SMITH V. ARIZONA AND THE PROBLEM OF TEAMS

BRANDON SHARP

The Supreme Court in *Smith v. Arizona* clarified that when a substitute witness relies upon an absent lab analyst's work product to form an independent opinion and the absent analyst's "statements" support the opinion only if true, then the analyst's statements that come in through the substitute witness are hearsay. This holding, in turn, implicates a defendant's right under the Confrontation Clause if those statements are also deemed to be testimonial. Though its holding is narrow, *Smith v. Arizona* addressed widespread confusion among state and lower federal courts who had grappled, and oftentimes, splintered, over this question. The Court's decision is well-reasoned, but has already generated a new set of Confrontation Clause issues in instances where forensic evidence is generated by "teams" of analysts.

This note discusses the relevant Confrontation Clause jurisprudence and what *Smith* did—and did not—resolve. Then, it examines which practices are, might be, and are not permissible in *Smith*'s wake. In particular, the note focuses on the new Confrontation Clause questions that have arisen when forensic labs employ a "team" approach to processing forensic evidence.

INTRODUCTION

The Sixth Amendment to the United States Constitution declares that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with witnesses against him."[1] The meaning and construction of the right to confront "witnesses against him"

1. U.S. CONST. amend. VI.

seems intuitive when familiar evidence, such as eyewitness testimony, is at play. However, when the government seeks to admit forensic evidence, identifying the "witnesses" is less clear.

Picture a defendant arrested for possessing what appears to be cocaine. The substance gets collected as evidence and is ultimately sent to a lab for testing. An analyst runs the test, confirms that the substance is cocaine, and memorializes her findings in a report. When the trial starts two years later, the analyst no longer works for the lab. Accordingly, the lab's supervisor testifies about the evidence's composition, based on the analyst's notes and report. Whether such testimony triggers the protections of the Confrontation Clause and, if so, *whom* the defendant has the right to confront, were largely unresolved until recently. However, between 2009 and 2012, the Supreme Court attempted to clarify this constitutional right's scope in the forensic evidence context in a series of cases collectively termed the "*Melendez-Diaz* Trilogy."[2]

The first of these cases, *Melendez-Diaz v. Massachusetts*,[3] made clear that the analysts in forensic laboratories were indeed the sort of witnesses that the Constitution entitled defendants to confront.[4] The Court extended *Melendez-Diaz*'s logic two years later in *Bullcoming v. New Mexico*,[5] holding that a substitute analyst could not provide "surrogate testimony"—that is, testify as substitute witness for the analyst that examined the sample—without running afoul of the Confrontation Clause's requirements.[6] The trilogy's finale, *Williams v. Illinois*,[7] did not conclusively settle the scope of the Clause's protections, but rather created further uncertainty. *Williams*, which only commanded a plurality, affirmed the Illinois Supreme Court's holding that a witness serving as an "expert" could rely on and testify to a lab analyst's findings—of which the expert witness had no personal knowledge—because those findings

2. *See generally* Paul F. Rothstein & Ronald J. Coleman, *Confrontation's Multi-Analyst Problem*, 9 TEX. A&M L. REV. 165 (2021) (coining of "*Melendez-Diaz* Trilogy").

3. 557 U.S. 305 (2009).

4. *Id*. at 311 (internal quotation omitted).

5. 564 U.S. 647 (2011).

6. *Id*. at 661.

7. 567 U.S. 50 (2012).

simply served as "basis evidence."[8] Notably, five justices rejected that the relied-upon findings merely served as basis evidence and instead concluded that they were offered for their truth, and thus constituted hearsay.[9] The fractured opinion in *Williams*, consequently, led to confusion in state and lower federal courts as to whether and how an expert witness could testify to basis evidence.[10] Anticipating this confusion, Justice Kagan noted in her *Williams* dissent that she believed the Confrontation Clause's application to the introduction of forensic evidence was "clear no longer."[11] Over a decade later, in *Smith v. Arizona*,[12] the Court granted certiorari to reexamine the Confrontation Clause's application to forensic evidence. In *Smith*, the Court took up the same question presented in *Williams*.[13] This time, it arrived at a different result.[14] Justice Kagan, writing for a five-justice majority and two justices joining in part, held that when expert witnesses testify to an out-of-court statement in support of their opinions and the underlying statement supports that opinion only if true, then the statement is indeed offered for its truth and thus implicates the Confrontation Clause.[15] The Court further departed from the *Williams* plurality by

8. *Id*. at 78 (plurality opinion); *id*. at 103 (Thomas, J., concurring in the judgment) (finding there to be no Confrontation Clause violation because the statements containing the Cellmark findings "lacked the requisite 'formality and solemnity' to be considered 'testimonial' for the purposes of the Confrontation Clause." (quoting Michigan v. Bryant, 562 U.S. 344, 378 (2011) (Thomas, J., concurring in the judgment))).

9. *Id*. at 106 & n.1, 108–09 (Thomas, J., concurring in the judgment); *id.* at 132 (Kagan, J., dissenting).

10. *See, e.g*., Stuart v. Alabama, 139 S. Ct. 36, 36 (2018) (Gorsuch, J., dissenting) (citing cases to emphasize the "confusion" that surrounding the state of the law following *Williams*).

11. *Williams*, 567 U.S. at 141 (Kagan, J., dissenting); *see also* Ronald J. Coleman & Paul F. Rothstein, *A Game of* Katso *and Mouse: Current Theories for Getting Forensic Analysis Evidence Past the Confrontation Clause*, 57 AM. CRIM. L. REV. 27, 39 (2020) (claiming that the *Williams* opinion "confused more than it clarified").

12. 144 S. Ct. 1785 (2024).

13. *Id*. at 1796.

14. *Id*.

15. *Id.* at 1798. Justice Kagan was joined by Justices Sotomayor, Kavanaugh, Barrett, and Jackson. Justices Thomas and Gorsuch joined Parts I, II, and IV. Justice Alito, joined by Chief Justice Roberts, concurred in the judgment. *Id*. at 1787.

holding that the expert's in-court testimony was also offered for its truth.[16]

The decision in *Smith* was celebrated as a "pro-defendant victory" that clarified the hearsay prong of the Confrontation Clause analysis that *Williams* had muddled.[17] This is true. However, despite its narrow holding that only reached the hearsay issue, *Smith* may nonetheless impact most cases involving forensic evidence. Jurisdictions throughout the country, relying on the *Williams* plurality, had considered forensic evidence that served as an expert witness's basis evidence not to be hearsay.[18] *Smith*'s holding abrogates these prior holdings.[19] Prosecutors will face new but often manageable challenges in cases like *Smith* that involve a single absent lab analyst.[20] However, applying *Smith* raises thorny legal and practical challenges in the numerous cases where *teams* of analysts test forensic evidence.[21]

Section I surveys how the Court had interpreted the Confrontation Clause prior to *Smith*. Section II first discusses what *Smith* did—and did not—resolve. Next, it frames why *Smith*'s narrow holding will affect a wide swath of criminal trials involving forensic evidence. Section III outlines which evidentiary practices are, are not, and might be permissible after *Smith*. It then examines state and federal cases that have already grappled with *Smith* and finds that the next significant Confrontation Clause issues in the forensic evidence context will arise from labs that employ a "team approach"

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16. *Id*. at 1799. The Court did not decide the "other prong" of the Confrontation Clause analysis, that being whether the analyst's statement offered through the expert witness was "testimonial." *Id.* at 1801 (stating "that issue is not now fit for our resolution"). Accordingly, the Court remanded that issue to the Arizona Court of Appeals to determine in the first instance. *Id.* Whether an absent analyst's testimony is "testimonial" will continue to be a complication issue post-*Smith*. Many of these complexities are worthy of further discussion, but are beyond the scope of this note.

17. *Leading Case:* Smith v. Arizona, 138 HARV. L. REV. 365, 371, 374 (2024).

18. Brief of Respondent at 14–18, Smith v. Arizona, 144 S. Ct. 1785 (2024) (No. 22-899).

19. *Smith*, 144 S. Ct. at 1798–99.

20. *Id*. at 1795.

21. *See infra* Section III.B.

to analyzing evidence.[22] Ultimately, this note concludes that *Smith* will lead more defendants to raise successful Confrontation Clause challenges to forensic evidence. As such, prosecutors will likely struggle to comply with the constitutional requirement pronounced in *Smith*.

I. THE CONFRONTATION CLAUSE AND THE "*MELENDEZ-DIAZ* TRILOGY"

The Confrontation Clause reads: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[23] The understanding of the Clause at the Founding is "murky,"[24] as members of the Supreme Court have noted.[25] The Court has only addressed this murkiness in the relatively recent past. One of the first Supreme Court cases addressing the Confrontation Clause occurred over one hundred years after the ratification

22. Most of the cases analyzed in Section III are state cases. Given that *Smith* was decided in June 2024, the federal cases which *Smith* has impacted are primarily habeas cases as well as a handful of cases with motions *in limine*. *See, e.g.*, Watson v. Edmark, 118 F. 4th 456 (1st Cir. 2024) (habeas); Garcia v. Montgomery, No. 2:22-cv-01209-HDV, 2024 WL 4820230 (C.D. Cal. Aug. 13, 2024) (same); Murdock v. McGuinness, No. 21-cv-5624, 2024 WL 5040448 (E.D.N.Y. Dec. 9, 2024) (same); United States v. Moore, No. 1:23-cr-47, 2024 WL 3324817, at *11 (S.D. Ohio July 2, 2024) (motion *in limine*).

23. U.S. CONST. amend. VI.

24. Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L.J. 77, 77 (1995).

25. *See* White v. Illinois, 502 U.S. 346, 359 (1992) (Thomas, J., concurring) ("There is virtually no evidence of what the drafters of the Confrontation Clause intended it to mean."); Crawford v. Washington, 541 U.S. 36, 42–43 (2004) (noting there are at least two plausible readings of the Clause); California v. Green, 399 U.S. 149, 173–74 (1970) (Harlan, J., concurring) (remarking the Confrontation Clause's "[h]istory seems to give us very little insight into [its] intended scope").

of the Bill of Rights.[26] And state court defendants did not enjoy the Clause's protections until 1965.[27]

In *Crawford v. Washington*,[28] the Supreme Court examined the Confrontation Clause's original meaning to delineate the scope of a defendant's right to confront witnesses against him.[29] The Court's examination of the original understanding of the Clause led it to two primary conclusions.[30] First, the Clause was directed at the "principal evil" of the use of out-of-court statements against the accused, particularly when those statements derived from "*ex parte* examinations."[31] Second, the Court determined that "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination."[32]

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26. *See* Mattox v. United States, 156 U.S. 237 (1895). The Court in *Mattox* notably sought to identify the Framer's "primary object" of the Confrontation Clause, which it understood to be "prevent[ing] depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Id.* at 242–43.

27. *See* Pointer v. Texas, 280 U.S. 400, 406 (1965).

28. 541 U.S. 36 (2004).

29. *Id.*; *but see* Franklin v. New York, 145 S. Ct. 831, 832, 832 n.4 (2025) (statement of Alito, J.) (noting more recent scholarship casting doubt on *Crawford*'s finding that the "Confrontation Clause was meant to codify a well-established common law right against the introduction of a certain category of what we now call hearsay.").

30. *Crawford*, 541 U.S. at 42–50 (tracing the right from its origins under Roman law through English practice and application during the early Republic).

31. *Id.* at 50.

32. *Id*. at 53–54; *see also Mattox*, 156 U.S. at 242–43; Coy v. Iowa, 487 U.S. 1012, 1016 (1988) (arriving at the same conclusion). The Court in *Crawford* clarified that while its Confrontation Clause cases' outcomes faithfully complied with the text's original understanding, the same could not be said of the rationale buttressing those outcomes. *See Crawford*, 541 U.S. at 60; *see also* White v. Illinois, 502 U.S. 346, 366 (1992) (Thomas, J., concurring in part and concurring in the judgment) ("Neither the language of the Clause nor the historical evidence appears to support the notion that the Confrontation Clause was intended to constitutionalize the hearsay rule and its exceptions," and that the Court's opinion followed misguided precedent steering the law in that direction).

Crawford went on to clarify that out-of-court statements only implicate the Confrontation Clause if they are "testimonial,"[33] which the opinion took to mean as the sort that could be "reasonably expect[ed] to be used prosecutorially."[34] In *Davis v. Washington*, the Court elaborated that statements are "testimonial" if they are made primarily in furtherance of a criminal prosecution.[35] Thus, one prong of the Confrontation Clause analysis became whether the government's offered statement was "testimonial."[36] The other prong—and the one more relevant to *Smith*—is of older vintage.[37] This prong analyzes if the government's statement is offered for its truth.[38] And if it is being offered for its truth, it implicates the Confrontation Clause.[39] Such an out-of-court statement offered to prove the truth of the matter asserted is known as hearsay.[40]

In *Melendez-Diaz*, the Court clarified that the Confrontation Clause applies to the introduction of forensic evidence at trial.[41] Specifically, the Court found that a forensic laboratory report declaring a particular substance to be cocaine was testimonial.[42] Thus, for the prosecution to offer the report into evidence, it had to offer a live competent witness so that the defendant would have the opportunity for cross-examination.[43] *Bullcoming* built on *Melendez-Diaz*'s foundation. There, a substitute analyst replaced the analyst who had tested the defendant's blood-alcohol level and who had prepared the "testimonial certification" indicating that it was above

33. *Crawford*, 541 U.S. at 53–54.

34. *Id.* at 51–52 (citation omitted).

35. 547 U.S. 813, 826–28 (2006); *see also id*. at 836–37 (Thomas, J., concurring in the judgment and dissenting in part) (voicing his understanding that "testimonial" statements are "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions") (citation omitted). While *Davis* provided further clarity as to what statements are "testimonial," the Court has not fully defined the term. *See* Rothstein & Coleman, *supra* note 2, at 166–67.

36. *See Smith*, 144 S. Ct. at 1792.

37. *See* Tennessee v. Street, 471 U.S. 409, 414 (1985).

38. *Id.*; *see also* Anderson v. United States, 417 U.S. 211, 219–20 (1974).

39. *Smith*, 144 S. Ct. at 1792.

40. *Id*. (citing *Anderson*, 417 U.S. at 219).

41. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 309 (2009).

42. *Id*. at 310–11.

43. *Id.* at 311.

the legal limit.[44] The *Bullcoming* Court held that such "surrogate testimony" violated the defendant's right to confront "the analyst who made the certification, unless the analyst is unavailable at trial, and the accused had the opportunity, pretrial, to cross-examine that particular scientist."[45] But the *Williams* plurality complicated the question of whom a defendant has the constitutional right to cross-examine by holding that the Clause was not violated when a defendant was able to confront an expert witness who relied upon a laboratory report authored by an absent analyst, but not the absent analyst herself.[46] But five justices thought otherwise, opining that the report's statements came into evidence through the testifying expert and were therefore hearsay.[47] Thus, uncertainty permeated the state and lower federal courts, which splintered as to whether the practice sanctioned by the plurality was constitutional or, as five other justices in effect suggested, had created a backdoor of sorts that permitted the government to present impermissible hearsay evidence through basis evidence relied upon by an expert witness.[48]

Smith, therefore, presented the opportunity to resolve this confusion around the Confrontation Clause—at least as to the hearsay component.

II. *SMITH V. ARIZONA* AND CLOSING THE BASIS EVIDENCE "BACKDOOR"

Like *Melendez-Diaz*, *Smith* involved the forensic testing of drugs.[49] A team of police, while executing a search warrant in Yuma County, Arizona, smelled an "overwhelming odor of fresh marijuana and burnt marijuana" emanating from a shed on the property being searched.[50] The police searched the shack and found what they

44. Bullcoming v. New Mexico, 564 U.S. 647, 651–52 (2011).

45. *Id*. at 652.

46. Williams v. Illinois, 567 U.S. 50, 57–58 (2012) (plurality opinion).

47.*Id*. at 106 & n.1, 108 (Thomas, J., concurring in the judgment); *id.* at 132 (Kagan, J., dissenting).

48. *See* Stuart v. Alabama, 139 S. Ct. 36, 36 (2018) (Gorsuch, J., dissenting).

49. *See* Smith v. Arizona, 144 S. Ct. 1785, 1795 (2024).

50. Brief of Respondent at 3, Smith v. Arizona, 144 S. Ct. 1785 (2024) (No. 22-899).

believed to be drugs and other paraphernalia used for distribution.[51] They sent the seized evidence to the Arizona Department of Public Safety (DPS) lab, where forensic scientist Elizabeth Rast ran a "full scientific analysis."[52] During the course of her analysis, Rast generated ten pages of notes of "shorthand and technical jargon" and ultimately produced a two-page report, printed on DPS letterhead with her "results/interpretations."[53] Her report stated that the evidence contained "usable" quantities of methamphetamine, marijuana, and cannabis.[54]

The case went to trial about twenty-one months after the initial arrest and seizure of the evidence.[55] Although Arizona intended to call Rast to testify to the forensic evidence's composition, she had left the DPS laboratory before the trial.[56] In her place was "Greggory Longoni, forensic scientist (substitute expert)."[57] Longoni had no prior connection to Smith's case, and the State's amended filing proffered that he would "provide an independent opinion on the drug testing performed by Elizabeth Rast."[58] Longoni's testimony detailed which methods Rast employed, the lab's "policies and practices," and the materials contained in Rast's report "item by item by item."[59] Crucially, Longoni offered his "independent opinion" of the seized substances' composition, which mirrored Rast's conclusions in her report.[60]

A jury convicted Smith of four drug offenses.[61] Smith appealed.[62] Smith's challenge before the Arizona Court of Appeals targeted his

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51. *Id*.
52. *Id.*
53. *Id*.
54. *Smith*, 144 S. Ct. at 1795.
55. Brief of Petitioner at 8, Smith v. Arizona, 144 S. Ct. 1785 (2024) (No. 22-899).
56. Brief of Respondent, *supra* note 50, at 4.
57. *Smith*, 144 S. Ct. at 1795.
58. *Id*. (citing the cert. pet. at 26a).
59. *Id.* at 1795–96.
60. *Id.* at 1796.
61. Brief of Respondent, *supra* note 50, at 2 (specifically convicted of possessing marijuana for sale, possessing a dangerous drug (methamphetamine), a narcotic drug (cannabis wax), and drug paraphernalia).
62. *Smith*, 144 S. Ct. at 1796.

inability to "confront" and cross-examine Rast.[63] In response, the State argued that the Confrontation Clause was not implicated because Longoni merely testified to "his own independent opinions."[64] The Arizona Court of Appeals agreed with the State, anchoring its decision in Arizona precedent that closely resembled the reasoning of the Illinois Supreme Court, which the *Williams* plurality reviewed and approved.[65] It also distinguished *Smith* from *Melendez-Diaz* and *Bullcoming* on the grounds that the latter two involved "testimonial documents"—namely, the forensic reports—being entered into evidence, whereas Rast's actual work product was never similarly put before a jury[66] The Arizona Supreme Court rejected Smith's petition for certiorari, but the United States Supreme Court granted it.[67]

The Court faced the same question with which it grappled in *Williams*[68] whether the Confrontation Clause "permits the prosecution in a criminal trial to present testimony by a substitute expert conveying the testimonial statements of a nontestifying forensic analyst" under the rationale that "the testifying expert offers some independent opinion and the analyst's statements are offered not for their truth but to explain the expert's opinion."[69] Justice Kagan, writing for the Court, held that an expert witness's testimony is hearsay when (1) it relies upon a forensic analyst's out-of-court statement to form his testimony and (2) that out-of-court statement only bolsters the witness's testimony if true.[70] According to the

63. *Id*.

64. *Id*.

65. State v. Smith, No. 1 CA-CR 21-0451, 2022 WL 2734269, at *4 (Ariz. Ct. App. July 14, 2022) (citing State *ex rel.* Montgomery v. Karp, 236 Ariz. 120, 122, 124–25 (Ariz. Ct. App. 2014)).

66. *Id.* at *5 (citing Bullcoming v. New Mexico, 564 U.S. 647, 663–65 (2011); Melendez-Diaz v. Massachusetts, 557 U.S. 305, 307–11 (2009)).

67. Brief of Respondent, *supra* note 50, at 9.

68. *Smith*, 144 S. Ct. at 1796.

69. Petition for a Writ of Certiorari at i, Smith v. Arizona, 144 S. Ct. 1785 (2024) (No. 22-899). The petition for certiorari included a second sub-question involving the defendant's effort to subpoena the analyst in which the Court spent little time addressing because Arizona chose not to defend its position. *See Smith*, 144 S. Ct. at 1796 n.3.

70. *Smith*, 144 S. Ct. at 1798.

majority, the "truth is everything when it comes to the kind of basis evidence presented here," because the "the whole point of the prosecutor's eliciting such a statement is to establish" what it asserts is the truth.[71] Put differently, the Arizona's expert is useless to the prosecution if the analyst's work forming the basis of the expert's opinion is not true.[72]

Longoni's testimony served as an "almost-too-perfect illustration" of how, in the majority's view, the State effectively laundered Rast's out-of-court statements and asserted them for their truth.[73] Longoni had no personal knowledge of the evidence's lab testing in this case, so his understanding of the evidence's contents and Rast's procedures came only from Rast's notes and report—that is, her "statements."[74] And the reality that the State offered these statements for their truth, according to the majority, becomes apparent through a series of excerpts of the trial-court transcript.[75] Here is one short example from the State's questioning of Longoni:

> Q Turn your attention to Item 26. I'm going to hand you what's been marked as State's Exhibit 98 [Rast's notes]. . . . Did you review how [Item] 26 was tested in this case?
>
> A Yes.
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> Q When you reviewed it, did you notice whether the [standard lab] policies and practices that you have just described were followed?
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> A Yes.
>
> Q Were they followed?

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71. *Id.* (citing Stuart v. Alabama, 139 S. Ct. 36, 37 (2018) (Gorsuch, J., dissenting) (internal citations omitted)).

72. *See id*. Not said in the opinion, but what might be the case, is that the basis evidence (and in turn, the expert's testimony) would be irrelevant if the out of court statements are not offered for their truth. *See* FED. R. EVID. 401.

73. *Smith*, 144 S. Ct. at 1799. The terms "laundering" and "backdoor" have been used strictly descriptively and are not to suggest that prosecutors maliciously deprived defendants of the opportunity to cross-examine the analyst.

74. *Id*.

75. *Id.*

A Yes.[76]

Longoni asserted that Rast followed the lab's standard policies and practices. But how would he have known, given that he had no role in testing the evidence? He only knew based on what he has read in Rast's notes. And, when answering "were they followed?" his response necessarily derived from Rast's notes and report being offered for their truth. If Rast misrepresented her procedures in her notes, or if she fabricated her report, Longoni would have no way of knowing the truth of the matter.[77]

Below is another excerpt the majority includes of the Longoni's testimony:

> Q In reviewing what was done, your knowledge and training as a forensic scientist, your knowledge and experience with DPS's policies, practices, procedures, your knowledge of chemistry, the lab notes, the intake records, the chemicals used, the tests done, can you form an independent opinion on the identity of Item 26?
>
> A Yes.
>
> Q What is that opinion?
>
> A That is a usable quantity of marijuana.[78]

The key question is: how could Longoni form this "opinion" in a way that the jury could possibly credit? According to the majority, he could not: his opinions were solely "predicated on the truth of Rast's factual statements."[79] A jury, the majority reasoned, weighs the credibility of the "truth of the factual assertions on which [the opinion] is based."[80] "If believed true, that basis evidence will lead the jury to credit the opinion; if believed false, it will do the opposite."[81] In other words, the majority found that the testifying expert witnesses' credibility, when relying on basis evidence to form an

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76. *Id.* at 1797–98.

77. *See id*. at 1800.

78. *Id*. at 1798.

79. *See id*. (phrasing Longoni's "independent opinions" in quotations).

80. *Id*. at 1798.

81. *Id*. (citing Williams v. Illinois, 567 U.S. 50, 106 & n.1 (2012) (Thomas, J., concurring in the judgment); *id*. at 126–27 (Kagan, J., dissenting)).

opinion, is predicated on the validity of the underlying basis evidence. As such, Rast's notes and report were deemed hearsay—out-of-court statements offered for the truth of the matter asserted.[82] Because these statements were hearsay, they would pose a Confrontation Clause problem if they were also testimonial, unless that witness is both "'unavailable to testify" and 'the defendant ha[s] had a prior opportunity' to cross-examine her."[83]

This view, however, was not unanimous. Justice Alito, concurring in the judgment, noted that "experts routinely" rely on report data by scientists and other scholarly materials to form their opinions.[84] He detailed the history of expert testimony, particularly the "hypothetical-question requirement" in place prior to the Federal Rules of Evidence.[85] Under the "hypothetical-question requirement" regime, experts "generally testified in the form of an opinion in response to a hypothetical question" so as to "prevent a jury from jumping to the conclusion that the facts packed into the hypothetical were true."[86] Justice Alito then made two primary points: first, the majority errs in—in effect—returning to a similar sort of practice, and second, there seems be no meaningful difference between an expert's typical reliance on outside statements purporting to be truth and the statements Longoni relied upon.[87] As to the latter, Justice Alito contended that any concern that the jury would credit the basis evidence as true could be cured with a jury instruction.[88] The law assumes that "juries will follow the instructions given to them by the trial judge" in all but one context.[89] Accordingly, Justice Alito

82. *Id*.

83. *Id*. at 1791 (citing Crawford v. Washington, 541 U.S. 36, 53–54 (2004)). Note that Justices Thomas and Gorsuch joined this part of the opinion and agreed with this hearsay analysis. *See id.* at 1802–03 (Thomas, J., concurring); *id*. at 1804 (Gorsuch, J., concurring).

84. *Id*. at 1805 (Alito, J., concurring in the judgment) (citation omitted). The Chief Justice joined Justice Alito's opinion.

85. *Id.* at 1806.

86. *Id*.

87. *Id*. at 1805–11.

88. *Id.* at 1809–10.

89. *Id*. at 1810 (quoting Marshall v. Lonberger, 459 U.S. 422, 438 n.6 (1983)). One exception to this assumption is in the *Bruton* context in which a defendant is considered

concluded that although Longoni went too far in testifying that Rast's statements were true, his expert testimony otherwise did not violate the Confrontation Clause and otherwise complied with Federal Rules of Evidence 703 and 705.[90]

Smith was a battle over the "hearsay" prong of the Confrontation Clause analysis. The Court did not resolve the "testimonial" prong, instead remanding that issue to be considered by the Arizona Court of Appeals in the first instance.[91] The majority included some guidance as to how to make this determination—guidance that Justices Thomas and Gorsuch did not sign on to.[92] Justice Thomas wrote separately to reaffirm his view that the proper test to determine whether a statement is testimonial is to discern if the "extrajudicial statements . . . are contained in formalized testimonial materials, such as affidavits, depositions, prior testimonial, or confessions."[93] Justice Gorsuch also wrote separately to address only the testimonial prong, raising the question whether Court's "primary purpose" test is the correct approach.[94] These concurrences indicate that, while *Smith* clarified the hearsay prong of the Confrontation Clause analysis, the testimonial prong may generate future challenges and clarification—a worthy topic for examination beyond this note's scope.

To be clear, what *Smith* explicitly barred was the government's ability to utilize an expert witness to be the conduit by which an

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to have been deprived of his Sixth Amendment right to confront the witness against him when a facially incriminating confession of a non-testifying codefendant is introduced at their joint trial. *See* Bruton v. United States, 391 U.S. 123, 136–37 (1968).

90. *Id*. at 1811–12. Justice Alito limited his conclusion that there had been a Confrontation Clause question only because Longoni, during particular segments of his testimony, served as nothing more than a mouthpiece for Rast.

91. *Id.* at 1802.

92. *Id*. at 1801–02 (Section III).

93. *Id.* at 1803 (Thomas, J., concurring in part and concurring in the judgment) (quoting White v. Illinois, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in the judgment)).

94. *Id*. at 1804 (Gorsuch, J., concurring in part and concurring in the judgment); *see also* Franklin v. New York, 145 S.Ct. 831, 834–35 (2025) (statement of Gorsuch, J.) (noting that the Court has "never quite settled on what the primary purpose test *is*" and mentioning several articulations) (emphasis original).

absent forensic analyst's work product—being offered for its truth—enters into evidence. This holding was narrow. But this is not to say that the ruling is unimportant. Prior to *Smith*, the practice of "introducing" forensic evidence through an expert witness's basis evidence effectively insulated the analyst(s) that processed the evidence from cross-examination. If the Court in *Smith* had come out differently and found that such basis evidence was not hearsay, it would have had the effect of creating an "independent opinion exception" that could have partially undermined the Confrontation Clause protections previously clarified in *Melendez-Diaz* and *Bullcoming*.[95]

In terms of practical impact, *Smith* will substantially affect how prosecutors introduce forensic evidence in states—such as Illinois and Arizona—whose law had followed the *Williams* plurality.[96] As the amicus brief submitted by thirty-eight states and one territory highlights, governments had been employing "independent experts" to present forensic findings in court due an array of practical and resource challenges.[97] There are instances, such as in *Smith*, where the analyst is no longer employed by the lab and is otherwise unavailable to testify.[98] Given the length of investigations, the states' brief contends that it is not uncommon for the analyst or examiner to die, become incapacitated, or relocate out of state.[99] The post-

95. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 313–14 (2009); Bullcoming v. New Mexico, 564 U.S. 647, 659–60 (2011).

96. *See* State v. Smith, No. 1 CA-CR 21-0451, 2022 WL 2734269, at *4 (Ariz. Ct. App. July 14, 2022) (citing State *ex rel.* Montgomery v. Karp, 236 Ariz. 120, 124 (Ariz. Ct. App. 2014)); Brief of Colorado et al. as Amici Curiae Supporting Respondents, at 26–27, Smith v. Arizona, 144 S. Ct. 1785 (No. 22-899).

97. *See* Brief of Colorado, *supra* note 96, at 22–26.

98. *Smith*, 144 S. Ct. at 1795. The majority opinion notes that the record isn't clear as to the reason for her departure.

99. *See* Brief of Colorado, *supra* note 96, at 22 (quoting State v. Bass, 132 A.3d 1207, 1211–14 (N.J. 2016)); *see also* Williams v. Illinois, 567 U.S. 50, 97–98 (2012) (Breyer, J., concurring) ("Autopsies are typically conducted soon after death," and "when, say, a victim's body has decomposed, repetition of the autopsy may not be possible. What is to happen if the medical examiner dies before trial?"); *see, e.g.*, Ackerman v. State, 51 N.E.3d 171, 176 (Ind. 2016) (medical examiner died before cold case murder brought to trial); Chambers v. State, 181 So.3d 429, 436 n.2 (Ala. Crim. App. 2016) (lab analyst "diagnosed with terminal colon cancer and was too weak to testify at trial"); Naquin v.

Smith understanding of the defendant's Confrontation Clause right may mean that states will have to try these cases without forensic evidence because the author of the lab notes or report cannot be produced.

There are also significant resource constraints on a state's limited forensic analysts having to travel throughout a state—especially a large state—to testify in criminal trials while also processing a backlog of evidence.[100] And this is assuming that a state's court and prosecutors office can even afford to cover the analysts' travel, which many states assert is a burden.[101] To be clear, the strong likelihood of an increased burden on the states does not mean that *Smith* was wrongly decided. The majority's reasoning undergirding its determination that basis evidence relied upon by Longoni was hearsay is sound, though Justice Alito makes a strong—and largely unanswered—argument that there is no obvious distinction between forensic reports and other basis evidence relied upon by experts in other contexts.[102] This post-*Smith* burden is instead highlighted here to forecast how this narrow holding will immediately have practical effects on the conduct of criminal prosecutions. As

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State, 156 So.3d 984, 987 (Ala. Crim. App. 2012) (by the time of trial, the physician who conducted the sexual assault examine was 87 years old, retired, and in ill health); State v. Gonzales, 274 P.3d 151, 152 (N.M. Ct. App. 2012) (doctor who performed the autopsy moved out of state).

100. *See, e.g.*, Brief of Colorado, *supra* note 96, at 25; Brief of Am. Bd. of Forensic Toxicology et al. as Amici Curiae Supporting Respondent, Smith v. Arizona, 144 S. Ct. 1785 (No. 22-899) (noting that the average drug chemistry laboratory in the United States had a backlog of 1,862 cases in 2019 and it took on average sixty days for a case be analyzed and results reported) (citation omitted); *id*. at 30 (highlighting that an independent group found that the United States is short of 750 full-time certified forensic pathologists); Transcript of Oral Argument at 48, Bullcoming v. New Mexico, 564 U.S. 647 (2011) (No. 09–10876) (stating that the expert would have had to drive from the lab in Albuquerque three hours to the county courthouse just to wait and thereafter testify); *Rape and Sexual Assault*, 25 GEO. J. GENDER & L. 871, 883 (2024) (stating that the current number of untested rape kits is unknown, but at least 183,000 have been identified in the United States).

101. Brief of Colorado, *supra* note 96, at 25.

102. *Compare* Smith, 144 S. Ct. at 1798–1800 (majority's reasoning) *with id*. at 1805 (Alito, J., concurring in the judgment) (highlighting that expert testimony routinely relies on data that is derived from hearsay).

will be detailed in the following section, courts applying *Smith* are already grappling with additional, less obvious complexities that flow from the decision.

III. THE STATE OF PLAY POST-*SMITH* AND THE PROBLEM OF "TEAMS"

Smith provided some clarity as to *whom* the defendant has a right to confront when faced with forensic evidence. However, when applying *Smith*'s ruling, state and lower federal courts will face complicated and highly fact-bound challenges, especially where forensic laboratories employ a "team-based approach." So then, what practices does *Smith* permit? This section will canvass a spectrum of practices from those least likely to raise Confrontation Clause issues post-*Smith* to those now prohibited. It devotes outsized attention to the common practice of multiple analysts testing evidence because the question of *whom* the defendant has the right to confront becomes more—not less—complicated post-*Smith*.

A. Practices Not Violative of the Confrontation Clause

If the original analyst is unable able to testify, the practice most likely to withstand constitutional scrutiny would be to have the expert witness or substitute analyst rerun the test herself. By doing so, the testifying witness would be testifying to her own (not another analyst's) personal knowledge.[103] However, retesting may not be possible for a host of reasons, such as in the autopsy context where retesting may not be possible if the trial occurs long after the initial testing.[104]

Still, the *Smith* majority suggested several ways in which expert witnesses such as Longoni could still testify on behalf of the

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103. *See* United States v. Moore, No. 1:23-cr-47, 2024 WL 3324817, at *11 (S.D. Ohio July 2, 2024) (denying a motion to exclude the testifying witness on *Smith* grounds because the witness retested the same sample the originally planned analyst examined and therefore could testify to her own knowledge); *cf. Smith*, 144 S. Ct. at 1799 ("Remember as you [the trial court transcript excerpts] that Longoni, though familiar with the lab's general practices, had no personal knowledge about Rast's seized items.").

104. See Brief of Colorado, *supra* note 96, at 22.

prosecution. For one, witnesses like Longoni—especially when working in the same lab as the absent analyst—"could testify from personal knowledge about how the lab typically functioned—the standards, practices, and procedures it used to test seized substances, as well as the way it maintained chains of custody."[105] Additionally, an expert who is not familiar with the absent analyst's lab can speak to "general terms about forensic guidelines and techniques—perhaps explaining what it means for a lab to be accredited and what requirements accreditation imposes."[106] And while the state would still have to prove the underlying statements, the testifying expert could speak in broad terms about the lab analyst's putative practices through hypothetical questions such as "*If* or *assuming* some out-of-court statement were true, what would follow from it?"[107]

Undisturbed by *Smith* are non-testimonial out-of-court statements.[108] For example, when the government offers a medical report that was compiled for the purposes of treatment, this would not offend the Confrontation Clause because the medical professional generating the report did not do so with the primary purpose of furthering a criminal investigation.[109] Out-of-court statements can still be offered to contextualize other evidence or to provide "background."[110] Additionally, an expert's interpretation of computer-generated data still does not raise a Confrontation Clause

105. *Smith*, 144 S. Ct. at 1800.

106. *Id*; *see also* Transcript of Oral Argument at 40, Smith v. Arizona, 144 S. Ct. 1785 (2004) (No. 22-899) (Justice Gorsuch suggesting that a testifying expert could speak to "industry standards or forensic standards").

107. *Smith*, 144 S. Ct. at 1800; *but see id*. at 1806–09 (Alito, J., concurring in the judgment) (comparing such hypotheticals endorsed by the majority to the discarded pre-Federal Rules of Evidence "hypothetical-question" requirement).

108. *See* Crawford v. Washington, 541 U.S. 36, 59 n. 9 (2004).

109. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 312 n.2 (2009); *see, e.g.*, Baber v. State, 775 So.2d 258, 263 (Fla. 2000) (finding no Confrontation Clause issue when the government offered a hospital record of a blood test made for medical, not litigation, purposes); State v. Garlick, 313 Md. 209, 223–24 (1988) (similar).

110. United States v. Kizzee, 877 F.3d 650, 659 (5th Cir. 2017) (citations omitted) ("These statements often provide necessary context where a defendant challenges the adequacy of an investigation.").

issue because a computer's "statement" alone is not generated with the "primary purpose" of furthering a criminal prosecution.[111] Likewise, cases where the report or notes are stipulated are still permissible.[112] Relatedly, though not a practice prosecutors can employ at trial, the law as to waivers and forfeitures remains unchanged.[113] This is clear from *Smith* itself, in which the majority notes, and allows the Arizona Court of Appeals to address on remand, whether the State forfeited the argument that "Rast's statements were anything but testimonial."[114]

B. Practices Raising New Confrontation Clause a Conundrum: "The Problem of Teams"

The context where there will likely be a multitude of challenges are situations were a forensic lab takes a "team" approach to

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111. *See* Bullcoming v. New Mexico, 564 U.S. 647, 659 n.6 (2011); *accord* State v. Lester, 910 S.E.2d 642, 649 (N.C. 2025) (citing United States v. Washington, 498 F.3d 225, 230 (4th Cir. 2007)) ("Because computer-generated data are the fruit of self-sufficient and automated processes, they are the machine's work alone . . . It is this independence—this freedom from human influence or interpretation—that makes computer-generated data distinct."); United States v. Hill, 63 F.4th 335, 358–59 (5th Cir. 2023), *cert. denied*, 144 S. Ct. 207 (2023) (rejecting that the report from a cell phone extraction report as well as GPS data are testimonial and therefore non-violative of the hearsay clause); United States v. Arce, 49 F.4th 382, 391–94 (4th Cir. 2022) (same); State v. Kandutsch, 799 N.W.2d 865, 878 (Wis. 2011) (finding computer-generated data to "represent the self-generated record of a computer's operations resulting from [its] programming," not the byproduct of human effort); *see also* Baez v. Commonwealth, 909 S.E.2d 809, 815 (Va. 2024) (finding body cameras to not produce hearsay). Also note that computer-generated statements are not hearsay. *See, e.g.*, United States v. Lizarraga-Tirado, 789 F.3d 1107, 1110 (9th Cir. 2015); United States v. Lamons, 532 F.3d 1251, 1263 (11th Cir. 2008); United States v. Moon, 512 F.3d 359, 362 (7th Cir. 2008); *Washington*, 498 F.3d at 230.

112. See *Melendez-Diaz*, 557 U.S. at 328; *Bullcoming*, 564 U.S. at 651; United States v. Carlson, 547 F.2d 1346, 1358 (8th Cir. 1976) ("By stipulating to the admission of evidence, the defendant waives the right to confront the source of the evidence." (citation omitted)).

113. *See* Smith v. Arizona, 144 S. Ct. 1785, 1801 (2024) (stating that on remand, the Arizona Court of Appeals must, among other things, determine the threshold issue of whether Smith forfeited the testimonial issue); *Melendez-Diaz*, 557 U.S. at 313 n.3 ("The right to confrontation may, of course, be waived, including by failure to object to the offending evidence; and States may adopt procedural rules governing the exercise of such objections.").

114. *Smith*, 144 S. Ct. at 1801.

analyzing evidence.[115] Facially, *Smith*'s holding is clear: if an analyst, while playing a role in the team's process, creates any statements that are testimonial and those statements are offered in court for their truth, the defendant has the right to cross-examine that analyst. Because *Smith* only included a single analyst, the case was an ideal vehicle to arrive at this holding. However, applying *Smith*'s holding to instances where evidence is analyzed by teams of analysts, often in an assembly-line fashion, per the National Institute of Justice's recommended practice,[116] may raise difficult legal and practical questions. *Smith* suggests that each analyst's notes or findings that contribute to the report are likely hearsay, meaning a Confrontation Clause violation may be at hand *if* those analysts' statements are also found to be testimonial—again, an issue not reached by *Smith*. The practical implication of this is, where labs use an assembly-line model for analyzing evidence, *every* analyst may have to testify to avoid a Confrontation Clause problem. Thus, requiring all analysts to testify could hobble already-overburdened laboratories where fourteen to thirty individuals may have a hand in any given case's forensic work.[117] Already state and lower federal courts have splintered in applying *Smith* to evidence analyzed by teams.

One friction point that arises when applying *Smith* to laboratories practicing a "team approach" is when there is a challenge to the testifying analyst's "involvement" with and "personal knowledge" of the specimen. Recently, in *State v. Shea*, a Minnesota court distinguished one such case from *Smith*, finding that "[u]nlike Longoni, B.K. [testifying witness] was directly involved with this case as she

115. See Chambers v. State, 181 So.3d 429, 437–38 (Ala. 2015) (discussing in a pre-*Smith* case how the Alabama Department of Forensic Sciences lab, responsible for the state's DNA analysis, takes a "team approach").

116. Brief of Nat'l Dist. Att'ys Ass'n et al. as Amici Curiae in Support of Respondent at 17, Smith v. Arizona, 144 S. Ct. 1785 (2004) (No. 22-899) (citation omitted).

117. *Id*. at 18; Brief of Board of Forensic Toxicology, *supra* note 100, at 17 (stating that "sometimes dozens of people" are involved in the testing of any given sample); *see also id*. at 17–19 (discussing how the assembly line procedure often works in a forensic laboratory); Williams v. Illinois, 567 U.S. 50, 85 (2012) (plurality opinion) (citing People v. Johnson, 389 Ill.App.3d 618, 627 (2009) (discussing how "approximately 10 Cellmark analysts were involved" in *Johnson*)).

participated as the technical reviewer in finalizing the BCA's [Bureau of Criminal Apprehension] conclusions by independently reviewing the machine-generated DNA profiles."[118] At first glance, this ruling appears to be a straightforward application of *Smith* and the *Melendez-Diaz* trilogy. Because the witness "was directly involved," she would have personal knowledge of the techniques and procedures used and the corresponding results. Applying this rationale, there theoretically should not be a hearsay issue so long as there was at least one testifying witness who had worked alongside or "directly" with the author of the forensic notes or report.

However, a closer look at *Shea* reveals that the court may have in fact departed from *Smith*, as the testifying witnesses may have indeed incorporated an absent analyst's hearsay. The *Shea* court stated that "L.A., a BCA forensic scientist, tested the samples" and that the "results of those tests were reviewed by B.K., another BCA forensic scientist."[119] As stated, "B.K." testified for the government.[120] Implicitly, the *Shea* court considered B.K.'s review of the test results to amount to being "directly involved."[121] But consider one of the excerpts of the *Smith* transcript cited above.[122] If B.K. were asked a similar question such as "did L.A. follow the lab's procedures?", reviewing L.A.'s work alone would not provide B.K. the personal knowledge of whether L.A. *actually* followed the lab's procedures.[123] Instead, B.K., like Longoni, would have to assume that the analyst who conducted the test indeed took the steps she claimed to have taken. Thus, whether the testifying witness in a lab with a "team" approach is testifying to personal knowledge or

118. State v. Shea, No. A23-1523, 2024 WL 4115377, at *5 (Minn. Ct. App. Sept. 9, 2024) (distinguishing additionally on the grounds that the testifying witness "was not reliant upon—or simply replicating—the notes or reports of a different analyst" and the process included computer-generated data).

119. *Id*. at *1.

120. *Id.*

121. *See id.* at *1–2, 5.

122. *See* Smith v. Arizona, 144 S. Ct. 1785, 1797–98 (2024).

123. *See also* State v. McElveen, No. 2023 KA 0939, 2024 WL 5245030, at *9–10 (La. App. 1 Cir. Dec. 30, 2024) (finding that a DNA forensic lab's supervisor could testify that the lab's procedures for "handling and analyzing the defendants' sample had been followed" based on his post-testing and unspecified "review").

another's out-of-court statement may itself be a factual inquiry. Consequently, it is not certain that labs that operate in this manner can *per se* avoid a hearsay challenge.

Two other recent state cases further demonstrate the fact-bound nature of this analysis. The first case, *State v. Hale*, also involved a DNA testing laboratory that employed a "teamwork approach" in which "'different qualified analysts' perform the different tasks 'at each step of the process.'"[124] Two of the analysts in this case were found through testimony to be "responsible for drawing final analytic conclusions and drafting reports, "[125] which is a common practice.[126] On the stand, both analysts were "candid about the fact that they were involved only in the final-step analysis, not the hands-on laboratory testing," with one specifically mentioning that she "did not handle" the evidence itself.[127] In fact, these analysts who served as the "final links in this teamwork chain" were not even in the laboratory where the DNA was tested and merely relied upon notes taken by each analyst.[128]

This drew an objection from the defendant.[129] Specifically, the defendant contested the State's offering of the two experts' DNA testing reports on Confrontation Clause grounds, stating that there was "no way to determine the validity of the test because the individual who did the test results is not available for cross-examination."[130] As mentioned above with regards to *Shea*, this objection appears to have a valid constitutional basis after *Smith*. The trial court, however, overruled the objection and admitted the three DNA reports.[131] The Ohio Court of Appeals found that the two testifying analysts had not merely parroted another analyst's conclusions, as Longoni is said to have done in *Smith*.[132] Nevertheless, in light of

124. State v. Hale, No. C-230420, 2024 WL 4901601, at *8 (Ohio Ct. App. Nov. 27, 2024).
125. *Id*.
126. *See* Brief of Board of Forensic Toxicology, *supra* note 100, at 18.
127. *Hale*, 2024 WL 4901601, at *8.
128. *Id*.
129. *Id*.
130. *Id.*
131. *Id.*
132. *Id.* at *9.

Smith, the court still had to determine whether the two witnesses, either in their testimony or DNA reports, relied upon out-of-court statements that were offered for their truth.[133] A careful parsing of the record led the court to find that the two testifying analysts had indeed done so in two ways: first, "by making factual assertions regarding what procedures were performed and what precautions were followed without personal knowledge;" and second, "by using underlying data derived from those same laboratory tests, as the basis for their conclusions."[134] After finding that these hearsay statements were also testimonial and not otherwise harmless error, the court of appeals found that the trial court had erred and that the defendant had a constitutional right to cross-examine the analysts who physically handled the evidence and performed the tests.[135]

The outcome in *Hale* is likely to be repeated in other cases where laboratories take similar approaches. This is because unless the compiler of the report and/or the testifying witness physically observes the testing, he cannot verify that the analysts handled the sample according to the prescribed procedures or that the notes reflect what was actually done. At best, this witness could do as the *Smith* Court suggested and testify to the laboratory's general procedures.[136] Likewise, unless the witness is verifying each teammate's work during each link in the analytical process, the State would be susceptible to a defendant's Confrontation Clause challenge.

So, what is a prosecutor to do when working with a laboratory that takes such an approach? To play it safe, the prosecutor could bring in the whole team of analysts to testify. However, this approach has serious resource and administrability concerns.[137] Namely, this would require the prosecutor to have the funds to bring in the entire team for some portion of the trial, which depending on the geographic location of trial, could require paying for

133. *Id*.
134. *Id.*
135. *Id.* at *13–14.
136. *See* Smith v. Arizona, 144 S. Ct. 1785, 1799 (2004).
137. Brief of Colorado, *supra* note 96, at 25.

both travel and lodging. And it would mean that the team, while at the courthouse, could not progress on what is often a backlog of samples.[138] Alternatively, the prosecutor could ask if the defendant will stipulate to an absent witness's testimony in a way that would obviate the potential "team-derived" hearsay problem.[139] In the chain of custody context, Defendants will frequently stipulate without fanfare.[140] But, of course, the defendant does not need agree to this stipulation and could force the prosecution to carry its burden by bringing in the entire team of analysts.[141] This, should it begin to occur with frequency, could strain states and their already-overburdened labs.[142] It could also alter prosecutors' calculus as to which cases to bring and potentially incentivize defendants to not stipulate to all the involved analysts testifying. Finally, these labs that practice a team approach could transition to working as solo practitioners, thus resolving the issue of having to bring in an entire team. However, this assumes everyone on the team has the same set of skills or that a given piece of evidence can be properly analyzed by a single team member. The "solo practitioner" approach

138. *See* Brief of Board of Forensic Toxicology, *supra* note 100, at 28.

139. *See* Bullcoming v. New Mexico, 564 U.S. 647, 651, 667 (2011).

140. *See, e.g.*, United States v. Olea-Monarez, No. 14-20096-JAR, 2016 WL 1535965, at *3 (D. Kan. Apr. 15, 2016) (stipulating to the chain of custody, but also, notably to the laboratory reports); United States v. Morris, No. 06–87–DCR, 2006 WL 2054585, at *1 (E.D. Ky. July 20, 2006) (suggesting the defendant stipulated for strategic reasons to deny the government's sought delay); *see* Melendez-Diaz v. Massachusetts, 557 U.S. 305, 328 (2009) (highlighting that defense attorneys and their clients will "often" stipulate and not even challenge the "nature of the substance in the ordinary drug case").

141. Of note, in the chain of custody context, the government bears the burden of establishing the chain of custody, but "this does not mean that everyone who laid hands on the evidence must be called," and that "gaps in the chain [of custody] normally go to the weight of the evidence rather than its admissibility." (citation and internal quotations omitted). *Melendez*-Dias, 557 U.S. at 312 n.1. And while defendants often stipulate to the evidence's chains of custody, occasionally they will intend refuse to stipulate so to challenge the evidence's admissibility. *See, e.g.*, United States v. Fisher, 624 F.3d 713, 722 (5th Cir. 2010).

142. Brief of Board of Forensic Toxicology, *supra* note 100, at 28–29.

has other downsides, such as losing what might be necessary checks and oversight.[143]

A second, related Confrontation Clause issue could arise from such a team-based approach. This is when several analysts generate "raw data,"[144] for a single analyst who uses that data to comply a report and testify about that report at trial. A Michigan court in *People v. Peterson* grappled with such a scenario about a month after *Smith* was decided.[145] There, the State's DNA evidence was produced by a private laboratory working under a federal grant.[146] The private laboratory's analyst, who had interpreted the data and prepared the report, took the stand for the State.[147] But she was not the actual analyst who had generated the DNA profile for the defendant.[148] Applying *Smith*, the court rejected the State's argument that the witness merely relied on "raw DNA data" from the laboratories.[149] What the parties meant by "raw data," "raw numbers," and "notes" was not evident to the court.[150] Without more clarity, the court could not decide the hearsay issue, much less the testimonial prong.[151] Thus, it remanded the case to the trial court to resolve the ambiguities surrounding terms like "raw" and determine whether the "data," "numbers," and "notes" were testimonial in nature.[152]

Questions about "raw data" also came before a Texas court. *Gourley v. State*, a case that involved a drug screening facility that took a team approach, raised an issue of whether the defendant had a

143. Scott Malone, *Thousands of Massachusetts drug cases to be dismissed after lab scandal*, REUTERS (Apr. 19, 2017), https://www.reuters.com/article/massachusetts-drugs-idUSL1N1HR1LW/ [https://perma.cc/W9UF-8MGR] (discussing close to 20,000 criminal drug cases in Massachusetts that were dismissed due to one state chemist's routine falsification of results).

144. For example, DNA profiles, metadata, and testing indicators that "would be meaningless to a non-expert." Brief of National District Attorneys Association, *supra* note at 116, at 10–11.

145. People v. Peterson, No. 364313, 2024 WL 3548797 (Mich. Ct. App. July 25, 2024).

146. *Id.* at *1.

147. *Id*. at *4.

148. *Id.* at *5.

149. *Id*. at *6.

150. *Id*.

151. *Id.*

152. *Id*.

right to cross-examine the absent analyst instead of the analyst who "conducted his own analysis of the analytical data from that testing and had formed his own conclusions from the data."[153] The court, accounting for both *Smith* and *Bullcoming*, found that no Confrontation Clause violation had occurred.[154] It distinguished the present case from *Bullcoming*, finding it more analogous to a 2020 Texas state court case where the court had sanctioned a lab analyst's testimony recounting his review of the blood-alcohol content data and his subsequent conclusions despite not having run the test himself.[155] The *Gourley* court found both that the raw data produced by the absent analyst was nontestimonial and that the testifying witness properly formed an "independent opinion" based on this data.[156] It also found it meaningful that there, as well as the Texas precedent it relied upon, the prosecution did not offer the laboratory report into evidence, as happened in *Bullcoming*.[157] Finding no issue with the nature of the "raw data" relied upon by the witness, the Texas Court of Appeals rejected the defendant's challenge to the testimony.[158]

The *Gourley* court, unlike the *Peterson* court, expressed no qualms about the nature of the "raw data" being relied upon by the

153. Gourley v. State, 710 S.W.3d 368, 372 (Tex. App. 2025) (noting that the lab "employs over 200 scientists and works on 'a segmented workflow, so everyone has a job to do'" and that the testifying analyst asserted "[M]y report is my own conclusions drawn from analytical data, period."); *see also* Murdock v. McGuinness, No. 21-cv-5624, 2024 WL 5040448, at *6 (E.D.N.Y. Dec. 9, 2024) (finding no hearsay problem because the testifying analyst, though not doing each chain of the DNA testing, "performed the final DNA analysis comparing the DNA profile to the DNA alleles" and "the trial court limited [testifying analyst's] statements that derived entirely from observations of other analysts and were not performed by her independently").

154. *See Gourley*, 2025 WL 421228, at *7.

155. *Id*. (citing Downing v. State, No. 02-19-00385-CR, 2020 WL 5833631, at *3 (Tex. App. Oct. 1, 2020)).

156. *Id.*

157. *Id.*; *see also* Williams v. Illinois, 567 U.S. 50, 71 (2012) (plurality opinion) (the fact that the Cellmark DNA report did not come into evidence nor was seen by the trier of fact was a key reason the plurality found there to be no hearsay problem); *cf. supra* note 66 and accompanying text.

158. *Gourley*, 2025 WL 421228, at *8.

testifying witness.[159] It is unclear if this is a result of differences in the record or if the judges simply had different conceptions of what "raw data" entailed. Regardless, these disparate outcomes highlight that courts may apply *Smith* differently when the testifying witness's interpretation of "raw data" is at issue. Defendants, like the ones in these cases, could reasonably challenge this raw data on either hearsay or testimonial grounds—potentially with differing results.

Like the team approach, cases involving the presentation of "raw data" will frequently have to grapple with questions whether the absent analyst *actually* performed the procedure that she claimed to have done in her notes or report, or whether she *actually* followed lab procedures. If the performing analyst had taken a step that materially changed the lab result and had not recorded it in her notes, the testifying analyst relying on the raw data would not know this. So, while the *Gourley* court, agreeing with an earlier Texas case, found the relied-upon numbers to neither be testimonial nor hearsay, this is not clearly true unless the data was the byproduct of a machine's work. And even then, the defendant may be able to raise colorable questions about what sort of inputs an absent analyst *actually* entered into the machine. Consequently, experts testifying to their "independent opinion" based on raw data could not speak to the actual procedures employed during testing. Otherwise, they could also face challenges that this "data"—like Rast's notes and report—is channeled through the witness and offered for its truth.

Other evidence handled by "teams" to which one member testifies will likely elicit a host of challenges post-*Smith*. One related scenario that is likely to arrive at inconsistent outcomes in *Smith*'s wake is when an expert, either forensic or otherwise, relies on notes captured by some other member of law enforcement. Justice Barrett raised a version of this scenario during oral arguments, focusing on

159. *Compare id*. at *6–7 (adopting this view with little discussion as to whether "raw data" was in fact a statement with Confrontation Clause implications), *with* People v. Peterson, No. 364313, 2024 WL 3548797, at *6 (Mich. Ct. App. July 25, 2024) (expressing skepticism as to the content, purpose, and effect of the "raw data" as presented in the record).

whether the notes of a police officer taken during the course of an investigation should be deemed testimonial.[160] As stated, *Smith* did not alter the testimonial analysis.[161] But versions of this same hypothetical could trigger a hearsay problem post-*Smith*.

Imagine a vehicle that speeds through a busy crosswalk and intersection, leading to the death of several pedestrians. A police officer arriving to the scene analyzes the vehicle's speed at various points during the alleged crime. He arrives at an assessment in which he has high confidence and jots down his thoughts to this effect in his notebook. The contents of these notes do not make the police report. Later, at trial, a consultant who regularly serves as an expert witness in cases involving vehicles, testifies to the likely speed of the vehicle relying on the officer's notes alone. The consultant simply reiterating the officer's estimation of the driver's speed would uncontestably be hearsay—after all, the consultant would be offering the officer's estimation for its truth. Now, if the expert testifies based on his "opinion" that the car was going X miles per hour, and if that opinion draws solely from the officer's observations as inputs, these notes that helped formed the officer's conclusion are hearsay under *Smith*. But following the approach taken in *Gourley*, a court might otherwise find that these sort of annotations are "raw data" that helped the officer form his independent conclusion. This would seem to circumvent *Smith*'s holding by characterizing the officer's recorded observations as "raw data," though Justice Alito notes that this information could arguably be treated as the kind of basis evidence experts routinely rely upon.[162]

160. See Transcript of Oral Argument at 18–20, Smith v. Arizona, 144 S. Ct. 1785 (2004) (No. 22-899).

161. A statement is "testimonial" when it is "made in the course of police interrogation" and "the primary purpose of the interrogation [was] to establish or prove past events potentially relevant to alter criminal prosecution." Davis v. Washington, 547 U.S. 813, 822 (2006).

162. Smith v. Arizona, 144 S. Ct. 1785, 1805 (2024) (Alito, J., concurring in the judgment).

*C. Clearly Violative of the Confrontation Clause Post-*Smith

What is likely not permissible for prosecutors following *Smith* is obtaining a limiting instruction that the jury should not consider the basis evidence relied upon by the expert as being offered for its truth. Justice Alito emphasized that trial judges, upon request, routinely issue requested jury instructions to this effect.[163] But only the Chief Justice joined this opinion.[164] And while the majority at most implies that a jury instruction would not cure the hearsay issue, Justice Alito clearly read the majority opinion as doing so.[165]

As for what is no longer permissible, in addition to the *Williams* "backdoor," are most variations of otherwise using Rules 703[166] or 705[167] to construe an absent analyst's work product as mere basis evidence for the expert's opinion.[168] Nor can prosecutors use their compliance with the Federal Rules of Evidence to cure Confrontation Clause violations.[169] This is because "federal constitutional rights are not typically defined—expanded or contracted—by reference to non-constitutional bodies of law like evidence rules."[170] The Federal Rules of Evidence could still inspire novel methods for

163. *Id*. at 1809.

164. *Id.* at 1805.

165. *See id*. at 1809.

166. FED. R. EVID. 703 ("An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed.").

167. FED. R. EVID. 705 ("Unless the court orders otherwise, an expert may state an opinion—and give the reasons for it—without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.").

168. *See Smith*, 144 S. Ct. at 1797.

169. *See id.*

170. *Id*.; *see also* Crawford v. Washington, 541 U.S. 36, 61 (2004) ("Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'"); Williams v. Illinois, 567 U.S. 50, 105 (2012) (Thomas, J., concurring in the judgment) ("[W]e have recognized that concepts central to the application of the Confrontation Clause are ultimately matters of federal constitutional law that are not dictated by state or federal evidentiary rules."); *but see Smith*, 144 S. Ct. at 1797 n.4 (qualifying that if "an evidentiary rule reflects a long-established understanding, then it might shed light on the historical meaning of the Confrontation Clause").

introducing forensic analysis, but for any such method to prevail, it must also accord with the strictures of the Constitution.

IV. ONE QUESTION RESOLVED, MANY MORE ARISE

The Court's decision in *Smith* clarified the post-*Williams* confusion as to whether an expert witness could use an absent analyst's work product as basis evidence and thereby present that work product to a jury without being hearsay. The law as to hearsay is now clearer when the case involves forensic evidence that was tested in full by one unavailable analyst and testified to by another expert witness, as was the case in both *Williams* and *Smith*. But as is often the case when courts confront problems iteratively, *Smith* simply—and perhaps appropriately—fought the last war. Now, given *Smith*'s understanding of hearsay, prosecutors relying on forensic laboratories that, out of practice or necessity, utilize a team approach will have to tread in *terra incognita* to determine which analysts any given defendant has the right to confront. Few prosecutors are going to be able to call the entire lab to testify, so they will have to make tough judgments.[171] As mentioned, cases decided in months following *Smith* have already come to divergent conclusions when faced with that question. Consequently, *Smith* solves one problem only to spawn many others.

171. *See Williams*, 567 U.S. at 90 (Breyer, J., concurring) (questioning the reality of the prosecution having "to call all potentially involved laboratory technicians").