IN THE SUPREME COURT OF MISSISSIPPI

NO. 2010-CT-00203-SCT

ROBERT L. JENKINS

v.

STATE OF MISSISSIPPI

ON WRIT OF CERTIORARI

DATE OF JUDGMENT:	09/16/2009
TRIAL JUDGE:	HON. JOHN C. GARGIULO
COURT FROM WHICH APPEALED:	HARRISON COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	PHILLIP BROADHEAD OFFICE OF INDIGENT APPEALS BY: LESLIE S. LEE
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: LADONNA C. HOLLAND
DISTRICT ATTORNEY:	CONO A. CARANNA, II
NATURE OF THE CASE:	CRIMINAL - FELONY
DISPOSITION:	AFFIRMED - 10/04/2012
MOTION FOR REHEARING FILED:	11/01/2012; DENIED AND OPINION MODIFIED AT ¶¶ 18 AND 27- 12/20/2012
MANDATE ISSUED:	

EN BANC.

CARLSON, PRESIDING JUSTICE, FOR THE COURT:

¶1. Robert Lee Jenkins was convicted in the Circuit Court for the Second Judicial District of Harrison County for possession of a controlled substance. He was sentenced to life imprisonment under the habitual-offender statute. Miss. Code Ann. § 99-19-83 (Rev. 2007). On appeal, we assigned the case to the Court of Appeals, which affirmed. We granted Jenkins's petition for writ of certiorari to examine whether the trial court erred by allowing a laboratory supervisor to testify regarding the results of substance testing, where the

supervisor reviewed and verified the results, but another analyst actually performed the tests. Finding no error, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2. Shortly before midnight on January 27, 2007, Biloxi police officer Michael Brennan observed Robert Jenkins stumbling as he walked down the street. Brennan approached Jenkins to ascertain his sobriety and noticed that Jenkins's speech was slurred, his breath smelled of alcohol, his eyes were bloodshot, and his balance was unsteady. Concluding that Jenkins was intoxicated, Brennan commenced the process of taking Jenkins into custody for public intoxication. At that point, Brennan noticed a white tissue in Jenkins's mouth. Brennan directed Jenkins to place the tissue on the hood of the patrol car, and when Jenkins complied, a white rock rolled out of the tissue. Jenkins quickly grabbed and swallowed the loose rock. Two additional rocks were found in the tissue, which were taken into evidence and submitted to the Mississippi Crime Laboratory. Jenkins was arrested for public intoxication and possession of a controlled substance.

¶3. Jenkins was indicted for possession of cocaine in an amount of more than 0.1 gram but less than 2 grams. Miss. Code Ann. § 41-29-139 (Rev. 2009). The case went to trial in the Circuit Court for the Second Judicial District of Harrison County, Judge John C. Gargiulo presiding. The State called Timothy Gross, associate director of the Mississippi Crime Laboratory and manager of the Gulf Coast Regional Laboratory, to testify at trial regarding identification of the controlled substance. Gross was the supervisor and technical reviewer in this case, and he was called to testify in lieu of Alison Smith, the laboratory analyst who

had performed the testing procedure that identified the substance seized from Jenkins as cocaine. Smith was on indefinite medical leave and unavailable to testify. Jenkins objected because Gross did not conduct the actual examination. Outside the presence of the jury, Judge Gargiulo heard testimony from Gross regarding his involvement in the testing process.

¶4. Gross testified that Smith had completed both a chemical test and gas chromatography mass spectroscopy on the substance. Gross did not participate in or observe Smith's testing of the substance, but he was the "case technical reviewer" assigned to the matter. As the technical reviewer, Gross reviewed all of the data submitted and the report generated by Smith to ensure that the data supported the conclusions contained in Smith's laboratory report. Gross testified that, based on his review of Smith's analysis, he reached his own conclusion that the substance was cocaine. The certified laboratory report was signed by both Smith and Gross, identifying Smith as the case analyst and Gross as the technical reviewer.

¶5. Following questioning by attorneys for the State and defense, Judge Gargiulo examined Gross. The relevant portion of the record reads as follows:

THE COURT: Did you oversee the results of Ms. Smith's tests?

GROSS: Yes, yes.

THE COURT: Okay.

GROSS: That is my function as the technical reviewer is to ensure that the data in the case files supports the conclusions.

THE COURT: Alright. And do you conduct any procedural checks?

GROSS: The Mississippi Crime Laboratory has quite an extensive quality control regimen that is followed by every analyst.

THE COURT: . . . did you have to verify the results of the analysis?

GROSS: Yes.

Judge Gargiulo found that Gross's participation as the technical reviewer was sufficient to satisfy the Sixth Amendment right to confrontation. Gross was accepted as an expert witness and allowed to testify regarding the test results and chain of custody. The trial proceeded with the State's introduction of the laboratory report through Gross's testimony.

¶6. Ultimately, the jury found Jenkins guilty of possession of a controlled substance. The trial court adjudicated Jenkins an habitual offender pursuant to Mississippi Code Section 99-19-83 and sentenced him to life imprisonment. Miss. Code Ann. § 99-19-83 (Rev. 2007). Jenkins appealed, and we assigned the case to the Court of Appeals. The Court of Appeals affirmed. Jenkins filed a petition for writ of certiorari, which we granted.

DISCUSSION

¶7. We granted certiorari to examine one issue – whether the trial court erred by allowing Gross, the laboratory supervisor, to testify in place of the analyst who had performed the substance 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). Jenkins contends that his Sixth Amendment right to confrontation was violated because he was not provided an opportunity to cross-examine the analyst who had performed the testing on the substance and authored the forensic report admitted as evidence against him. "Our standard of review regarding admission or exclusion of evidence is abuse of discretion." ***Smith v. State***, 25 So. 3d 264, 269 (Miss. 2009) (citing ***Brown v. State***, 965 So.

2d 1023, 1026 (Miss. 2007)). Constitutional issues are reviewed de novo. ***Id.*** (citing ***Hayden v. State***, 972 So. 2d 525, 536 (Miss. 2007)).

¶8. First, we address the Court of Appeals' finding that Jenkins's Confrontation Clause issue was procedurally barred from review because there was no motion in limine or contemporaneous objection.[1] Jenkins did not raise the issue in a motion in limine, but he sufficiently objected to Gross's testimony at trial. Upon being notified that Gross would testify, the trial judge said, "I am understanding that the defense is objecting to the witness based on hearsay and the fact that . . . Gross did not personally conduct the actual examination." Counsel for Jenkins confirmed that was the defense's objection. Following a hearing held outside the presence of the jury, the trial judge overruled the objection and allowed Gross to testify. Thus, we disagree with the Court of Appeals' finding that Jenkins's Confrontation Clause issue was procedurally barred. We now proceed to discuss the merits of Jenkins's Confrontation Clause argument.

¶9. 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. The United States Supreme Court has held that the Sixth Amendment Confrontation Clause bars

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[1] A motion in limine is intended to curtail the jury's exposure to highly prejudicial material. *See* ***McMillan v. City of Jackson***, 701 So. 2d 1105, 1111 (Miss. 1997) (citations omitted). While a motion in limine can be sufficient to preserve an issue for appeal even without a contemporaneous objection during trial, a motion in limine is not required in advance of all objections to the admission of evidence to be made at trial. *See* ***Goff v. State***, 14 So. 3d 625, 640 (Miss. 2009); ***Kettle v. State***, 641 So. 2d 746, 748 (Miss. 1994).

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 there is no exhaustive list defining testimonial statements, "[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.

¶10. 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.

¶11. 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).[2]

¶12. 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

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[2] 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.

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.

¶13. None of these cases stand 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.

Conners, 92 So. 3d at 690 (Carlson, P.J., specially concurring). 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.

¶14. 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 ¶ 30(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 an inaccurate 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.

¶15. 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.

¶16. 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 reviewed the work of the analyst who had performed the DNA tests, conducted her own analysis of the testing, and 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.[3]

¶17. In our case today, the testifying witness was the laboratory supervisor. While Gross was not involved in the actual testing, he reviewed the report for accuracy and signed the report as the "case technical reviewer." Gross is much like the laboratory manager in ***Brown***, who the Court of Appeals held was "sufficiently involved with the analysis and overall process" and whose testimony did not violate the defendant's Sixth Amendment right of confrontation. ***Brown***, 999 So. 2d at 861. Gross was able to explain competently the types of tests that were performed and the analysis that was conducted. He 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, Gross reached his own conclusion that the substance tested was cocaine. His conclusion was consistent with the report, and he signed the report as the technical reviewer. Gross satisfied the ***McGowen*** test because he had "intimate knowledge" about the underlying analysis and the report prepared by the primary analyst.

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[3] *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 had reached after evaluating the results of DNA tests performed by a technician under her supervision).

¶18. The dissent takes the position that Gross 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, by 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***.

¶19. The primary analyst in this case was unavailable to testify because she had taken an indefinite leave of absence after being diagnosed with stage-four cancer. These situations arise in life, and there is a constitutionally recognized alternative when the primary analyst is unavailable. 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 the analyses even though [he or] she did not perform the tests first hand." ***McGowen***, 859 So. 2d at 340. Gross met this standard, and the trial court did not abuse its discretion by allowing him to testify. Jenkins had the opportunity to confront and cross-examine Gross at trial, which satisfied his Sixth Amendment right to confront the witness against him.

CONCLUSION

¶20. We agree with the Court of Appeals that the circuit court did not abuse its discretion by allowing Gross to testify regarding the laboratory report and his conclusion that the substance seized from Jenkins was cocaine. Jenkins's constitutional right to confrontation

was not violated. The judgments of the Court of Appeals and the Circuit Court for the Second Judicial District of Harrison County are affirmed.

¶21. **THE JUDGMENTS OF THE COURT OF APPEALS AND THE CIRCUIT COURT FOR THE SECOND JUDICIAL DISTRICT OF HARRISON COUNTY ARE AFFIRMED. CONVICTION OF POSSESSION OF A CONTROLLED SUBSTANCE, AS A HABITUAL OFFENDER, AND SENTENCE OF LIFE IMPRISONMENT IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, AFFIRMED**.

WALLER, C.J., RANDOLPH, LAMAR AND PIERCE, JJ., CONCUR. KITCHENS, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY DICKINSON, P.J., CHANDLER AND KING, JJ.

KITCHENS, JUSTICE, DISSENTING:

¶22. 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). Gross, as a "technical reviewer," who neither observed nor participated in the testing process, was indeed a "surrogate witness" for Smith. ***Id.***, 131 S. Ct. at 2710. Thus, the admission of *Smith's* laboratory report via *Gross's* testimony, without a prior opportunity to cross-examine Smith, violated Jenkins's constitutional right to confrontation, thereby impairing his right to a fair trial.

¶23. 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.

¶24. 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.

¶25. In ***Bullcoming***, 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).

¶26. The majority holds that Jenkins's right to confrontation was fulfilled through the cross-examination of Gross. But, like the surrogate witness in ***Bullcoming***, 131 S. Ct. at 2716, who did not "perform or observe the test reported in the certification," Gross did not observe Smith conducting her analysis, and was therefore unable to provide the calibre of confrontation required by the Sixth Amendment. Specifically, Gross could not testify whether Smith followed proper protocol, nor could his cross-examination "expose any lapses or lies" on Smith's part. ***Id.*** at 2715. Although he testified at length about what Smith "would have" done, such as "visually examin[ing] the exhibit, obtain[ing] the weight of the exhibit, obtain[ing] the sample of the exhibit, and then subject[ing] that sample to the examinations," Gross had no personal knowledge whether Smith actually did these things, and he did none of these things himself. Notably, the crime for which Jenkins was convicted could have been charged as a misdemeanor depending on the weight of the substance, thus foreclosing Jenkins's life sentence as an habitual offender. Miss. Code Ann. § 41-29-139

(c)(1)(a) (Rev. 2009) (possession of less than one-tenth of a gram may be charged as a misdemeanor or felony). The State's proof of this essential element was before the jury in Smith's laboratory report, but Gross testified, "I didn't actually weigh that particular sample."

¶27. 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. ¶ 18. However, neither case addressed or "settled" this exact issue. Maj. Op. ¶ 18. ***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

¶28. The laboratory report at issue in this case was not merely relied upon by Gross to form the basis of his opinion. Smith's report listed "Robert Lee Jenkins" as the "suspect" and concluded that the substance received from the Biloxi Police Department was "Cocaine, Amount: 0.1 Gram." 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.[4] Because the report unquestionably

[4]*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

became testimonial when the prosecution elected to admit it into evidence, Smith, not Gross, became the witness whom Jenkins 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)).

¶29. The majority refers to Smith as the "primary analyst" and notes that "some tests involve multiple analysts." [5] 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).

¶30. 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,

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did not speak for itself.").

[5]Despite the majority's assertion to the contrary, footnote 1 of the ***Melendez-Diaz*** opinion does not discuss testing by multiple analysts. *See* Maj. Op ¶ 14. That footnote simply explained that, "we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case." ***Melendez-Diaz***, 557 U.S. at 311 n.1.

overruling ***Ohio v. 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."

¶31. Finally, the majority notes that Smith's absence from trial was an unfortunate fact of life, but finds that there was "a constitutionally recognized alternative" for submitting her

testimonial statements. Maj. Op. ¶ 19. There was no such alternative. 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. The State "could have avoided any Confrontation Clause problem by asking [Gross] 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 seized from Jenkins was not destroyed by Smith'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.

¶32. Jenkins's cross-examination of Gross was not equivalent to a cross-examination of Smith, and the admission of Smith's report denied Jenkins 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., CHANDLER AND KING, JJ., JOIN THIS OPINION.

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

¶33. I dissent from the denial of rehearing for the same reasons stated in my dissent to the denial of rehearing in ***Grim v. State***, No. 2008-CT-01920-SCT (Dec. 20, 2012), handed down this date.

KITCHENS AND CHANDLER, JJ., JOIN THIS OPINION.