No. 25-689

IN THE
Supreme Court of the United States

GEORGE SHARROD JOHNS,
Petitioner,

v.

GEORGIA,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Georgia

REPLY BRIEF OF PETITIONER

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INTRODUCTION

This Court's decisions establish unequivocally that the Sixth Amendment "right to confrontation" requires the Government to produce *all* witnesses who offer testimonial statements in criminal trials. This is a categorical rule. There is no exception for *de minimis* testimonial hearsay or for administrative convenience.

Yet, the Georgia Supreme Court has manufactured an exception to the Confrontation Clause for "peer review" experts. *See* Pet. App. at 4a. In the decision below, the court considered *Smith v. Arizona*, 602 U.S. 779 (2024), but then failed to follow it, holding that the state may introduce autopsy findings by an examining pathologist through a different pathologist who reviewed the work. Relying on a different expert may be cheaper, easier, and more convenient than producing the expert who performed the autopsy. But a defendant has the right to confront any witness against him, including expert witnesses. *See Crawford v. Washington*, 541 U.S. 36, 68–69 (2004); *Bullcoming v. New Mexico*, 564 U.S. 647, 663 (2011); *Smith*, 602 U.S. at 783.

In its Brief in Opposition, the State brings the kitchen sink. It argues that there is no conflict; the decision is correct; and the issue was not properly preserved. None of these arguments has merit. The decision below conflicts with this Court's precedents establishing that the Confrontation Clause is a "categorical constitutional guarantee." *Crawford*, 541 U.S. at 67. It also conflicts with decisions of the supreme courts of three other states.

Here, the surrogate expert necessarily relied on the veracity of recorded statements in the autopsy report. The Georgia court approved this procedure, citing pre-*Smith* caselaw to hold that a prosecutor may "ask [a second expert] his independent, expert opinion regarding the facts contained in [a prior expert's] report and associated documents." Pet. App. at 11a (quoting *Naji v. State*, 797 S.E.2d 916, 920 (Ga. 2017)). This is precisely the procedure *Smith* forbade.

Statements are "testimonial" when "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial . . . ." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 (2009) (quoting *Crawford*, 541 U.S. at 52). Aiken's autopsy results obviously would be required to be provided to Johns in discovery and expected to be available at Johns's criminal trial, given that Johns had already been arrested for Cason's murder when it was performed.

Johns properly preserved the Confrontation Clause issue. The State complains that Johns's briefing to the Georgia court was paltry, Opp. at 14, implicitly suggesting that stronger briefing may have changed the result. But the State does not—nor can it—deny that Johns raised the Confrontation Clause issue, and the Georgia court decided it on the merits, including by addressing *Smith* directly. *See* Pet. App. at 10a–11a. Georgia is on the incorrect side of a clear split.

Faced with the unpleasant prospect of grappling with the cost of compliance with the Confrontation Clause, the Georgia court found a way to avoid *Smith*'s holding, issuing a precedential opinion that reaffirmed all its pre-*Smith* caselaw. That opinion

permitting the use of surrogate experts to present testimonial hearsay will be the final word in Georgia unless this Court intervenes. This Court should grant review to reaffirm that there are no exceptions to the Confrontation Clause; a criminal defendant is entitled to confront *all* witnesses who testify against him.

ARGUMENT

I. The Georgia Supreme Court's decision flouts *Smith v. Arizona*.

The State argues that this Court should deny review because there is not a well-developed split. Opp. at 9. That argument misses the point. The principal reason for review is that the Georgia court's decision conflicts directly with this Court's precedents. Other lower courts have likewise departed from this Court's command in *Smith,* but the departure here is critically important and intolerable because the Georgia Supreme Court's decision is binding on all courts in Georgia, unless this Court corrects it.

A criminal defendant has the right to "be confronted with the witnesses against him" in "all criminal prosecutions." U.S. Const. amend. VI. *Crawford* clarified that the Confrontation Clause prohibits the prosecution from introducing out-of-court testimonial statements against a defendant, unless the witness is unavailable and the defendant previously had the opportunity to cross-examine her. *Crawford*, 541 U.S. at 68–69. Statements are testimonial if they are made with the primary purpose of being introduced as evidence in a criminal case. *See Williams v. Illinois*, 567 U.S. 50, 82–83 (2012) (plurality opinion). These rules extend to expert

witnesses; they apply whenever "an expert conveys an absent analyst's statements in support of his opinion, and the statements provide that support only if true." *Smith* at 783; *id.* at 803 (Thomas, J. concurring); *see id.* at 805 (Gorsuch, J. concurring).

A. Conflict with this Court's Precedents.

The Georgia court's decision directly conflicts with this Court's controlling precedents. When a surrogate expert uses the statements of an absent analyst as the basis of her opinion, the Confrontation Clause is necessarily implicated. *Smith*, 602 U.S. at 802–03. And this Court has held that a statement is testimonial when its "primary purpose" is for use as evidence in a criminal case. *See Williams*, 567 U.S. at 82–83 (plurality opinion). The State seeks to avoid these precedents by arguing that the decision was consistent with this Court's rulings because Sullivan "built on" Aiken's findings rather than parroting them, and because Aiken's report was "not testimonial." Opp. at 17–21. Neither of these arguments is true.

1. The problem with the first argument is that no degree of independent expertise can launder away errors in an original expert's process or procedures. Sullivan could be the best forensic pathologist in the world. But when she's discussing an autopsy that she did not perform, her opinions are necessarily "predicated on the truth of [the first analyst's] factual statements." *Smith*, 602 U.S. at 798. An autopsy is a complicated scientific process; an incompetent, lazy, or dishonest doctor might form incorrect conclusions based on details that were misinterpreted or overlooked, and someone who comes after would never know. Take an extreme example: assume Cason died

of a heart attack and then was stabbed post-mortem, but Aiken did not report this fact—either due to incompetence or bad faith. Sullivan would have no way to ascertain the actual cause of death or to figure it out from the autopsy report. Sullivan's opinions about the validity of Cason's autopsy findings must rely upon the accuracy and good faith of Aiken's original work.

The testimonial hearsay Sullivan presented in Johns's trial is admittedly limited in quantity. Tr. 407–09, 420. But there is no *de minimis* exception to the Confrontation Clause. Sullivan "reviewed the case information that the investigator had prepared initially," the photographs, and "Dr. Aiken's draft report." Tr. 407. She repeated Aiken's statements that recorded Cason's age, height, and weight, Tr. 408, 420, and she conveyed Aiken's assertions about a reliable chain of custody. Tr. 409 ("This is Mr. Cason as he is received in our office from his left-hand side. . . . I believe he came [directly] from the crime scene.").

Sullivan had no personal knowledge of any of those facts. She assumed that a stab wound to the heart caused Cason's death, rather than that Cason was stabbed after suffering death by heart attack or some other circumstance. Of course, there is no special reason to distrust Aiken's good faith when she recorded her measurements of Cason's body or vouched for the chain-of-custody procedures, especially in a "run-of-the-mill" prosecution of a criminal defendant. *Crawford*, 541 U.S. at 68. But then again, as Justice Scalia explained in his opinion for the Court, "[t]he Constitution prescribes a procedure for determining the reliability of testimony

in criminal trials"—and that procedure is confrontation through cross examination, not an assumption of good faith. *Id.* at 67. The Framers would not have indulged any assumption of good faith from government officers. *Id.*

2. The State's second argument is based on a faulty application of the primary purpose test, which holds that statements are testimonial when their "primary purpose" is to "establish or prove past events potentially relevant to later criminal prosecution." *Davis v. Washington*, 547 U.S. 813, 822 (2006). True, the Georgia Death Investigation Act requires investigation of deaths in a variety of circumstances, some of which do not necessarily imply criminality. The State contends these other potential purposes are evidence that the "primary purpose" of the autopsy in this case was not preparation for criminal prosecution. Opp. at 21–22. But that an autopsy *may* be conducted for public health purposes does not change the fact that *this* autopsy was conducted in the explicit context of a homicide investigation with a suspect already in custody.

Statements are testimonial when they were "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial . . . ." *Melendez-Diaz*, 557 U.S. at 311 (quoting *Crawford*, 541 U.S. at 52). An autopsy of an apparent homicide victim conducted during a criminal investigation and after a suspect has already been arrested would constitute mandatory discovery material and clearly be available for use at trial.

The State also asserts that "Georgia law requires medical examiners and pathologists . . . to investigate deaths in a wide range of circumstances." Opp. at 21. What the Brief in Opposition does not acknowledge is the reason the statute requires such an investigation. "Under the Georgia Death Investigation Act, law enforcement personnel, county coroners, and county medical examiners are notified of suspicious or unusual deaths. . . . These officials are charged with investigating the cause of death and taking appropriate action to *preserve evidence*." Op. Att'y Gen. Ga. No. 96-13 (emphasis added) (citation omitted). Here, the autopsy was performed to preserve evidence but the person who could vouch for its integrity and accuracy did not testify.

B. Conflict among the lower courts.

The Georgia court's decision contributes to a split among the lower courts. Some courts have adopted the same approach as Georgia. The Minnesota Court of Appeals and the Texas Court of Appeals have both permitted surrogate analysts to testify about results they had no role in producing and about which they had no personal knowledge. *See Gourley v. State*, 710 S.W.3d 368 (Tex. App. 2025); *State v. Shea*, No. A23-1523, 2024 WL 4115377 (Minn. Ct. App. Sept. 9, 2024).[1] These decisions conflict with *Smith*'s rule; they seek to preserve the administrative convenience of permitting surrogate expert witnesses to testify at the expense of contradicting this Court's holdings that a criminal defendant has a categorical right to confront *all* witnesses against him.

[1] The petition inadvertently referred to *Shea* as a Minnesota Supreme Court decision. Counsel apologize for that error.

On the other hand, several states have honored *Smith's* holding by requiring that any testifying forensic analyst have personal knowledge of the relevant facts. *See Commonwealth v. Gordon*, 266 N.E.3d 369 (Mass. 2025); *State v. Thomas*, 334 A.3d 686 (Me. 2025). Earlier this year, the Supreme Court of Pennsylvania joined Massachusetts and Maine in respecting *Smith*, holding that testimonial statements in a nurse examiner's report could not be admitted through a surrogate witness. *Commonwealth v. Walker*, No. 38 EAP 2024, 2026 WL 247429, at *26 (Pa. Jan. 28, 2026). *Walker*, like *Gordon* and *Thomas*, directly conflicts with the decision of the Georgia Supreme Court in this case.

This direct conflict between state supreme courts is intolerable because it means that criminal defendants in Georgia will be deprived of their Confrontation Clause rights. Sullivan's surrogate testimony violated the Confrontation Clause because she had no personal knowledge regarding the truth or falsity of the testimonial statements recorded in Aiken's autopsy report. Aiken received the body and performed the measurements and tests as part of the homicide investigation. *See* Tr. 401–06 (describing autopsy procedures); Notice of Intent to Present Testimony of a Substitute Medical Examiner at 1, *State v. Johns*, No. 23SC186170 (Ga. Super. Ct. Nov. 20, 2023). No cross-examination of Sullivan would ever reveal any errors, mistakes, unreliability, or fraud in Aiken's process, because Sullivan had no personal knowledge. *Smith*, 602 U.S. at 798 ("If Rast had lied about all those matters, Longoni's expert opinion would have counted for nothing, and the jury would have been in no position to convict.").

It does not matter that this case involves an autopsy, rather than DNA or drug testing; the same reasoning applies in all these scenarios. *Smith* is about the importance of cross-examination to reveal the potential for error or fraud by an expert witness. If a surrogate expert testifies cross-examination has no prospect of uncovering problems in the underlying procedures. The surrogate expert necessarily premises her testimony on the *assumption* that the original expert was competent and truthful. Regardless of the subject matter of expert testimony, criminal trials are different from civil because of the Sixth Amendment. Johns was entitled to confront all witnesses against him.

II. The Confrontation Clause issue was preserved and decided on the merits.

The Confrontation Clause issue was preserved and decided on the merits at every stage of this case. Johns' trial counsel made a Confrontation Clause objection to the introduction of Sullivan's surrogate expert testimony. Tr. at 341. Johns raised the Confrontation Clause issue on appeal, Brief of Appellant at 11, *Johns v. State*, 919 S.E.2d 588 (Ga. 2025) (No. S25A0875), and the Georgia Supreme Court decided that issue on the merits. In doing so, the Georgia court cited *Smith* and evaluated its significance but erred by nonetheless affirming all its pre-*Smith* caselaw. Pet. App. at 10a–11a. The Georgia Supreme Court opinion thus leaves no doubt that that court was creating binding precedent for all of Georgia's lower courts. Under the decision below, Georgia courts have free reign to permit surrogate experts to offer testimonial hearsay in criminal trials.

The Brief in Opposition does not seriously argue that the Confrontation Clause issue was not preserved. Instead, it laments that if the issue had been more skillfully briefed below, the Georgia court might have revisited its pre-*Smith* Confrontation Clause jurisprudence more carefully. Opp. at 14. That complaint is disingenuous because the State contradicts itself by forcefully arguing that the decision below was correct.

The dispositive point is that the Georgia court evaluated the impact of *Smith* and affirmed all its pre-*Smith* caselaw. It is now the law in Georgia that a prosecutor may "ask [a second expert] his independent, expert opinion regarding the facts contained in [a prior expert's] report and associated documents." Pet. App. at 11a (quoting *Naji v. State*, 797 S.E.2d 916, 920 (Ga. 2017)). That holding is egregiously wrong and this Court should correct it. Otherwise, violations of the Confrontation Clause will become routine. The Confrontation Clause must apply to expert witnesses across the country, no matter how administratively inconvenient complying with it may be.

III. This Case is an ideal vehicle for deciding the Question Presented.

This case presents an ideal vehicle to decide the Question Presented because it has an elegantly narrow scope. The issue could not be more squarely presented. The surrogate expert, Sullivan, relied upon a discreet number of measurements and recorded statements about the chain of custody of Cason's body. Those "facts" were reported in the original autopsy report and parroted by Sullivan as truthful. Tr. 407–07, 420. In doing so, Sullivan

necessarily vouched for the accuracy of those autopsy findings.

Although the State protests that only a few impermissible statements were introduced, the Confrontation Clause has no *de minimis* exception. It is a categorical rule that applies to *all* testimony at a criminal trial. *Crawford*, 541 U.S. at 67.

That only limited testimonial hearsay was introduced at trial makes this case a *better* vehicle because this fact pattern permits the Court to reaffirm cleanly that it meant exactly what it held in *Crawford* and *Smith*: the Confrontation Clause forbids the introduction of *any* testimonial hearsay, unless the witness is unavailable and the defendant previously had an opportunity for cross-examination.

The State's argument that this Court should not accept review because the error below was harmless beyond a reasonable doubt is simply wrong. The Georgia court decided the Confrontation Clause issue on the merits. It did not make an alternative determination that any error was harmless. *See* Pet. App. at 11a–12a. Indeed, although the trial court held in the alternative that any error was harmless, the Georgia Supreme Court did not even mention the harmless error issue. *Id.* It held only that the Confrontation Clause was not violated.

If this Court reverses, it may remand for the Georgia Supreme Court to consider the harmless error issue. That is exactly what the Court did earlier this Term when it summarily reversed a Mississippi Supreme Court Confrontation Clause decision and remanded for harmless error review. *Pitts v. Mississippi*, 607 U.S. __, 146 S. Ct. 413 (2025); *see also*

Crane v. Kentucky, 476 U.S. 683, 691 (1986) (reversing Kentucky Supreme Court holding that a criminal defendant did not have a constitutional right to present evidence regarding the circumstances of his confession and remanding for harmless error review); *Lilly v. Virginia*, 527 U.S. 116, 139–40 (1999) (finding violation of the Confrontation Clause and remanding for harmless error review); *Lee v. Illinois*, 476 U.S. 530, 547 (1986) (same).

The critical reason to grant review is that the Georgia Supreme Court established a binding precedent for Georgia courts that contradicts *Smith* by permitting a surrogate expert to recite testimonial hearsay recorded by another expert. Some lower courts have similarly permitted surrogate expert testimony. This Court should intervene to prohibit this side-step of the Confrontation Clause.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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