IN THE SUPREME COURT OF MISSISSIPPI

NO. 2008-CT-01920-SCT

FREDERICK DENELL GRIM

v.

STATE OF MISSISSIPPI

ON WRIT OF CERTIORARI

DATE OF JUDGMENT:	11/14/2008
TRIAL JUDGE:	HON. ALBERT B. SMITH, III
COURT FROM WHICH APPEALED:	TUNICA COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	PRO SE
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: LAURA HOGAN TEDDER
DISTRICT ATTORNEY:	BRENDA FAY MITCHELL
NATURE OF THE CASE:	CRIMINAL - FELONY
DISPOSITION:	AFFIRMED - 10/18/2012
MOTION FOR REHEARING FILED:	11/15/2012; DENIED AND OPINION MODIFIED AT ¶¶ 21 AND 30 - 12/20/2012
MANDATE ISSUED:	

EN BANC.

CARLSON, PRESIDING JUSTICE, FOR THE COURT:

¶1. Frederick Denell Grim was convicted by a Tunica County jury for the sale of cocaine. The circuit judge adjudicated Grim a habitual offender pursuant to Mississippi Code Section 99-19-83 (Rev. 2007) and sentenced him to life imprisonment without the possibility of parole. On appeal, we assigned this case to the Court of Appeals, and that court addressed the six issues raised by Grim. The Court of Appeals affirmed the trial court's judgment of conviction and sentence. ***Grim v. State***, No. 2008-KP-01920-COA, ___ So. 3d ___, 2010 WL

2367279 (Miss. Ct. App. June 15, 2010). We granted Grim's petition for writ of certiorari[1] to examine whether the trial court erred by allowing a laboratory supervisor, who neither observed nor participated in the testing of the substance, to testify in place of the analyst who had performed the testing. *See* ***Harness v. State***, 58 So. 3d 1, 4 (Miss. 2011) (under Mississippi Rule of Appellate Procedure 17(h), this Court may limit the question for review upon grant of certiorari). Finding no error, we affirm.

PRELIMINARY ISSUE: COUNSEL ON APPEAL

¶2. As a preliminary matter, we must address Grim's motion to dismiss appellate counsel and to represent himself. After this case was assigned to the Court of Appeals, and before briefing had begun, Grim filed a motion to dismiss his appointed counsel, the Indigent Appeals Division of the Office of State Public Defender.[2] On April 3, 2009, the Court of Appeals granted Grim's motion in a single-judge order, allowing Grim to proceed pro se. The Court of Appeals affirmed Grim's conviction, and this Court granted his pro se petition for writ of certiorari.

¶3. Finding insufficient evidence to determine whether Grim had knowingly and intelligently exercised his right to self-representation and waived his right to counsel, this Court ordered supplemental briefing on the matter from the Attorney General and the State Public Defender. Considering the matter further, this Court vacated the April 3, 2009, order

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[1] ***Grim v. State***, 50 So. 3d 1003 (Miss. 2011) (Table).

[2] At the time, the Office of State Public Defender did not exist, and Grim was represented by the Office of Indigent Appeals. Miss. Code Ann. § 99-18-1 (Supp. 2011).

of the Court of Appeals, suspended the appeal, and remanded Grim's motion to the Tunica County Circuit Court. On remand, the circuit court conducted a hearing and entered an order finding that Grim "knowingly and voluntarily desires to act as his own attorney on appeal," and that he "has intelligently and completely waived the appointment of counsel on appeal."

¶4. A criminal defendant has a constitutional right to effective assistance of counsel at trial and on his or her first appeal as of right. ***Evitts v. Lucey***, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985); ***Neal v. State***, 422 So. 2d 747, 748 (Miss. 1982); U.S. Const. amends. VI, XIV; Miss. Const. art. 3, § 26. The United States Supreme Court also has recognized a constitutional right to proceed without counsel at trial so long as the defendant "voluntarily and intelligently elects to do so." ***Faretta v. California***, 422 U.S. 806, 807, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). Because of the inherent conflicts between the right to self-representation and the right to effective assistance of counsel, Uniform Circuit and County Court Rule 8.05 requires a trial court to conduct an "on the record . . . examination of the defendant to determine if the defendant knowingly and voluntarily desires to act as his/her own attorney." *See also* ***Faretta***, 422 U.S. at 835 ("When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must 'knowingly and intelligently' forgo those relinquished benefits.") While there is no federal constitutional right to self-representation on appeal, the states may provide one under their own constitutions. ***Martinez v. Court of Appeal of California***, 528 U.S. 152, 163, 120 S. Ct. 684, 145 L. Ed. 2d 597 (2000). The Mississippi Constitution reads, "[i]n all

criminal prosecutions the accused shall have a right to be heard by himself or counsel, or both. . . ." Miss. Const. art. 3, § 26. Accordingly, this Court has said that "it is elemental that an appellant, if mentally competent, has a right to discharge his attorneys and represent himself in this Court . . . ." ***Tarrants v. State***, 231 So. 2d 493, 493 (Miss. 1970).

¶5. Because a criminal defendant has a state constitutional right to self-representation on appeal, upon learning that a defendant wishes to proceed without counsel, Mississippi appellate courts have the same duty as trial courts, that is, to ensure that the defendant is making a waiver of his or her right to counsel, "knowingly and voluntarily." URCCC 8.05. *See* ***Tarrants***, 231 So. 2d at 494 (remanding case to trial judge to conduct a factual hearing to determine whether appellant was mentally competent to represent himself). To this end, Mississippi Rule of Appellate Procedure 6(c)(2) (amended effective August 2, 2012), sets forth the procedures for allowing an indigent criminal appellant to dismiss appointed counsel and proceed pro se on appeal. "If it is determined that appellant has intelligently and competently waived the right to counsel on appeal, then the motion to dismiss counsel shall be granted." ***Id.***

¶6. On remand, the trial judge conducted a hearing on the record and thoroughly questioned Grim about his desire to proceed pro se. The trial judge also informed Grim of his constitutional rights and the perils of self-representation. Grim unequivocally expressed that he desired to act as his own attorney without the assistance of appointed counsel. Reviewing the transcript and the trial court's order, we agree with the trial judge's findings

and hereby grant Grim's Motion to Dismiss Counsel and lift the suspension of appellate proceedings. We now turn to the merits of Grim's petition for writ of certiorari.

FACTS AND PROCEEDINGS IN THE TRIAL COURT

¶7. On February 15, 2007, the Mississippi Bureau of Narcotics and the Tunica County Police Department used confidential informant Terry Reed to conduct a controlled buy of cocaine from Frederick Denell Grim. A video and audio recording of the transaction was introduced at trial and played for the jury. Based on these events, Grim was indicted for selling cocaine in violation of Mississippi Code Section 41-29-139(a)(1) (Rev. 2009). Grim's indictment also alleged that he was a second and subsequent offender as defined in Mississippi Code Section 41-29-147 (Rev. 2009), and that he was a habitual offender under Mississippi Code Section 99-19-83 (Rev. 2007).

¶8. The jury also heard testimony from Eric Frazure, a forensic scientist with the Mississippi Crime Laboratory. Over Grim's objection, Frazure testified about the crime lab's analysis of the substance purchased from Grim. Through Frazure, the State introduced the crime lab report that determined the substance to be cocaine. Frazure signed the report as the "technical reviewer," but another scientist, Gary Fernandez, signed the report as the "case analyst."

¶9. Frazure testified that he neither participated in Fernandez's analysis nor observed his testing of the substance. Frazure's involvement was that he had reviewed the report to ensure that Fernandez's data supported the conclusions contained in his laboratory report. According to Frazure "[a] technical reviewer is part of the quality assurance, quality control

methods within the crime laboratory. It ensures that we are doing quality work or correct work each and every time."

¶10. Grim's trial attorney timely objected to the admission of the report through Frazure, arguing that, without testimony from Fernandez, Grim would be denied his Sixth Amendment right to confront his accusers. U.S. Const. amend. VI. *See also* Miss. Const. art. 3, §26 ("[i]n all criminal prosecutions the accused shall have a right . . . to be confronted by the witnesses against him"). The trial court overruled Grim's objection and allowed the State to introduce the crime lab report. On cross-examination, Frazure reiterated that he did not perform any testing and that he was not present when Fernandez tested the substance.

DISCUSSION

¶11. Grim contends that his right to confrontation was violated because he was not provided an opportunity to cross-examine Fernandez, the analyst who authored the forensic report admitted as evidence against him. Our standard of review governing the admission or exclusion of evidence is abuse of discretion. ***Williams v. State***, 991 So. 2d 593, 597 (Miss. 2008) (citations omitted). However, this Court reviews constitutional issues *de novo*. ***Smith v. State***, 25 So. 3d 264, 267 (Miss. 2009).

A. Confrontation-Clause Jurisprudence

¶12. The Sixth Amendment to the United States Constitution and Article 3, Section 26 of the Mississippi Constitution guarantee a criminal defendant the right to confront and cross-examine the witnesses against him. U.S. Const. amend. VI; Miss. Const. art. 3, § 26 (1890). The United States Supreme Court has held that the Sixth Amendment Confrontation Clause

bars the admission of "testimonial statements" made by a witness who does not appear at trial, unless the witness is unavailable *and* the defendant had a prior opportunity to cross-examine him. ***Crawford v. Wash.***, 541 U.S. 36, 53-54, 59, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Though no exhaustive list defining testimonial statements exists, "[a] document created solely for an 'evidentiary purpose' . . . ranks as testimonial." ***Bullcoming v. N.M.***, 131 S. Ct. 2705, 2717, 180 L. Ed. 2d 610 (2011) (quoting ***Melendez-Diaz v. Mass.***, 557 U.S. 305, 129 S. Ct. 2527, 2532, 174 L. Ed. 2d 314 (2009)). Forensic laboratory reports created specifically to serve as evidence against the accused at trial are among the "core class of testimonial statements" governed by the Confrontation Clause. ***Melendez-Diaz***, 129 S. Ct. at 2532.

¶13. In ***Melendez-Diaz***, the prosecution introduced three sworn certificates of state laboratory analysts, which provided that evidence seized from the defendant was cocaine, without any live testimony. ***Id.*** at 2531. Because the certificates, or affidavits, were the functional equivalent of live testimony, the analysts who had tested the substance were witnesses subject to the Confrontation Clause. ***Id.*** at 2532. The Supreme Court noted that forensic evidence is no more reliable or straightforward than any other form of testimonial evidence. ***Id.*** at 2536-38. Therefore, the prosecution was required to make the analysts available for Confrontation-Clause purposes. ***Id.*** at 2532.

¶14. In ***Bullcoming***, the evidence introduced was "a forensic laboratory report certifying that Bullcoming's blood-alcohol concentration was well above the threshold for aggravated DWI." ***Bullcoming***, 131 S. Ct. at 2709. The laboratory analyst who testified about the report

"was familiar with the laboratory's testing procedures, but had neither participated in nor observed the test on Bullcoming's blood sample." ***Id.*** The Supreme Court held that the "surrogate testimony" of a lab analyst "who did not sign the certification or perform or observe the test reported in the certification" did not satisfy the Sixth Amendment right to confrontation. ***Id.*** at 2710. In Justice Sotomayor's separate opinion, concurring in part, she emphasized the "limited reach" of the ***Bullcoming*** decision, because the testifying analyst in that case "had no involvement whatsoever in the relevant test and report." ***Id.*** at 2719, 2722 (Sotomayor, J., concurring in part). Justice Sotomayor stated:

> [T]his is not a case in which the person testifying is a *supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue*. [The testifying analyst] conceded on cross-examination that he played no role in producing the BAC report and did not observe any portion of . . . the testing. It would be a different case if, for example, a supervisor who observed an analyst conducting a test testified about the results or a report about such results.

Id. at 2722 (Sotomayor, J., concurring in part) (emphasis added).[3]

[3] We acknowledge an even more recent Supreme Court case that addressed the Confrontation Clause – ***Williams v. Illinois***, 132 S. Ct. 2221, 183 L. Ed. 2d 89 (2012). In ***Williams***, an expert was allowed to opine about matching the defendant's DNA profile, but the analyst who recovered and tested the DNA was not called to testify. ***Id.*** at 2227. The plurality concluded that the expert testimony did not violate the Confrontation Clause because the DNA report relied on by the expert "was not prepared for the primary purpose of accusing a targeted individual" and it was not a "formalized statement" like the certificates or affidavits found in ***Bullcoming*** and ***Melendez-Diaz***. ***Id.*** at 2242-44 (citing ***Bullcoming***, 131 S. Ct. at 2710-11; ***Melendez-Diaz***, 557 U.S. at 308-09). ***Williams*** has no bearing on the case at hand because we do not dispute that the forensic report at issue is "testimonial" and that it is the type of document subject to the Confrontation Clause.

¶15. This Court recently addressed the Sixth Amendment right to confrontation in ***Conners v. State***, 92 So. 3d 676 (Miss. 2012). In ***Conners***, the State introduced a toxicology report and a ballistics report through the testimony of a detective, and the detective was allowed to testify regarding the contents of the reports. ***Conners***, 92 So. 3d at 682. The detective was not involved in any way in the testing procedures or in preparing the reports, and the analysts who performed the underlying tests and prepared the forensic reports were not called to testify. ***Id.*** This Court held that "[b]ecause the forensic reports were testimonial in nature, the reports were inadmissible at Conners's trial absent the analysts' live testimony, and the admission of the reports violated the Confrontation Clause." ***Id.*** at 684.

¶16. None of these cases stands for the proposition that, in every case, the only person permitted to testify is the primary analyst who performed the test and prepared the report. This Court has said that there are instances in which "someone other than the primary analyst who conducted the test can testify regarding the results." ***Conners***, 92 So. 3d at 690 (Carlson, P.J., specially concurring, joined by Waller, C.J., Dickinson, P.J., Randolph, Lamar, Kitchens, Chandler, and Pierce, JJ.) (citing ***Melendez-Diaz***, 129 S. Ct. at 2532 n.1; ***McGowen v. State***, 859 So. 2d 320, 339-40 (Miss. 2003)). To determine if a witness satisfies the defendant's right to confrontation, we apply a two-part test:

> First, we ask whether the witness has "intimate knowledge" of the particular report, even if the witness was not the primary analyst or did not perform the analysis firsthand. [***McGowen***, 859 So. 2d at 340]. Second, we ask whether the witness was "actively involved in the production" of the report at issue. ***Id.*** We require a witness to be knowledgeable about both the underlying analysis and the report itself to satisfy the protections of the Confrontation Clause.

Id. In ***McGowen v. State***, this Court held, "when the testifying witness is a court-accepted expert in the relevant field who participated in the analysis *in some capacity, such as by performing procedural checks*, then the testifying witness's testimony does not violate a defendant's Sixth Amendment rights." ***McGowen***, 859 So. 2d at 339 (emphasis added). In ***McGowen***, we held that, although one analyst had performed most of the testing, a second analyst who had assisted in the testing and in preparing the report was qualified to testify about the crime lab report. ***Id.*** The testifying analyst was "actively involved in the production of the report and had intimate knowledge of the analyses even though she did not perform the tests first hand." ***Id.*** at 340.

¶17. The dissent implies that ***McGowen*** is not good law following the Supreme Court's decision in ***Crawford v. Washington***, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). The dissent relies on a comment in Justice Kennedy's dissenting opinion in ***Melendez-Diaz*** that Mississippi's Sixth Amendment practices may not be capable of reconciliation with ***Melendez-Diaz***. Dis. Op. at ¶ 33 (citing ***Melendez-Diaz***, 129 S. Ct. at 2558 (Kennedy, J., dissenting)). With the utmost respect for Justice Kennedy, his statement that Mississippi "excuses the prosecution from producing the analyst who conducted the test, so long as it produces someone" is not an accurate representation of our law. ***Melendez-Diaz***, 129 S. Ct. at 2558 (Kennedy, J., dissenting). Mississippi law requires far more than a "custodian" or "someone" who can authenticate the document; we require a witness – an analyst – who not only knows about the analysis performed, but is knowledgeable about the document as well. ***McGowen***, 859 So. 2d at 340. As in the case at hand, we do not always

require "the particular analyst who conducted the test" to testify, because we recognize that some tests involve multiple analysts. ***Melendez-Diaz*** recognized this fact as well. *See* ***Melendez-Diaz***, 129 S. Ct. at 2532 n.1.

¶18. This Court's decision in ***Barnette v. State***, 481 So. 2d 788 (Miss. 1985), also highlights why Justice Kennedy's comments are in error. In ***Barnette***, the Court addressed Mississippi Code Section 13-1-114 (now repealed), which authorized certificates of physicians, chemists, and laboratory technicians to be admitted into evidence without affording a defendant the opportunity to cross-examine. ***Barnette***, 481 So. 2d at 790-91. This Court carefully construed the statute and held that "the certificate cannot be admitted without the in-court testimony of the analyst unless the defendant gives his pre-trial consent and waives his right to confront." ***Id.*** at 792. It has always been this Court's understanding of the Sixth Amendment that, as long as a defendant timely objects that he is being denied his right to confrontation, the State then has the burden to present the witnesses against the defendant. Mississippi caselaw regarding protection of defendants' rights to confrontation has been consistent, and it is consistent with the ruling and reasoning in ***Melendez-Diaz*** as well.

¶19. The Court of Appeals correctly applied the principles from ***McGowen*** in ***Brown v. State***, 999 So. 2d 853 (Miss. Ct. App. 2008). In that case, much like today's case, the analyst called to testify was the laboratory manager, rather than the primary analyst who had performed the DNA tests at issue. ***Brown***, 999 So. 2d at 860. The analyst who had performed the DNA tests was not called to testify. ***Id.*** The testifying analyst had reviewed the work of the analyst who had performed the DNA tests, had conducted her own analysis of the testing,

and had reached her own conclusions. ***Id.*** The Court of Appeals held that the laboratory manager was "sufficiently involved with the analysis and overall process so as to avoid violating Brown's Sixth Amendment right of confrontation." ***Id.*** at 861.[4]

B. Application

¶20. In today's case, the testifying witness was the laboratory supervisor, Eric Frazure. While Frazure was not involved in the actual testing, he had reviewed the report for accuracy and signed the report as the "case technical reviewer." Frazure is much like the laboratory manager in ***Brown***, who the Court of Appeals held was "sufficiently involved with the analysis and overall process" so that his testimony did not violate the defendant's Sixth Amendment right of confrontation. ***Brown***, 999 So. 2d at 861. Frazure was able to explain competently the types of tests that were performed and the analysis that was conducted. He had performed "procedural checks" by reviewing all of the data submitted to ensure that the data supported the conclusions contained in the report. Based on the data reviewed, Frazure had reached his own conclusion that the substance tested was cocaine. His conclusion was consistent with the report, and he had signed the report as the technical reviewer. Frazure

[4] *See also* ***Mooneyham v. State***, 842 So. 2d 579, 586-87 (Miss. Ct. App. 2002) (defendant's Sixth Amendment rights were not violated where laboratory supervisor, who did not conduct the actual testing but verified the results of the analysis, was allowed to testify regarding the test results and chain of custody); ***Gray v. State***, 728 So. 2d 36, 55-57 (Miss. 1998) (defendant's Sixth Amendment right was not violated where he was able to cross-examine and confront the expert who testified regarding the conclusion she reached after evaluating the results of DNA tests performed by a technician under her supervision).

satisfied the ***McGowen*** test because he had "intimate knowledge" about the underlying analysis and the report prepared by the primary analyst.

¶21. The dissent takes the position that Frazure was a "surrogate" through whom the laboratory report should not have been admitted. Such a decision would take the standards set forth in ***McGowen*** and ***Bullcoming*** to a new level, finding that lab supervisors and case reviewers could not testify regarding testing and procedures that they supervised, reviewed, or verified, and on which they based their own conclusions, inapposite to what was settled in ***McGowen***.

¶22. We hold that a supervisor, reviewer, or other analyst involved may testify in place of the primary analyst where that person was "actively involved in the production of the report and had intimate knowledge of analyses even though [he or] she did not perform the tests first hand." ***McGowen***, 859 So. 2d at 340. Frazure met this standard, and the trial court did not abuse its discretion by allowing him to testify. Grim had the opportunity to confront and cross-examine Frazure at trial, which satisfied his Sixth Amendment right to confront the witness against him.

CONCLUSION

¶23. We agree with the Court of Appeals that the circuit court did not abuse its discretion by allowing Frazure to testify regarding the laboratory report and his conclusion that the substance seized from Grim was cocaine. Our de novo review of the constitutional issue before us leads us to the conclusion that Grim's constitutional right to confrontation was not

violated. The judgments of the Court of Appeals and the Circuit Court of Tunica County are affirmed.

¶24. **THE JUDGMENTS OF THE COURT OF APPEALS AND THE CIRCUIT COURT OF TUNICA COUNTY ARE AFFIRMED. CONVICTION OF THE SALE OF COCAINE AND SENTENCE OF LIFE WITHOUT PAROLE, AS A HABITUAL AND SECOND AND SUBSEQUENT OFFENDER, IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, AFFIRMED. SENTENCE IMPOSED IN THIS CAUSE SHALL RUN CONSECUTIVELY TO ANY AND ALL SENTENCES PREVIOUSLY IMPOSED.**

WALLER, C.J., RANDOLPH, LAMAR AND PIERCE, JJ., CONCUR. KITCHENS, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY DICKINSON, P.J., AND CHANDLER, J. KING, J., NOT PARTICIPATING.

KITCHENS, JUSTICE, DISSENTING:

¶25. The United States Supreme Court has made clear that the prosecution's use of one expert to admit the testimonial report of another implicates a criminal defendant's Sixth Amendment right to confront his accusers. ***Bullcoming v. New Mexico***, __ U.S. __, 131 S. Ct. 2705, 2717, 180 L. Ed. 2d 610 (2011). Eric Frazure, as a "technical reviewer," who neither observed nor participated in the testing process, was indeed a "surrogate witness" for Gary Fernandez. ***Id.***, 131 S. Ct. at 2710. Thus, the admission of *Fernandez's* laboratory report via *Frazure's* testimony, without the defendant's having had a prior opportunity to cross-examine Fernandez, violated Grim's constitutional right to confrontation, thereby impairing his right to a fair trial.

¶26. The Sixth Amendment to the United States Constitution and Article 3, Section 26, of the Mississippi Constitution guarantee a criminal defendant the right to confront and cross-examine the witnesses against him. Before 2004, the United States Supreme Court had

interpreted the federal Confrontation Clause to allow admission of absent witnesses' testimonial statements based on a judicial determination of reliability. ***Ohio v. Roberts,*** 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980). However, in ***Crawford v. Washington***, 541 U.S. 36, 61, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the justices held that "indicia of reliability" was not constitutionally sufficient, declaring that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." ***Id.***, 541 U.S. at 69. Therefore, without exception, the Sixth Amendment's Confrontation Clause bars the admission of "testimonial" statements by a witness who did not appear at trial unless the witness is unavailable and the defendant has had a prior opportunity to cross-examine that witness. ***Id.*** at 61.

¶27. Forensic laboratory reports created specifically to serve as evidence against the accused at trial belong to the "core class of testimonial statements" governed by the Confrontation Clause. ***Melendez-Diaz v. Massachusetts***, 557 U.S. 305, 129 S. Ct. 2527, 2532, 174 L. Ed. 2d 314 (2009). Therefore, the authors of forensic reports sponsored by the prosecution must be made available for confrontation purposes even if they possess "the scientific acumen of Mme. Curie and the veracity of Mother Teresa." ***Id.*** at 2537 n.6.

¶28. In ***Bullcoming v. New Mexico***, 131 S. Ct. at 2710, the Supreme Court clarified that, when a forensic report is admitted into evidence, "surrogate testimony" by a scientist who neither conducted nor oversaw the testing process is insufficient to pass Sixth Amendment scrutiny. At Bullcoming's aggravated-DUI trial, the prosecutor called a substitute analyst

from the crime laboratory to validate the forensic report prepared by the technician who had tested Bullcoming's blood. ***Id.*** at 2711-12. Unswayed by the surrogate witness's familiarity with the laboratory's procedures and experience with the testing equipment, the Supreme Court held the report inadmissible, stressing that a defendant's right to confrontation cannot be swept aside by a court's belief "that questioning one witness about another's testimonial statements provides a *fair enough* opportunity for cross-examination." ***Id.*** at 2716 (emphasis added). The opinion reiterated that "[t]he text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts." ***Id.*** at 2716 (quoting ***Crawford***, 541 U.S. at 54).

¶29. The majority holds that Grim's right to confrontation was fulfilled through the cross-examination of Frazure during the trial. But, like the surrogate witness in ***Bullcoming***, 131 S. Ct. at 2716, who did not "perform or observe the test reported in the certification," Frazure did not observe Fernandez conducting his analysis, and was therefore unable to provide the calibre of confrontation required by the Sixth Amendment.[5] On cross-examination, Frazure made it clear that he did not participate in Fernandez's analysis:

Q. So, you didn't do any scientific analysis of that exhibit, did you?

A. No firsthand analysis.

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[5]The State "could have avoided any Confrontation Clause problem by asking [Frazure] to retest the sample, and then testify to the results of his retest rather than to the results of a test he did not conduct or observe." ***Id.*** at 2718. The substance was not destroyed by Fernandez's testing, and the State, as the party bearing the burden of proof, easily could have requested a retest by an analyst available for cross-examination.

Q. By "firsthand," that means testing the item yourself, right?

A. Correct.

Q. So, basically, all you did was, from what it appeared, the paperwork that had been filed, that Mr. Fernandez followed the proper procedure to obtain the result he got?

A. That is correct.

Q. But the only way you would really know is if you tested it yourself, wouldn't you?

A. Mr. Fernandez did proper examinations on this item of evidence. I can look at the data that he has generated – or the data that was generated from his examinations and with a reasonable degree of scientific certainty I agree with his examinations and the results of his – or the results of the report.

Q. But to have, as you say, firsthand knowledge, you would have to test it yourself, wouldn't you?

A. That is correct.

. . . .

Q. Just so I'm clear, basically what you testified to is that you basically checked the paperwork and procedures, and you didn't do any scientific analysis; is that right?

A. That is correct.

Without any firsthand knowledge, Frazure could not testify whether Fernandez had followed proper protocol, nor could his cross-examination "expose any lapses or lies" on Fernandez's part. ***Id.*** at 2715.

¶30. The majority relies on ***McGowen v. State***, 859 So. 2d 320 (Miss. 2003), and ***Bullcoming***, 131 S. Ct. 2705, to approve the *admission* of laboratory reports "on which

[other witnesses] based their own conclusions." Maj. Op. ¶ 21. However, neither case addressed or "settled" this exact issue. Maj. Op. ¶ 21. ***McGowen***, 859 So. 2d at 326, 338-40, did not say that the testifying witness had relied on the report to form her own, independent, expert opinion, or that the report itself had been admitted into evidence. In ***Bullcoming***, 131 S. Ct. at 2722, Justice Sotomayor explicitly and correctly noted that the Supreme Court had not yet addressed whether, in an independent opinion, an expert witness could testify about underlying forensic reports *not admitted into evidence*. (Sotomayor, J., concurring in part).

¶31. Assuming Frazure performed his own scientific analysis, the laboratory report at issue in this case was not merely relied upon by Frazure. This document, as were those admitted against the defendants in ***Melendez-Diaz*** and ***Bullcoming***, was received into evidence, and was *incriminating on its face*, thereby requiring its author to be present for confrontation purposes as is constitutionally mandated by the Sixth Amendment.[6] Because the report unquestionably became testimonial when the prosecution elected to admit it into evidence, Fernandez, not Frazure, became the witness whom Grim had a right to confront. *See* ***Bullcoming***, 131 S. Ct. at 2716 ("[W]hen the State elected to introduce Caylor's certification, Caylor became a witness Bullcoming had a right to confront. *Our precedent cannot sensibly be read any other way*." (emphasis added)).

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[6] *Cf.* ***Conners v. State***, 92 So. 3d 676, 690 (Miss. 2012) (Carlson, P.J., specially concurring) (noting that, in ***McGowen***, "it was the analyst who ultimately testified; the report did not speak for itself.").

¶32. The majority refers to Fernandez as the "primary analyst," but the drug testing in this case was performed by one person, and the report was authored by that same person. Other forensic testing, such as DNA analysis, is much more complex, and could involve a "primary analyst." *See* ***Gray v. State***, 728 So. 2d 36, 56-57 (Miss. 1998) (noting that, under Rule 703 of the Mississippi Rules of Evidence, "the opinion of the nontestifying expert would serve simply as a premise supporting the testifying expert's opinion on a broader issue"). In those cases, the underlying reports may not be "testimonial" for Confrontation Clause purposes. *See* ***Williams v. Illinois***, __ U.S. __, 132 S. Ct. 2221, 183 L. Ed. 2d 89 (2012). Notably, the majority relies heavily on a Court of Appeals case involving DNA testing, ***Brown v. State***, 999 So. 2d 853 (Miss. Ct. App. 2008). Under the United States Supreme Court's most recent precedent, ***Williams v. Illinois***, __ U.S. __, 132 S. Ct. 2221, 183 L. Ed. 2d 89 (2012), the DNA testing in ***Brown***, 999 So. 2d 853, would not be "testimonial" evidence. The majority concedes that the report at issue in Grim's case is testimonial. Maj. Op. n.3. Thus, like ***Williams***, ***Brown*** should have "no bearing on the case at hand." Maj. Op. n.3.

¶33. I also note that ***McGowen*** was decided before the United States Supreme Court significantly changed its approach to the Confrontation Clause. *See* ***Crawford***, 541 U.S. 36, *overruling* ***Roberts***, 448 U.S. 56. Before ***Bullcoming***, Justice Kennedy observed that ***McGowen*** might not withstand a post-***Crawford*** analysis:

> A fifth state, Mississippi, excuses the prosecution from producing the analyst who conducted the test, so long as it produces someone. *Compare* ***Barnette v. State,*** 481 So. 2d 788, 792 (Miss. 1985) (cited by the Court), *with* ***McGowen v. State,*** 859 So. 2d 320, 339-40 (Miss. 2003) (the Sixth Amendment does not require confrontation with the particular analyst who conducted the test). It is

> possible that neither Mississippi's practice nor the burden-shifting statutes [of other states] can be reconciled with the Court's holding.

Melendez-Diaz, 129 S. Ct. at 2558 (Kennedy, J., dissenting). Despite the majority's protests to the contrary, Justice Kennedy was correct in suggesting that ***McGowen*** was not entirely consistent with this Court's holding in ***Barnette v. State***, 481 So. 2d 788, 791 (Miss. 1985), "that it was reversible error to admit, over the objection of [the defendant], the certificate of analysis into evidence without the testimony of *the analyst who prepared such*." (Emphasis added.) *See also* ***Kettle v. State***, 641 So. 2d 746, 750 (Miss. 1994) ("We hold that . . . when someone other than *the person who conducted the laboratory test* attempts to testify in a cocaine possession or sale case over the objection of the defense that in doing so his Sixth Amendment right to confrontation is violated." (emphasis added)). In distinguishing ***Barnette*** and ***Kettle***, ***McGowen*** relied on ***Adams v. State,*** 794 So. 2d 1049, 1057-58 (Miss. Ct. App. 2001); but even in ***Adams***, 794 So. 2d at 1057, the testifying witness was a laboratory supervisor who had "supervised, witnessed, and checked the tests performed by his technician."

¶34. The application of the Confrontation Clause to forensic evidence is "unbending" and it "may not be disregarded at our convenience." ***Bullcoming***, 131 S. Ct. at 2717-18. Grim's cross-examination of Frazure was not equivalent to a cross-examination of Fernandez, and the admission of Fernandez's report denied Grim his Sixth Amendment right to confront a witness against him. *See also* Miss. Const. art. 3, §26 ("[i]n all criminal prosecutions the accused shall have a right . . . to be confronted by the witnesses against him"). For this

reason, the judgment of conviction should be reversed. As the majority holds otherwise, I respectfully dissent.

DICKINSON, P.J., AND CHANDLER, J., JOIN THIS OPINION.

DICKINSON, PRESIDING JUSTICE, DISSENTING TO THE DENIAL OF THE MOTION FOR REHEARING:

¶35. I dissent from the denial of rehearing. When this Court handed down its original majority opinion,[7] I joined Justice Kitchens's well-reasoned dissent. While I continue to join Justice Kitchens, upon further reflection I now take this opportunity to record my separate disagreement with the majority's misapplication of the United States Supreme Court's decision in ***Bullcoming v. New Mexico***,[8] the controlling law on the issue before us today.

¶36. In ***Bullcoming*** – a case identical in every material respect to the case before us today – the State of New Mexico prosecuted Bullcoming for driving while intoxicated.[9] The principal evidence against Bullcoming was a forensic laboratory report certifying that his blood-alcohol concentration exceeded the percentage necessary for conviction.[10]

¶37. At trial, instead of calling Curtis Caylor, the lab analyst, who performed the tests on Bullcoming's blood, the prosecution called another analyst named Razatos, who was familiar with the testing performed by the lab, and who "qualified as an expert witness with respect

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[7] ***Grim v. State***, No. 2008-CT-01920-SCT, 2012 WL 4945744 (Miss. Oct. 18, 2012).

[8] ***Bullcoming v. New Mexico***, ___U.S.___, 131 S. Ct. 2705, 2714, 180 L. Ed. 2d 610 (2011).

[9] ***Id.*** at 2709.

[10] ***Id.***

to the gas chromatograph machine" used to test Bullcoming's blood.[11] Also, "Razatos provided live, in-court testimony and, thus, was available for cross-examination regarding the operation of the . . . machine, the results of [Bullcoming's] BAC test, and the SLD's established laboratory procedures."[12]

¶38. Against this background, the ***Bullcoming*** majority reversed Bullcoming's conviction, holding that out-of-court, testimonial statements "may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had an opportunity to confront that witness."[13] The ***Bullcoming*** majority went on to point out that, even though Caylor's report and Razatos's surrogate testimony might be deemed reliable, that "does not dispense with the Confrontation Clause," because the Confrontation Clause "'commands not that the evidence be reliable, but that reliability be assessed in a particular manner: by testing [the evidence] in the crucible of cross-examination.'"[14] These observations led the ***Bullcoming*** majority to hold:

> Accordingly, the analysts who write reports that the prosecution introduces must be made available for confrontation even if they possess "the scientific acumen of Mme. Curie and the veracity of Mother Teresa."[15]

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[11] ***Id.***

[12] ***Id.*** at 2713.

[13] ***Id.***

[14] ***Id.*** at 2715 (quoting ***Crawford v. Washington***, 541 U.S. 36, 62, 124 S. Ct 1354, 158 L. Ed. 2d 177 (2004)).

[15] ***Bullcoming***, 131 S. Ct. at 2715 (quoting ***Melendez-Diaz v. Massachusetts***, 557 U.S. 305, 319, 129 S. Ct. 2527, 174 L. Ed. 2d 314 n.6 (2009)).

¶39. In further explanation of why the Confrontation Clause entitled Bullcoming to cross-examine the analyst who actually performed the tests, the Court stated that

> surrogate testimony of the kind Razatos was equipped to give could not convey what Caylor knew or observed about the events his certification concerned, *i.e.*, the particular test and testing process he employed. Nor could such surrogate testimony expose any lapses or lies on the certifying analysts part. . . . With Caylor on the stand, Bullcoming's counsel could have asked questions designed to reveal whether incompetence, evasiveness, or dishonesty accounted for Caylor's removal from his work station.[16]

¶40. In further explanation of why Bullcoming had a constitutional right to confront Caylor, the analyst who actually received the blood and performed the tests, the Court stated:

> Caylor [the analyst who didn't testify] certified that he received Bullcoming's blood sample intact with the seal unbroken, that he checked to make sure that the forensic report number and the sample number "corresponded," and that he performed on Bullcoming's sample a particular test, adhering to a precise protocol. He further represented, by leaving the "remarks" section of the report blank, that no "circumstances or condition affected the integrity of the sample of the validity of the analysis. These representations, relating to past events and human actions not revealed in raw, machine-produced data, are *meet for cross-examination*.[17]

¶41. In today's case, Frazure – the certifying analyst – provided none of the above-mentioned "material" for cross-examination. Although the majority places great weight on Frazure's signature, ***Bullcoming*** nowhere says, and does not hold, that confrontation required only a scrivener's signature. In fact, it suggested the opposite. The majority, however, accepts the scrivener's signature and misrepresents that ***Bullcoming*** allows the same.

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[16] ***Bullcoming,*** 131 S. Ct. at 2715**.**

[17] ***Id.*** at 2714 (emphasis added) (citations omitted).

¶42. Additionally, the fact that the following quoted language from the ***Bullcoming*** majority is not found in this Court's majority demonstrates why I feel compelled to respond to today's majority opinion which purports to be (but certainly is not) grounded in and supported by ***Bullcoming***. According to the United States Supreme Court's majority opinion in ***Bullcoming***, the Confrontation Clause

> does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination. . . . In short, when the State elected to introduce Caylor's certification, Caylor became a witness Bullcoming had the right to confront. Our precedent cannot sensibly be read any other way.[18]

¶43. As a final point, the majority's reliance on ***McGowen v. State***[19] is completely misplaced, since that case was decided by this Court before the United States Supreme Court handed down three landmark Confrontation Clause cases: ***Crawford***,[20] ***Melendez-Diaz***,[21] and ***Bullcoming***.[22]

¶44. For the reasons stated above, I dissent from the denial of rehearing in this case. Because the State violated Grim's constitutional right to confront witnesses against him, I would grant rehearing and reverse his conviction.

KITCHENS AND CHANDLER, JJ., JOIN THIS OPINION.

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[18] ***Id.*** at 2716.

[19] ***McGowen v. State***, 859 So. 2d 320 (Miss. 2003).

[20] ***Crawford v. Washington***, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

[21] ***Melendez-Diaz v. Massachusetts***, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009).

[22] ***Bullcoming v. New Mexico***, ___U.S.___, 131 S. Ct. 2705, 2714, 180 L. Ed. 2d 610 (2011).