

No. __-____

In The
Supreme Court of the United States

DAVID SWIMS

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent

**ON PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF MISSISSIPPI**

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QUESTION PRESENTED

Whether the Sixth Amendment's Confrontation Clause permits a State to introduce forensic pathology results and an autopsy through a surrogate pathologist who neither performed nor observed the autopsy first-hand, and whose testimony depends on the truth of an absent pathologist's statements.

PARTIES TO THE PROCEEDINGS BELOW

David Swims, Applicant and Petitioner/Appellant below.

State of Mississippi, Respondent/Appellee

CORPORATE DISCLOSURE STATEMENT

For purposes of Rule 29.6, no party to the proceedings in the Court of Appeals of Mississippi is a nongovernmental corporation.

RELATED PROCEEDINGS

State v. Swims, No. LK21-334 (Circuit Court of Lafayette County) (September 19, 2023, convicted) (October 30, 2023, sentenced)

Swims v. State, 428 So.3d 389 (Miss. 2025) (conviction and sentence affirmed on direct appeal)

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ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OF MISSISSIPPI

The Petitioner, David Swims, prays for a writ of certiorari to review the judgment of the Court of Appeals of Mississippi affirming, on direct appeal, his conviction of second-degree murder and possession of a weapon by a convicted felon.

OPINION BELOW

The opinion of the Mississippi Court of Appeals, Cause No. 2023-KA-01244-COA (Pet. App. A) is reported at *Swims v. State*, 428 So.3d 389 (Miss. 2025), that court's order denying rehearing on November 25, 2025 (Pet. App. B), and the Mississippi Supreme Court's Order denying Swims's Petition for Writ of Certiorari on February 23, 2026. (Pet. App. C).¹

JURISDICTION

The judgment of the Mississippi Court of Appeals was entered on August 5, 2025, and Petition for Writ of Certiorari was denied by the Supreme Court of Mississippi on February 23, 2026. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1257 on the ground that a right or privilege of the defendant which is claimed under the Constitution of the United States has been denied by the State of Mississippi.

¹ The opinion below is attached as Appendix A to this Petition. All citations to that opinion will be to "Pet. App. A" by paragraph. Other appendices to this Petition will be cited as "Pet. App." by letter. Citations to the record below are to the Clerk's Papers and Trial Transcript as "C.P." and "Tr." respectively, by page number, and to trial exhibits as "Trial Ex. S" or "Trial Ex. D" by number.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides that:

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him”

STATEMENT OF THE CASE

David Swims was convicted of second-degree murder and possession of a firearm by a convicted felon following a jury trial commenced September 18, 2023, in the Circuit Court of Lafayette County Mississippi, the honorable Grady Franklin Tollison III, Circuit Judge, presiding. Swims was sentenced to terms of forty (40) years, with two (2) suspended after serving thirty-eight (38) in Count I and ten (10) years in Count II, said sentences to run concurrently.

At his trial Swims testified in his defense that the shooting was accidental and in self-defense. David Swims said he and Antiata (Anteeatta) (“T”)² had been married in the year 2010. They moved to Oxford in 2015, for her job. (Tr. 197, 200). At some point they developed “marital issues.” David believed she had been unfaithful. Because of their marital issues, they decided to try an “open relationship.” David, however, became jealous and did not want that to continue. (Tr. 199-201).

There were arguments, but they never got “physical.” (Tr. 197-198). An exception was one occasion where T got physical. They were in T’s car. She told David

² The indictment spelled the name Anteeatta, but the name in the trial transcript was spelled Antiatta.

he should have thanked her for helping him put his wheelchair in the car, and he replied “like, ok.” This provoked her to shove him, and he nearly fell out of the car.³

On June 9, 2021, David and T were “together” but sleeping in different rooms. On or before that day he had tracked her location to a hotel. (Tr. 203). David sent T a text. At the time, she wanted a divorce, so David agreed. (Tr. 204).

On June 8th, David had been sleeping in the master bedroom, the special bed in that room being better for him. That night he offered to make supper and she told him she did not need him to do a “damn thing for [her].” David went outside, and T followed. She wanted to argue. David asked her to leave him alone, and she went inside. David stayed outside until late. (Tr. 205-206).

The next day he was up at 7:30 am and wheeled himself to the guestroom to dress and use the bath. His clothes were kept in the guest room, and the bath was more accommodating for his disability. (T. 206). When he went to get his shoes, which were in the room where T was, she came to the door nude. David said she normally slept that way. When she opened the door, he told her he needed his shoes. (Tr. 207). He went to the bed where his shoes were, when she shoved him, telling David to hurry up. T then, took her last sip of wine, placed the wine glass on the dresser, and walked toward the bath. David said that she drank wine every day and had been drinking that morning. (Tr. 208-209).

The situation escalated as David cursed her. T said she felt sorry for the next person David was with, and he said he felt sorry for the next person T was with. She

³ David is a paraplegic and confined to a wheelchair.

told him the man she was with now would love her more than he ever had. (Tr. 209). David retorted that he had a relationship with her sister. T told him that had better not be true. David showed her a video on his phone confirming it. T picked up a knife and pulled it out of the sheath. T sleeps with a gun on her nightstand. David picked up the gun but set it on his lap as they began to call one another names. The look on her face scared him. (Tr. 209-210). When she heard the audio part of the video with her sister moaning, that was when T lost it completely, lunging at him with the knife. David braced himself and jolted causing his wheelchair to tilt backwards. David fired three times. The chair was tilting and David was not sure the angle of the shots or where they had gone. As T fell and stumbled towards the bath, David dropped the gun. (Tr. 211).

David drug himself out of the wheelchair. He heard T gasping. The confined area did not allow him to maneuver, so he slid down near T. He tried to pull her to him by the legs but was not able to do so. (Tr. 211-212). David wiped some of the blood so he would not get on himself. (Tr. 212). As he tried to pull her away from the bath, she stopped breathing. He then tried to move her head to resuscitate her. (Tr. 212).

David was in a state of panic, feeling devastated and thoroughly traumatized. He had no idea what to do next. He went in and out of the rooms. At some point he picked up the spent shell because he kept running over them in his wheelchair and put them in a tube. (Tr. 213).

David wanted to kill himself but could not bring himself to do it. He took 8-10 Ambien pills. (Tr. 213-214). The next morning, he went to work, handed in his keys

and the business credit card. (T. 214). When he came home, he took the rest of the Ambien, with the thought that he would just not wake up. But he did wake up on June 11. (Tr. 214).

At trial, the State called pathologist Dr. Mark LeVaughn to testify as to manner and cause of death. (Tr. 160). Trial counsel objected to the introduction of Dr. Mark LeVaughn's CV because it was not produced to the defense in discovery. (Tr. 162-163, S23). Trial counsel objected to Dr. LeVaughn testifying because LeVaughn did not perform the autopsy and he had no personal knowledge of the postmortem examination. (Tr. 164). Trial counsel objected that the defense had not been provided with a report of the opinion of Dr. LeVaughn. (Tr. 166-167). Trial counsel objected to Dr. LeVaughn authenticating Dr. Arboe's autopsy report. (Tr. 166-167, S24). Trial counsel objected to the autopsy photos taken by Dr. Arboe being introduced. (Tr. 168, 172, 174). Trial counsel objected to Dr. LeVaughn's opinion on cause of death. (Tr. 177).

LeVaughn stated that he was using the original report, saying "based on the autopsy report." "This is the final autopsy report on Mrs. Swims. And it was generated by the pathologist that actually completed the exam. Dr. David Arbow[sic]." (Tr. 166). The report is then said to "absolutely" reflect the work of Dr Arboe, but not the separate opinion of Dr Levaughn. Neither the state, nor the defense, ever established that Dr. Levaughn did his own independent review of the entire autopsy procedure and reach an independent conclusion. Dr LeVaughn did not write an independent report.

Dr. LeVaughn testified that the cause of Mrs. Swims's death was multiple gunshot wounds, and the manner of death was homicide. (Tr.177). LeVaughn's opinions on Mrs. Swims's cause of death were identical to Arboe's opinion in the autopsy report. (S-24).

The manner and cause of death were central to the case. Swims admitted he shot his wife. Swims argued the shooting was accidental and in self-defense explaining that he shot his wife during an argument and physical fight. (Tr. 211). In closing argument, the prosecution argued evidence from the autopsy contradicted Swims's defense:

She was shot three different times at three different angles. This is the most telling. Perforating gun shot wound to the chest. Right lateral chest perforates soft tissue of the chest, abdomen, back, heart, liver, lungs. Exit location left back. You will have the photographs and I am going to show you those in a second. Leftward, downward front to back. Right posterior thigh. Bullet perforates soft tissue of the right leg, abdomen, uterus. Left abdomen exit location. Leftward upward front to back. Third wound entrance location, left interomedial thigh, perforates soft tissue of the left leg, fractured femur. Exit location, left posterior thigh. Leftward front to back. Three different angles. Here, here and here. The evidence shows, ladies and gentlemen, that as he is shooting at her. Pulling that trigger three separate times he is not doing this, he is aiming. He is tracking her as she moves throughout that room.

(Tr. 286-287).

REASONS WHY THE WRIT SHOULD BE GRANTED

The ruling below defies this Court’s holding in *Smith v. Arizona*, placing it at odds with every other jurisdiction that has addressed this issue. Summary reversal is appropriate here—“the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error.” *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting) (per curiam). At a minimum, this Court should grant review to resolve the split that the decision below created and clarify *Smith*’s application to the of surrogate testimony by an expert who reviews autopsy reports and similar materials and then claims to give an independent opinion on the manner and cause of death.

The decision below conflicts with *Smith*⁴.

The Mississippi Court of Appeals found that Dr. Arboe’s autopsy report was testimonial hearsay and should not have been admitted into evidence. Pet. App A. ¶22. The Mississippi Court of Appeals also agreed that Dr. LeVaughn’s testimony about the conclusions of the autopsy was inconsistent with the confrontation clause. Pet. App A. ¶23. However, the Court of Appeals held that “the bulk of LeVaughn’s testimony consisted of his own opinions based on his own review of the autopsy photos” and this testimony did not violate the confrontation clause. Pet. App A. ¶24. The Mississippi Court of Appeals concluded that the bulk of LeVaughn’s testimony

⁴ In the brief in opposition in *Jeffrey Dale Busby v. Mississippi*, No. 25-6885, the State of Mississippi stated that; “[t]his 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). pp 5-6.

was properly admitted and any error in admitting the written autopsy report and allowing LeVaughn to repeat Arboe’s conclusions was harmless. Pet. App A. ¶26.

The dissenting opinion disagreed, finding this Court’s opinion in *Smith v. Arizona*, requires the Mississippi Court of Appeals to hold that surrogate testimony by an expert who reviews an autopsy report and claims to give an independent opinion violates the confrontation clause. The dissenting opinion argued:

Smith specifically rejects the surrogate testimony of experts like LeVaughn, who have no prior connection with a case but offer an “independent expert opinion” using testimonial hearsay. Here, LeVaughn had no involvement in the preparation or review of the autopsy. In essence, the opinion LeVaughn offered was the opinion Arboe formed as a result of the autopsy that he had performed. LeVaughn made no additional analysis, and the State used LeVaughn to relay what Arboe found; to use the *Smith* Court’s word, LeVaughn effectively became Arboe’s mouthpiece. *See id.* at 800. Under the Sixth Amendment, Swims had the right to confront the person who authored the autopsy report, Arboe. In my opinion, *Smith v. Arizona* requires us to withdraw our approval of the sole use of surrogate testimony by an expert who reviews autopsy reports and similar materials and then claims to give an independent opinion on the manner and cause of death. We can no longer ignore the violations of the Confrontation Clause such testimony presents.

Pet. App A. ¶47

In *Smith v. Arizona*, this Court rejected Arizona’s reliance on the testimony of a surrogate expert who had used an absent analyst’s work as a “basis” for his calculations but had no personal knowledge about that work. Arizona offered the evidence provided by the surrogate witness so the jury would believe it—in other words, for its truth. *Smith v. Arizona*, 602 U.S.779, 798-799 (June 21, 2024). *Smith* held that an expert witness cannot present a forensic analyst’s testimonial out-of-court statements by asserting that those statements form the basis for the expert’s

opinion. 602 U.S. at 803. Because the forensic analyst’s statements could support the expert’s opinion only if true, the defendant had the right to cross-examine the analyst’s statements. *Id.* In other words, the testifying witness needs personal knowledge of the testimonial facts admitted through his testimony. *Id.* at 796, 799. Allowing a surrogate analyst to testify by forming an “independent opinion” would “end run” the Confrontation Clause’s protections. *Id.* at 799. In light of *Smith*, this Court issued a Grant, Vacate and Remand (“GVR”) in a Texas case involving a pathologist’s surrogate testimony. *Seavey v. Texas*, 145 S. Ct. 368 (Oct. 15, 2024) (state court had rejected confrontation claim, reasoning that the “substitute medical examiner’s testimony, premised upon his independent review of the autopsy file, did not violate the Confrontation Clause.”) (quote from *Seavey v. State*, No. 14-22-00513-CR, 2023 WL 8588054, at *3 (Tex. App. Dec. 12, 2023), petition for discretionary review refused (Apr. 17, 2024), cert. granted, judgment vacated, 145 S. Ct. 368 (2024))

All of Dr. LeVaughn’s testimony relied on Dr. Arboe’s methods and the assumed truth of his results. Dr. Arboe performed his autopsy and prepared his results with the intention that they be used at trial.

Because of the central role of the autopsy in the State’s case, the State cannot show that it is “clear beyond a reasonable doubt that the error did not contribute to the verdict.” *See Pittman v. State*, 385 So. 3d 1205, 1208 (Miss. 2024) (quoting *Chapman v. California*, 386 U.S. 18, 22 (1967), and *Young v. State*, 99 So. 3d 159, 165 (Miss. 2012)).

The decision below conflicts with five other courts’ post-*Smith* rulings.

The Mississippi Supreme Court’s rule conflicts with five other courts’ decisions on the level of personal knowledge required for a technical reviewer’s testimony to satisfy the Confrontation Clause. The high courts of Maine, Massachusetts, Georgia, and Washington, plus the Fourth Circuit, hold that the person who handles, observes, and tests forensic evidence—the analyst with personal knowledge of those testimonial facts—must be subject to cross-examination to satisfy the Confrontation Clause.

Maine. In *State v. Thomas*, 334 A.3d 686, 702–03 (Me. 2025), a chemist analyzed substances seized from the defendant, determined their weight, and concluded the substances were fentanyl before moving out of state prior to trial. *Id.* The State then sought to offer a technical reviewer’s testimony, which was subject to cross-examination, as to the weight of the two substances and his “independent opinion” that they contained fentanyl. *Id.* at 701. At trial, the technical reviewer based his testimony on the data that was collected by the absent chemist. *Id.* The Maine Supreme Judicial Court found that the trial court’s reliance on the absent chemist’s “file notes, test results, and sample profile, all generated by and based on [the absent chemist’s] actions, carries the same problem identified by the Supreme Court in *Smith*.” *Id.* at 703. The court held that the testimony of the chemist at trial relied on the truth of out-of-court statements which were testimonial, thus violating the defendant’s Confrontation Clause right post-*Smith*. *Id.*; see also *State v. Gleason*, 339 A.3d 774 (Me. 2025) (same).

Massachusetts. In *Commonwealth v. Gordon*, 266 N.E.3d 369, 373 (Mass. 2025), the analyst who conducted a drug-identification test on a substance seized from the defendant was no longer employed by the State at trial. A supervisor who did not perform or observe the testing reviewed the tests and identified the substances, and the State introduced the test results through the supervisor’s testimony. *Id.* at 375–76. The Massachusetts Supreme Judicial Court concluded from the Court’s reasoning in *Smith* that the supervising analyst’s opinion was dependent on the absent analyst’s out of court testimonial statements, thus making it “‘independent’ in name only.” *Id.* at 392–93. The court held that the supervisor’s testimony based on the absent analyst’s test results violated the Confrontation Clause post-*Smith*. *Id.*

Georgia. In *Watkins v. State*, 912 S.E.2d 574, 585 (2025), an analyst prepared a forensic report of substances seized from the defendant and certified that the substance was cocaine. The analyst ended employment with the State before the defendant’s trial, so the State called a reviewing analyst to testify to the factual assertions in the absent analyst’s report and to “state his own conclusion” about the report. *Id.* at 586. The reviewing analyst neither performed nor observed the testing and never handled or witnessed the substance at issue. *Id.* The Georgia Supreme Court reversed the defendant’s drug conviction, holding that the analyst’s trial testimony relaying “the factual assertions in [the absent analyst’s] report violated the Confrontation Clause under the United States Supreme Court’s decision in *Smith*, and therefore the trial court clearly and obviously erred in admitting it.” *Id.* at 587.

Washington. In *State v. Hall-Haught*, 569 P.3d 315, 318 (Wash. 2025), a technician performed all toxicology testing used against the defendant at trial. A supervisor did not perform or observe the testing but reviewed and signed off on the lab toxicology report, and the State admitted the toxicology report through the supervisor. *Id.* The Washington Supreme Court departed from precedent, finding that their prior case law which “allowed the supervisor’s expert opinion to rely on the nontestifying forensic analyst’s factual statements as the basis for their opinion . . . [was] unconstitutional under *Smith*.” *Id.* at 323. The court held the supervisor’s testimony admitting the lab toxicology report was based on testimonial hearsay and violated the Confrontation Clause post-*Smith*. *Id.*

Fourth Circuit. In *United States v. Seward*, 135 F.4th 161, 168 (4th Cir. 2025), a non-testifying analyst tested DNA samples taken from a crime scene. The State then introduced the DNA sample through the testimony of a DNA expert who reviewed the analyst’s conclusions and provided those conclusions at trial without having tested the samples herself. *Id.* The court found that “*Smith* makes clear that the government may not ‘eva[de]’ the Confrontation Clause by offering testimony that is based on a non-testifying analyst’s work ‘as long as [the testifying expert] bases an independent opinion on that material.’” *Id.* at 168–69. Any approach otherwise would make “*Smith* and several other post-*Crawford* decisions ‘a dead letter and allow for easy evasion of the Confrontation Clause.’” *Id.* The Fourth Circuit held that “this testimony was offered for the truth of the matter asserted and so implicates the Confrontation Clause.” *Id.*

These cases show that, post-*Smith*, courts are routinely rejecting the use of surrogate witnesses—whether technical reviewers, supervisors, or experts—to bootstrap an absent analyst’s testimonial statements. The work of the absent analyst and the testifying witness are inseverable. The latter’s ultimate, scientific conclusion relies entirely on the former: The testifying witness “could opine that the tested substances were [controlled substances] only because he accepted the truth of what [the absent analyst] had reported about her work in the lab.” See *Smith*, 602 U.S. at 798. In contrast, the Mississippi Supreme Court has created a lopsided split by reaffirming its prior case-law, which allows technical reviewers to sidestep the Confrontation Clause.

Prior to this Court’s ruling in *Smith v. Arizona*, New Mexico Court of Appeals held that statements in an autopsy report that formed the basis of the trial testimony of a pathologist were testimonial hearsay under the confrontation clause

New Mexico In *State v. Jarmillo* 272 P.3. 682 (N.M. 2011), Dr. Natarajan who at the time was employed at the Lubbock County Texas Medical Examiner’s Office performed an autopsy and determined the cause of death was closed head injuries and the manner of death was homicide. The findings of the autopsy report were reviewed, confirmed and signed off by four medical examiners. By the time of trial, Dr. Natarajan had left the County Medical Examiners for private practice and stated he required a fee of \$60,000 for his testimonial services. At trial, the State called Dr. Thomas Parsons, the Deputy Chief Medical Examiner of Lubbock County to establish cause and manner of death. Dr. Thomas was not one of the four reviewing examiners. Over defense objection, the district court admitted the autopsy report and permitted

Dr. Parsons to testify to its contents. *Id.* at 684 The New Mexico Court of Appeals held that the autopsy report was testimonial, and the defendant had no opportunity to cross-examine Dr. Natarajan. Therefore, the admission of the autopsy report violated the confrontation clause. *Id.* at 686-687. The court found that the cause and manner of death as intentional rather than accidental was the crux of the case and thus the constitutional violation was harmful error. *Id.* at 688.

This case is an ideal vehicle to decide this important issue.

This Court often rejects a lower court's erroneous legal rule regardless of whether the error might be deemed harmless. *Pitts v. Mississippi* is a prime example: The Court summarily reversed the Mississippi Supreme Court on the Confrontation Clause issue and remanded the case for further proceedings, including on harmless error: "[O]n remand the State remains free to argue, and the Mississippi Supreme Court remains free to consider, whether the error in this case warrants a new trial under the harmless-error standard." *Pitts v. Mississippi*, 607 U.S. 1, 6; 146 S. Ct. 413, 417 (2025); see also *Fields v. Colorado*, 145 S. Ct. 1136 (2025) (mem.) (issuing a GVR despite the state's harmless-error argument); *McFadden v. United States*, 576 U.S. 186, 197 (2015) (remanding for the lower court to consider harmlessness "in the first instance"); *Hedgpeth v. Pulido*, 555 U.S. 57, 62 (2008) (per curiam) (same); *California v. Roy*, 519 U.S. 2, 6 (1996) (per curiam) (same). The same course is appropriate here.

CONCLUSION

The Court should grant the petition and either (i) reverse the decision below and remand for further proceedings or (ii) set the case for argument.

Respectfully submitted,

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