnesses that the substance recovered from petitioner was methamphetamine. *See* App.19a-20a, 22a (concurring opinion); Appellee's Br. 8; *see also id.* at 2-4.

The nine-member Mississippi Supreme Court affirmed petitioner's conviction and sentence. App.12a. The five-justice majority did not rest its decision on waiver or harmless error. Instead, it rejected petitioner's confrontation claim on the merits. App.4a-12a. The majority explained that Mississippi Supreme Court precedent permits testimony from a "technical reviewer" who is "actively involved in the production of [a forensics] report" and has "intimate knowledge of [the underlying] analyses," even if the reviewer did not conduct the relevant testing. App.2a; *see* App.4a-5a. The majority ruled that Cothern met that standard because she "reviewed" the "testing process" and the resulting "data" "for accuracy," "formed her *own* conclusion that the substance tested was methamphetamine," and then "co-signed" the forensics "report stating that the substance was methamphetamine." App.11a-12a; *see* App.5a. The majority distinguished *Smith* on the ground that it did not resolve when a technical reviewer's involvement in the testing process becomes

sufficient to permit her to testify based on a forensics report that she "co-signed." App.11a; *see* App.7a-12a. The majority concluded that *Smith* did not condemn the "practice of allowing a technical reviewer's testimony when the reviewer was actively involved and had intimate knowledge of the [underlying] analyses." App.8a.

The other four justices concurred in the result. The concurrence, authored by Justice Coleman, rejected the majority's reading of *Smith* and concluded that admitting Cothern's testimony violated petitioner's confrontation rights. App.13a-21a. The concurrence stressed that Cothern had "no involvement with [any] testing" and "only reviewed the testing methodology and results after the fact." App.14a-15a. In the concurring justices' view, allowing Cothern to relay the absent analyst's factual assertions at trial ran afoul of *Smith* because Cothern lacked "personal knowledge" of the substance recovered from petitioner, did not "participate[ ] in testing it," and "had no involvement in preparing the [resulting] report" beyond "review[ing] it once complete." App.13a-14a. Even so, the concurrence maintained that affirmance was warranted because any error in admitting Cothern's testimony was harmless beyond a reasonable doubt given the "overwhelming" evidence from other witnesses that the substance petitioner sold was methamphetamine. App.21a-22a.

Petitioner sought this Court's review, arguing that the Mississippi Supreme Court's decision conflicts with *Smith* (Pet. 7-10) and urging this Court to summarily reject that decision and remand for further proceedings (Pet. 3, 6, 14).

DISCUSSION

This Court should summarily vacate the Mississippi Supreme Court's judgment and remand for further proceedings. The decision below conflicts with

Smith v. Arizona, 602 U.S. 779 (2024). That error can—and should—be rectified without plenary review: the error is readily apparent from the briefing now before the Court, summary vacatur would correct that error, and summary vacatur would eliminate any conflict between the decision below and decisions of other lower courts. Consistent with this Court's disposition in *Smith* itself, vacatur would allow the court below to address open issues on remand, including whether any out-of-court statements admitted at petitioner's trial are testimonial and whether any error in admitting them was harmless.

1. Under this Court's precedents, the Confrontation Clause applies to "testimonial hearsay": out-of-court statements made for the "primary purpose" of use in a criminal prosecution (testimonial) that are offered at trial "to prove the truth of the matter asserted" (hearsay). *Smith*, 602 U.S. at 784-85. The Mississippi Supreme Court held here that a "technical reviewer['s]" testimony stating the results of a forensic analysis that the reviewer did not participate in was not hearsay—and so the Confrontation Clause is not implicated—because the reviewer "formed her own conclusion" based on her review of the "testing process" and the resulting "data." App.2a, 11a (emphasis omitted). That holding conflicts with this Court's precedent.

In *Smith*, this Court reiterated that a State "may not introduce the testimonial out-of-court statements of a forensic analyst at trial"—including statements in lab reports—"unless" the analyst "is unavailable and the defendant has had a prior chance to cross-examine her." 602 U.S. at 802-03. A State also may not introduce such statements "through a surrogate analyst who did not participate in their creation." *Id.* at 803. And a State may not introduce such statements by having a surrogate

"present[ ]" them "as the basis for [her] expert opinion." *Ibid.* In that last scenario, the out-of-court statements "come into evidence for their truth"—and thus are hearsay—"because only if true can they provide a reason to credit the substitute expert." *Ibid.* And if the out-of-court statements of the absent analyst are also "testimonial," then "the Confrontation Clause will bar their admission." *Id.* at 783.

The decision below conflicts with *Smith* and precedents that *Smith* applies. The Mississippi Supreme Court held that testimony by a technical reviewer on the results of forensic testing that the reviewer did not participate in is not hearsay if she "reviewed" the underlying "data" on the tested substance, "co-signed" the resulting "forensics report," and "formed her own independent opinion" on the nature of the substance. App.2a-3a; *see* App.4a-12a. The court distinguished *Smith*, which was decided shortly after petitioner's trial, on the ground that it did not address the question of when "a testifying analyst becomes sufficiently involved in the [forensic-testing] process to give her own testimony based on [a forensics] report she co-signed." App.11a (emphasis omitted). It is true that *Smith* did not address that question. But *Smith* still dooms the ruling below. The "testifying analyst" here—Charlotte Cothern—was not "involved" in the testing "process" for the substance recovered from petitioner. *Ibid.* Rather, as the four-justice concurrence explains and as the record reflects, Cothern "never saw the substance" recovered from petitioner, did not "participate[ ] in testing it," "had no involvement in preparing" the forensics report based on that testing, and "only reviewed" that report once it was "complete." App.13a-14a; *see* App.15a (Cothern did not have "any personal involvement with the testing of the substance" or "personal knowledge of the substance itself"). So Cothern

was able to testify on the results of the forensic testing (and on the nature of the substance) only by "accept[ing] the truth of what" the testing analyst—Camille Roy—"had reported about her work in the lab." *Smith*, 602 U.S. at 798; *cf.* App.14a (concurring opinion) ("the only way" that Cothern "could testify" on those facts "was to learn them from the one person identified in the record who did have personal knowledge of them, the absent testing analyst, Roy"). Cothern's testimony thus "restate[d]" "factual assertions" made by Roy that could "support" Cothern's testimony "only if true." *Smith*, 602 U.S. at 783. And so, contrary to the holding below, Cothern's testimony contained hearsay statements that—to the extent that the statements are also testimonial—implicated petitioner's confrontation rights.

2. Given the Mississippi Supreme Court's misapplication of *Smith* and other relevant considerations, this Court should grant the petition, vacate the judgment below, and remand for further proceedings.

Vacatur is warranted. As explained, the Mississippi Supreme Court erred: the decision below conflicts with *Smith*. And the nature of that error shows that summary vacatur, rather than plenary review, is appropriate. The error is readily apparent from the decision below, the undisputed factual record, and this Court's recent precedent. *Supra* pp. 6-8; *cf.* Pet. 6-7. Further briefing and oral argument are not needed to elucidate that reality. And plenary review is not needed to resolve a lower-court conflict. The petition alleges only a "lopsided" conflict: the decisions of five courts against the decision below. Pet. 13; *see* Pet. 10-13. Vacating the decision below would eliminate that conflict. Petitioner himself recognizes that summary disposition is sufficient to address the error below. *See* Pet. 3, 6-7, 9-10, 13-14. And as explained

next, there is a strong prospect that this Court's intervention will not change the state supreme court's ultimate disposition—which also militates against plenary review.

Vacatur (rather than a broader reversal) is also appropriate because the Mississippi Supreme Court should have the opportunity to address remaining open issues. That includes whether any out-of-court statements in Cothern's testimony are testimonial. *Cf. Smith*, 602 U.S. at 803 (remanding to allow state court "[t]o address" whether relevant statements "were testimonial"). And, as petitioner recognizes, it also includes whether any error in admitting Cothern's testimony and the forensics report was harmless, given the uncontroverted testimony of several other witnesses that the substance recovered from petitioner was methamphetamine. *See* Pet. 10 (acknowledging that the "issue" of "harmless" "error" should be addressed on "remand"); Pet. 13-14; *cf. Bullcoming v. New Mexico*, 564 U.S. 647, 668 n.11 (2011) (allowing "a harmless-error inquiry on remand"). Indeed, the four-justice concurrence below maintained that any confrontation error was harmless beyond a reasonable doubt given the "overwhelming" (and unobjected-to) cumulative evidence at trial. App.21a-22a (noting that two law-enforcement officers and the informant "identif[ied] the substance as methamphetamine" at trial "without objection," and that "the jury observed the footage of the sale and pictures of the substance"). The Mississippi Supreme Court should be able to consider such matters on remand.

CONCLUSION

This Court should grant the petition for a writ of certiorari, vacate the judgment of the Mississippi Supreme Court, and remand for further proceedings.

Respectfully submitted.

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