

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

GREGORY LIVINGSTON,

Petitioner

V.

STATE OF TENNESSEE,

Respondent

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF TENNESSEE AND THE
TENNESSEE COURT OF CRIMINAL APPEALS**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the defendant was deprived of his Sixth Amendment Right to Confrontation at the trial of his case when the trial court allowed the state to present evidence of the manner and cause of death in this murder case by a doctor who did not perform the autopsy, when the evidence presented through the autopsy was developed by an out-of-court doctor who did not testify?

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PETITION FOR WRIT OF CERTIORARI

Gregory Livingston respectfully petitions for a writ of certiorari to review the judgements of the Supreme Court of Tennessee and the Tennessee Court of Criminal Appeals in this case.

OPINIONS BELOW:

On July 29, 2025, the Tennessee Court of Criminal Appeals entered its unpublished opinion in this case affirming the petitioner’s conviction and sentence. *State of Tennessee v. Gregory Livingston*, (Tenn.Crim.App.2025) 2025 WL 2144726. A copy of the opinion is attached to the Appendix. A petition to appeal to the Tennessee Supreme Court was timely filed. On December 11, 2025, the Tennessee Supreme Court denied the application to appeal. A copy of the order denying the application to appeal is attached to the Appendix. No Petition for Rehearing was filed.

STATEMENT OF JURISDICTION:

The Supreme Court of Tennessee issued the order denying the application for an appeal on December 11, 2025. No petition for

rehearing was filed. This Court has jurisdiction under 28 U.S.C. §1257(a), which states: “Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty, or statute of the United States is drawn in question or where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.”

CONSTITUTIONAL PROVISION INVOLVED:

This petition involves the following constitutional provision:

The Sixth Amendment to the Constitution of the United States guarantees a criminal defendant the right “to be confronted with the witnesses against him.” U.S. Const. Amendment VI.

STATEMENT OF THE CASE:

A. Procedural History:

On December 16, 2021, the Shelby County Grand Jury returned indictment number 21-03582 charging Appellant, Gregory Livingston, with murder first degree. (I, 1-2).

A trial of the case proceeded on April 24, 2024, before the Honorable Chris Craft, Judge of Division Eight of the Shelby County Criminal Court, and a verdict of guilty was returned by the jury on May 3, 2024, finding the defendant guilty of murder first degree. (I, 9-12, 33). The defendant was sentenced by Judge Craft on May 3, 2024, to life in prison. (I, 34-35)

The defendant's motion for a new trial was filed on May 14, 2024. (I, 36-37). A supplemental motion for a new trial was filed on July 8, 2024. (I, 41-42) The supplemental motion alleged that the trial court had denied the defendant his right to confrontation by letting a doctor, who had not engaged in the autopsy examination of the deceased victim, testify as to the manner and cause of death. The motion was heard and overruled on July 8, 2024. (I, 65).

The Shelby County Public Defender was appointed to represent the defendant on appeal. (I, 66) The Notice of Appeal was filed with the Tennessee Court of Criminal Appeals on July 24, 2024. (I, 67). The transcripts of the trial proceedings were filed with the Criminal Court Clerk on September 19, 2024. (I, 69). The record and transcripts were filed with the Court of Criminal Appeals on November 5, 2024. (I-X).

The Tennessee Court of Criminal Appeals decided the case and affirmed the jury verdict and the judgment of the trial court on July 29, 2025. A copy of the opinion of the Tennessee Court of Criminal Appeals is attached to the appendix to this petition.

An application for permission to appeal to the Tennessee Supreme Court was timely filed. The Tennessee Supreme Court denied the application on December 11, 2025. A copy of the order denying the application is attached to the appendix to this petition.

B. Summary of the Facts:

The defendant in this case had been hired as a security guard at a local convenience store. While on duty he was

confronted by the victim who threatened the defendant with bodily harm. The victim approached the defendant three times in an aggressive manner. On the first two occasions the victim was interrupted by his female companion and the store manager, and he was returned to the automobile in which he had arrived at the store. On the third occasion, the victim approached the defendant in an aggressive manner, and there was no one there to stop him. The defendant told the victim to stop and pointed a gun at him. The victim kept coming. The defendant fired the gun. The bullet penetrated the chest of the victim and resulted in his death.

The autopsy of the victim was performed by Doctor Scott Collier. The testimony in court at the trial of the case was presented by Doctor Marco Ross. Dr. Ross did not participate in the autopsy examination of the deceased. He testified at trial as to the manner and cause of death. His testimony was entirely based upon the autopsy examination of Dr. Collier.

REASONS FOR ALLOWING THE WRIT:

The court should grant this petition to determine whether the trial court denied the defendant his Sixth Amendment Right

to Confrontation by allowing a doctor to testify as to the manner and cause of death who did not perform the autopsy, and the testimony of the in-court doctor was based upon the examination and findings of the out-of-court doctor.

SUMMARY OF ARGUMENT:

As stated in the facts summarized above, the defendant was convicted of murder first degree. The manner and cause of death was testified to by a doctor who did not perform the autopsy upon the victim. After the jury verdict, but before the motion for a new trial, the United States Supreme Court decided the case of *Smith v. Arizona*, 602 U.S. 779, 144 S. Ct. 1785 (2024) and published the opinion. The ruling in the *Smith* case is that the right to confrontation of the Sixth Amendment to the United States Constitution is violated if an expert witness testifies regarding facts essential to the case that were found or developed by another expert who does not testify. If evidence is introduced for the truth of the matter contained therein and the evidence is testimonial, it must be presented in court by the expert who discovers or

develops the evidence. The evidence is considered testimonial if it is developed for the purpose of presentation in trial.

The testimony of Dr. Ross violated this rule. Dr. Collier did the autopsy. The purpose of the autopsy was for testimony in the murder trial. Dr. Ross testified about the evidence developed by Dr. Collier's autopsy. This deprived the defendant of his right to confrontation.

ARGUMENT:

The defendant, Gregory Livingston, was convicted of murder first degree and sentenced to life in prison. At the trial of his case the state presented evidence of the cause of death and the manner of death. The autopsy of the victim was performed by Dr. Scott Collier, a forensic scientist. The testimony in court regarding the autopsy, and the opinion of the cause of death and the manner of death, was presented by the testimony of Dr. Marco Ross, a forensic scientist. Because the defendant could not confront the scientist who performed the autopsy and made the determination of the cause and manner of death, the defendant's right to confrontation was violated. The cause and manner of death were

essential facts in the case. Without this proof, the defendant could not be convicted of murder.

The Sixth Amendment to the Constitution of the United States guarantees a criminal defendant the right “to be confronted with the witnesses against him.” U.S. Const. Amendment VI.

Smith v. Arizona, 602 U.S. 779, 144 S. Ct. 1785 (2024) The Constitution of Tennessee guarantees this also. The defendant has the right “to meet the witnesses face to face.” TN Const. Art1, § 9.

The Confrontation Clause bars the admission at trial of testimonial statements of an absent witness unless he is unavailable to testify, and the defendant has had a prior opportunity to cross-examine the witness. That prohibition applies in full to forensic evidence. *Smith*, supra, 783 citing *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). “The Clause, as *Crawford* explained, commands not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.” *Smith*, 784.

The defendant did not object to the presentation of this evidence at trial because the prevailing case at the time of the

trial was *State v. Hutchison*, 482 S.W. 3d 893 (Tenn.2016). The *Hutchison* rule allowed the in-court expert to testify to the facts determined by the out-of-court expert based upon the rule presented in the Supreme Court case of *Williams v. Illinois*, 567 U.S. 50 (2012). The *Hutchison* court stated that the *Williams* decision was difficult to apply because there was a four-justice plurality opinion that said that the out-of-court statements violated the confrontation clause if the statements had the primary purpose of accusing a targeted individual of engaging in criminal conduct. *Hutchison, supra*, 908. There was a concurring opinion by one justice that said that the statements must be formalized testimonial material such as depositions, affidavits, etc.in order to violate confrontation. *Hutchison, supra*, 909. There was a dissenting opinion by four justices that said that the statements violated confrontation if the statements established a fact in a criminal proceeding. *Hutchison, supra*, 909. The *Hutchison* court found that the statements complained of did not violate confrontation because, while they met the broad standard advocated by the dissent in *Williams*, they did not meet the

standard under the concurring opinion nor the plurality opinion, and, thus, there was not a majority opinion upon which to rely.

Hutchison, supra, 914

The jury returned a verdict in this case on May 3, 2024. On June 21, 2024, The United States Supreme Court released its opinion in *Smith v. Arizona*, 602 U.S. 779 (2024) This decision abrogated the *Hutchison* case and established a much clearer rule than the one stated in *Williams*. The rule set out in *Smith v. Arizona* is that the testimony of the in-court witness violates the Confrontation Clause if that testimony is based upon the statements of the out-of-court witness, the statements of the out-of-court witness are offered for the truth of the matters contained in them, and the statements of the out-of- court witness are testimonial. “If an expert for the prosecution conveys an out-of-court statement in support of his opinion, and the statement supports that opinion only if true, then the statement has been offered for the truth of what it asserts.” *Smith*, 795. When the primary purpose of the findings and statements of the out-of-court

witness is for evidence in court, the expert's report is deemed to be testimonial. *Smith*, 781.

That was the case here. Dr. Ross testified that his opinion was based upon the report of Dr. Collier. (VII, 575-576)¹ He in fact simply recites the opinion of Dr. Collier. (VII, 576, 578) There is no description of any analysis done by Dr. Ross. He simply repeats everything said in the autopsy report of Dr. Collier. The five-page report of the autopsy examination is introduced through the testimony of Dr. Ross as exhibit #9. (VII, 576-577) When asked about the injuries to the victim, Dr. Ross recites the findings of Dr. Collier. He describes the gunshot wound. (VII, 578) When asked how far away the gun was from the victim when it was fired, Dr. Ross refers to Dr. Collier's report. (VII, 579-580) He goes on to comment that the autopsy report shows that, although there were two gunshot wounds, they could have been caused by the same bullet. (VII, 580) That is not Dr. Ross' opinion. That is the opinion of Dr. Collier in the report.

¹ References to the record are by roman numerals for volume number and Arabic numerals for page number.

Dr. Ross is asked for the summary and interpretation of the autopsy. He does not state his summary and interpretation. He reads the summary and interpretation of the report of Dr. Collier. (VII, 580-581) In the opinion of Dr. Collier, the cause of death was a gunshot wound to the chest. The manner of death was homicide. (VII, 581) This is essential evidence in a murder case, and it was provided by the out-of-court witness.

There are cases in point from other jurisdictions. In *Roalson v. Noble*, 116 F. 4tg 661(2024) The court allowed a DNA expert to testify regarding DNA samples that had been collected from the scene and swabbed by another expert. *Id.*, 664. The court ruled that the in-court expert was able to reach her own conclusions based upon the evidence collected and tested by the out-of-court expert because the in-court expert had done her own analysis based upon the evidence collected. *Id.*, 664. The court stated the rule that “The state cannot introduce a report with testimonial conclusions into evidence without producing the analyst who prepared the report.” *Id.*, 666. The court went on to say that “...it

is less clear whether a state may allow an analyst to testify to his own conclusions about data another analyst collected.” *Id.*, 666.

In *Watson v. Edmark*, 118 F. 4th (2024) the court allowed the state to present laboratory evidence through the testimony of a forensic toxicologist who had not himself conducted the relevant tests. The material examined was blood samples that were tested to find the presence of drugs. The testifying expert did not do the tests on the samples but testified as to his conclusions after reviewing the test results. He testified that he reviewed the process through which the samples were tested. He signed the report describing the test results and he authored the laboratory report which was full of his own analysis and conclusions. *Id.*, 461-462.

In *Gourley v. State*, 710 S.W. 3d 368 (2025) the defendant was convicted of driving while intoxicated. The expert witness who testified as to the drug contents in the defendant’s blood, shown by the test results, was not the analyst who had conducted the tests. The tests had been performed by a toxicology lab that employed over two hundred scientists. Two of them tested the defendant’s

blood. A forensic toxicologist who had not done the tests testified at the trial. He stated that he had conducted his own analysis of the analytical data from the testing and had formed his own opinion from the data. *Id.*, 372. The court held that the defendant's confrontation rights had not been violated because the toxicology report was not admitted into evidence, and because the testifying expert had performed an independent review of the raw data from the testing and formed his own conclusions from that data. *Id.*, 378.

These cases raise the question as to exactly where the line is drawn when a testifying expert relies upon testing done by another expert and testifies regarding the conclusions that he, the in-court expert, draws from the tests. In the case before the court the autopsy report was entered into evidence, and Dr. Ross testified as to the results obtained by Dr. Collier. That is a clear violation of confrontation.

The rule in *Smith v. Arizona* applies because the United States Supreme Court has stated that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases,

state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a clear break with the past. *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). The reason for this rule, the *Griffith* Court stated, was because they could not hear each case pending on direct review and apply the new rule. “We fulfill our judicial responsibility by instructing the lower courts to apply the new rule retroactively to cases not yet final.” *Id.*, 323. This applied to rules that are deemed a “clear break” with the past in order to treat similarly situated defendants alike. *Id.*, 327.

The Court of Criminal Appeals bases its decision on the proposition that the defendant is not entitled to plenary review because the issue was not preserved by being objected to at the trial during the testimony of Dr. Ross. (CCA opinion, p. 14, and p. 19). The court further states that the issue is not reviewable under the plain error doctrine because the issue was waived for tactical reasons, and consideration of the alleged error is not necessary to do substantial justice. (CCA Opinion, p. 14, and p. 21).

First, the issue was preserved. The Court of Criminal Appeals cites *State v. Minor*, 546 S.W. 3d 59 (Tenn.2018) for the proposition that the *Griffith* rule applies to cases in which the issue is preserved in the trial court and the defendant is entitled to plenary review only if the issue is so preserved. (CCA opinion, p. 19) The *Minor* case cites Tenn. Rule App. Pro. 36(b) which provides in relevant part: when necessary to do substantial justice, an appellate court may consider an error that has affected the substantial rights of a party at any time, even though the error was not raised in the motion for a new trial or assigned as error on appeal. The rule does not say “even though the testimony was not objected to at trial.” The error was preserved in the defendant’s motion for a new trial and assigned as error on appeal.

Secondly, the *Minor* case cites the case of *Johnson v. United States*, 520 U.S. 461 (1997) In that case the rule at the time of the defendant’s trial for perjury was that the judge decided the materiality of the evidence, not the jury. The defense counsel argued that materiality was an issue for the judge. After the

defendant's conviction, and while her case was on appeal, the Supreme court ruled in another case that the question of materiality in a perjury case is a jury question. The Supreme Court ruled in the *Johnson* case that the subsequent ruling applied even though the defense counsel had not objected to the judge's ruling on the issue and had even argued it. The Supreme Court said that it was the law that existed at the time of the appeal that applied, not at the time of the trial court ruling.

That is the case that we have here. There was no objection to the testimony of Dr. Ross at the time of the trial because the *Hutchison* case was the law. *Smith v. Arizona* changed the rule.

Further the issue is reviewable under the Plain Error Doctrine because the issue was not waived for tactical reasons and consideration of the issue is necessary to do substantial justice. Because the *Hutchison* rule was going to allow the testimony of the in-court expert regarding the autopsy done by the out-of-court expert, the defendant sought to have the entire autopsy report entered so that the jury would be aware that the person, who was shot, was intoxicated by alcohol and drugs. This was relevant to

the defendant's defense. There was not a waiver of the rule stated in the *Smith* case because the *Smith* case had not yet been decided.

A consideration of the error is necessary to do substantial justice. The state must prove the manner and cause of death in a murder case beyond a reasonable doubt to carry the burden of proof. The manner and cause of death was not stipulated by the defense. It was not argued. Proof to the contrary was not presented, but it was not stipulated to. This does not relieve the state of the burden.

The issue of whether the admission of out-of-court statements of evidence violate the Confrontation Clause is a question of law that is subject to de novo review. *State v. Franklin*, 308 S.W. 3d 799, 809 (Tenn.2010). Whether the plain error doctrine has been satisfied is a question of law which the court reviews de novo. *State v. Minor*, supra, 65 citing *State v. Knowles*, 470 S.W. 3d 416, 423 (Tenn.2015). Whether a new rule of constitutional law is entitled to retroactive application is a question of law subject to de novo review. *State v. Minor*, supra, 65

citing *Bush v. State*, 428 S.W. 3d 1, 16 (Tenn.2014). Whether a defendant is entitled to relief via the plain error doctrine is a question of law subject to de novo review. *State v. Minor*, supra 65 citing *State v. Cooper*, 3321 S.W. 3d 501, 506 (Tenn.2010).

CONCLUSION

The Court should accept this petition to state the situation in which the rule in *State v. Arizona* applies. Does it apply in cases in which the in-court expert relies upon facts developed by an out-of-court expert? Is the evidence admissible if the in-court expert reviews the evidence created by the out-of-court expert and gives his, the in-court expert's, conclusions? Is the defendant entitled to confront and cross-examine the person who did the analysis and created the report? The rule needs clarification.

Respectfully submitted,

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APPENDIX

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OPINION OF THE TENNESSEE COURT OF CRIMINAL
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ORDER OF THE TENNESSEE SUPREME COURT.....A-2

PROOF OF SERVICE:

I, Barry W. Kuhn, counsel for Petitioner, do swear or declare that on this date, February 24, 2026, as required by Supreme Court Rule 29, I have served the enclosed Notice of Intent to file a Motion For Leave To Proceed In Forma Pauperis and Petition For A Writ Of Certiorari on each party to the above proceeding or that party’s counsel, and on every person required to be served, by

depositing an envelope containing the above documents in the United States mail properly addressed to each of them with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

Ronald Coleman, Senior Counsel, Criminal Justice Division,
State of Tennessee Attorney General's Office, P.O. Box 20207,
Nashville, TN 37202.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 24, 2026.

/s/ Barry W. Kuhn

Barry W. Kuhn
Assistant Public Defender
Counsel of Record for Petitioner

OPINION OF THE TENNESSEE COURT OF CRIMINAL
APPEALS.....A-1

ORDER OF THE TENNESSEE SUPREME COURT.....A-2

