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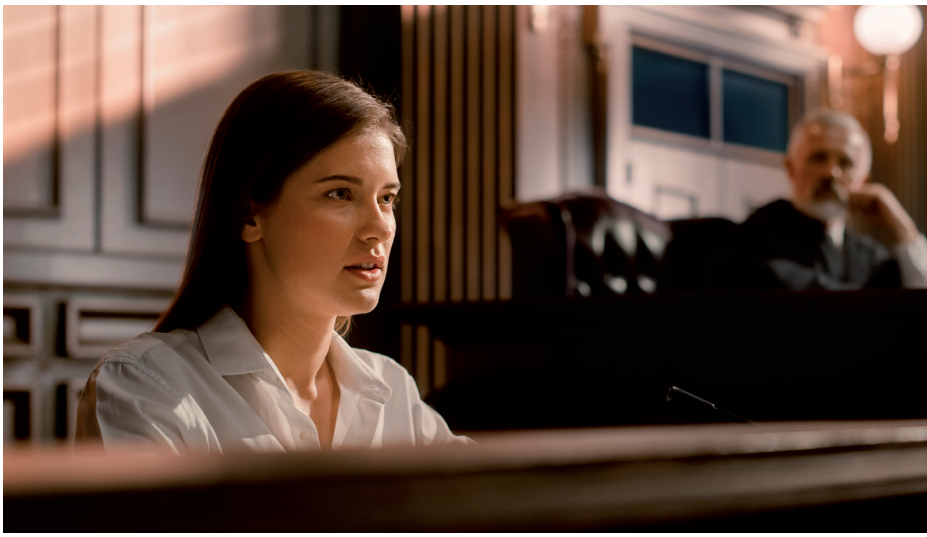

Smith v. Arizona: Hearsay and the Presentation of Forensic Evidence

By Joshua K. Saucier

Forensic toxicologists offer critical testimony in impaired driving cases, and admissibility of their testimony may be more challenging in light of last year's U.S. Supreme Court decision, *Smith v. Arizona*.[1] Toxicologists' testimony is often used by prosecutors to inform juries of the drugs in a defendant's body while that person was driving; toxicologists' testimony is also used by prosecutors to inform juries of the physiological responses and human behaviors that are consistent with persons having consumed a given drug.[2] The scientific process involved in isolating and identifying a drug in a person's blood involves several steps: collecting the sample, transporting

[1] 602 U.S. 779 (2024).

[2] *See* ANSI/ASB, ANSI/ASB Best Practice Recommendation 037: Guidelines for Opinions and Testimony in Forensic Toxicology 3–4 (1st ed. 2019).

the sample to the lab, assigning it to a particular person or department for analysis, analyzing the sample (screening and confirmation), reporting the results, and interpreting the results (including quality control and quality assurance measures). Labs prioritize obtaining accurate results and value efficient processes. Toward that end, some labs use batch processing, which can involve multiple analysts handling a specimen for complete toxicological analysis. Consequently, batch processing may lead to the forensic toxicologist interpreting the results of an analysis being a different person than the analyst who tested the sample.

A similar situation arose in *Smith v. Arizona* when a chemist who did not test the sample testified about the results obtained by another chemist.[3] This testimony was the basis for a Confrontation Clause[4] challenge.[5] Ultimately, the Court ruled in favor of the defendant, but the reasoning did not inherently prohibit the use of all "substitute analysts."[6] As a result, prosecutors must carefully consider whether calling[7] a substitute analyst[8] as a witness in an impaired driving case satisfies the right of the defendant to "be confronted with the witnesses against [them]."[9]

Smith: The Facts

In December 2019, Yuma County (AZ) Narcotics Task Force law enforcement officers executed a search warrant on the house of Jason Smith's father.[10] As the officers approached a shed on the property, they smelled the odor of marijuana.[11] After announcing themselves and knocking on the shed door, Jason Smith ("Smith") opened said door.[12] Smith was forcibly removed from the shed, and the officers found what they believed to be the following: marijuana plant material, "cannabis wax," methamphetamine, and various items of drug paraphernalia.[13]

The suspected drug samples were sent to Arizona's state laboratory for testing, and a chemist performed testing to identify the seized drugs.[14] The chemist, Rast, performed analyses, created a file, and generated notes and certificates of analysis for the file.[15] She opined that the samples contained the same illegal drugs that law enforcement suspected.[16] When it came time for trial, however, Rast no longer worked for the State of Arizona.[17] Given this, another state chemist reviewed and analyzed Rast's work.[18] This chemist, Longoni—using Rast's work—came to the same conclusions as Rast.[19] Longoni then testified at trial, indicating his opinion was

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[3] Smith v. Arizona, 602 U.S. 779, 789–791 (2024).

[4] U.S. Const. amend VI ("In all criminal prosecutions, the accused shall enjoy the . . . to be confronted with the witnesses against him.").

[5] Smith, 602 U.S. at 791.

[6] *See id.* at 800, 802–03.

[7] Or attempting to call.

[8] For this article, a "substitute analyst" is a witness called to testify and offer opinion evidence at trial in place of another technician who performed the laboratory testing or examination. Such substitute analysts have been used in a wide range of cases from a medical examiner relying on the autopsy performed by another doctor, *see* State v. Mercier, 2014 ME 28, ¶¶ 9–14, 87 A. 3d 700, 704, to a toxicologist relying on the chemical analysis performed by another chemist of a suspect's blood sample, *see, e.g.,* State v. Romano, 268 N.C. App. 440, 452–53, 836 S.E.2d 760, 771–72 (2019).

[9] U.S. Const. amend VI.

[10] State v. Smith, No. 1 CA-CR 21-045, 2022 Ariz. App. Unpub. LEXIS 552, at *1-2, 2022 WL 2734269 (Ariz. Ct. App., July 14, 2022) (hereinafter "Smith Unpub."); Pett. App. 3a, Smith v. Arizona, 602 U.S. 779 (2024) (No.22–899) (hereinafter "Pett. Appendix").

[11] Smith Unpub., at *2; Pett. Appendix 3a.

[12] Smith Unpub., at *2; Pett. Appendix 3a–4a.

[13] Smith Unpub., at *2–3; Pett. Appendix 4a.

[14] Smith, 602 U.S. at 789–90.

[15] *Id.* at 790.

[16] *See id.*

[17] *Id.*

[18] *Id.* at 790–91.

[19] *Id.* at 791.

that the items were drugs and cited Rast's work as support for his opinion.[20] Indeed, Longoni's testimony often referred to Rast's work.[21]

Specifically, Longoni testified that—based on Rast's notes—standard lab procedures were followed: that the scientific methods used included microscopic examination, a chemical color test, and other examinations; that blanks were run to avoid contamination; and that based upon such information and more, he formed independent opinions as to the contents of the suspected drug samples.[22]

Smith challenged the admission of Longoni's testimony, and his opinions based on the Confrontation Clause.[23]

Smith: The Confrontation Clause Rules

The Sixth Amendment of the U.S. Constitution guarantees a criminal defendant the right to confront the witnesses against them.[24] When an out-of-court statement is introduced into evidence and the defendant is not afforded the opportunity to cross-examine the witness who made the statement, this right might be violated.[25] The test to determine if a statement may be introduced in court is whether the out of court statement is (1) hearsay and (2) testimonial.[26] If those two things are true, then the statement is not admissible under the Confrontation Clause.[27]

If an out of court statement is offered for its truth, then it is hearsay, and the first prong of the test is met.[28]

To determine if a statement is testimonial, courts look to "primary purpose" of the statement.[29] Specifically, courts will look to the reason that the statement was made and its relation, if any, to criminal proceedings.[30] If a statement was made with primary purpose to "accuse a target individual or create evidence" or "establish or prove past events potentially relevant to later criminal prosecution," then it is testimonial and, if also hearsay, is inadmissible under the Confrontation Clause.[31]

Smith: The Arguments

In *Smith*, the defendant argued that Longoni's testimony violated the Confrontation Clause. Specifically, Smith argued that Rast and not Longoni was "the real witness against him," and allowing Longoni to testify prevented Smith from effectively cross-examining the person who reached the scientific conclusions.[32]

The state argued that Rast's statements, admitted through Longoni, were not offered for their truth.[33] Instead, the state said, the statements were offered as a basis for Longoni's independent conclusions.[34] In other words,

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[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] U.S. Const. amend VI.

[25] *See* Crawford v. Washington, 541 U.S. 36, 38–40, 60 n.9, 68–69 (2004).

[26] *See id.*; Davis v. Washington, 547 U.S. 813, 817–18, 819–20, 828–29, 829–32; Melendez-Diaz v. Massachusetts, 557 U.S. 305, 307, 311 (2009).

[27] *See* Crawford, 541 U.S. at 38–40, 68–69; Bullcoming v. New Mexico, 564 U.S. 647, 651–52, 657–58 (2011).

[28] Crawford, 541 U.S. at 60 n.9; Anderson v. United States, 417 U.S. 211, 219 (1974).

[29] *See* Davis, 547 U.S. at 822; Williams v. Illinois, 567 U.S. 50, 82–84 (2012). Note that Justice Thomas would also require the statements to be of a formal nature akin to testimony. *See* Williams, 567 U.S. at 103 (Thomas, J. *concurring*); *but see* Davis, 547 U.S. at 825–26 (rejecting the notion that the Confrontation Clause protects against only formal statements).

[30] *See* Davis, 547 U.S. at 827–29; Williams, 567 U.S. at 84–85.

[31] Williams, 567 U.S. at 84; Davis, 547 U.S. at 822.

[32] Smith, 602 U.S. at 791.

[33] *See id.* at 791–92.

[34] *Id.*

the state argued that because the statements were not offered for their truth, they could not be considered "hearsay," and their admission could not, therefore, violate the Confrontation Clause (*i.e.*, the first prong of the test was not met).

Importantly, the state did not argue that the statements were non-testimonial: it made only the non-hearsay (not for the truth) argument.[35] As such and as further discussed below, the trial court did not fully consider whether the statements of Rast were testimonial. The trial court did, however, allow Longoni's testimony finding that none of it was hearsay.[36] Smith appealed the trial court's decision to Arizona Court of Appeals, division one, which affirmed the trial court's decision.[37] The Supreme Court of the State of Arizona declined to review the case,[38] and the United States Supreme Court granted certiorari (*i.e.*, the Court decided to review the case).[39]

Smith: Application

The Court in *Smith* looked past the rules of evidence to determine if the statements made in notes by Rast and reiterated by Longoni were offered for the truth.[40] This was necessary to determine if those statements were hearsay; if an out of court statement is offered for its truth, then it is hearsay, and the first prong of the test for violating the Confrontation Clause is met.[41]

The Court concluded that the statements were offered for the truth of the matter that they asserted.[42] In so doing, the Court looked past the "basis of the opinion" argument to the statements themselves. The statements, the Court found, which included detailing the methods of analysis and the results of said methods, could only matter if they were true, in other words, that a scientist who did the testing ran a blank between samples to prevent contamination could only matter for its asserted statement (that a blank was in fact run).[43, 44]

Consequently, the Court found that all of Rast's statements offered in support of Longoni's opinion were offered for the truth and, thus, hearsay.[45] The Court sent the case back to the state courts for decisions related to whether the statements were testimonial and whether the state had abandoned any argument that they were not.[46] If the statements were also testimonial (an issue not raised in lower court proceedings), then their admission violated Smith's rights under the Confrontation Clause.[47]

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[35] *See id.* at 801.

[36] Smith Unpub., at *10–13; Pett. Appendix 10a–12a.

[37] Smith Unpub., at *17; Pett. Appendix 16a; *see also* Smith, 602 U.S. at 792.

[38] Pett. Appendix 1a.

[39] Smith v. Arizona, 144 S.Ct. 478 (2023).

[40] Smith, 602 U.S. at 792–98.

[41] Davis, 547 U.S. at 821–22 (discussing testimonial statements); *see, e.g.*, Williams, 567 U.S. at 70 ("This feature . . . is important because Crawford . . . took pains to reaffirm the proposition that the Confrontation Clause 'does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.'"); Crawford, 541 U.S. at 59–60, n.9; Crawford, 541 U.S., at 59–60 & n.9; Williams, 567 U.S. at 57–58 (plurality opinion).

[42] Smith, 602 U.S. at 798.

[43] *Id.* at 792–98.

[44] For an example of statements that were not offered for their own truth, *see* State v. Tieman, 2109 ME 60, ¶ 4 & n.4. In said case, the statements "he broke my heart" and "God has a plan" that were made by a victim and were offered into evidence at trial to show that defendant and victim were having a conflict. It did not matter if God had plan or if the defendant broke the victim's heart. All that mattered is that the statements were made and tended to show a disagreement.

[45] Smith, 602 U.S. at 798.

[46] *Id.* at 800–802.

[47] *See id.* at 803.

Conclusion & Additional Considerations

The best way to prepare for a Confrontation Clause challenge to the use of a substitute analyst may be to avoid it. By calling the scientist who performed the actual testing as a witness, the prosecutor ensures two things: that the evidence will not be excluded on confrontational grounds and that the defendant's constitutional rights are protected. Of course, calling the scientist who performed the testing will not always be possible: people move, change employment, and even die. Samples also degrade, are used up, or are thrown out. There is not always time for retesting.

In such instances, having an expert testify and opine based upon the chemical or physical analysis of a different analyst may now be more difficult for some prosecutors. In that regard, *Smith v. Arizona*[48] changed the arguments available to the state when calling or attempting to call such a "substitute analyst" as a witness. The argument that statements of the original analyst are not hearsay and are only used as a "basis" for the substitute analyst's testimony is not likely to be available to prosecutors.

A remaining available argument is that the original analyst's statements, used or relied upon by the substitute analyst, are not testimonial. If a prosecutor intends to pursue such an argument, they should do so carefully and after full consultation with the substitute analyst. To succeed, the prosecutor must be certain that using only non-testimonial statements will be sufficient to satisfy the foundational requirements for the expert's testimony. Indeed, the opinion in *Smith*[49] indicates the Court is ready to hear arguments on the non-testimonial nature of expert statements, and *Smith* provides a roadmap on how such arguments and analysis should be made.[50]

Other arguments may remain possible when the state needs to call a substitute analyst,[51] but they need to be considered carefully by prosecutors and their laboratory personnel. Lab personnel may want to consider future chemical analysis and whether policies and procedures need to be updated, reevaluated, or expanded.[52] Defining each step in a chemical analysis,[53] each step's corresponding documentation, the reason for the documentation, and the relationship of each statement within that documentation to any accreditation standards or laboratory protocols will assist prosecutors when evaluating whether a particular statement is "testimonial."

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[48] 602 U.S. 779 (2024).

[49] And Williams before it. *See* Williams, 567 U.S. at 81–86; *see also* Williams, 567 U.S. at 103–04, 110–13 (Thomas, J. *concurring*) (note that Justice Thomas using a different test for whether a statement is testimonial than is previously described in this article).

[50] Smith, 602 U.S. at 801–02.

[51] It may be possible to use hypothetical questions instead of hearsay in laying the foundation for a substitute analyst's testimony. Naturally, any fact that was used for the hypothetical would have to be proven in another non-testimonial hearsay way. *See* Fed. R. Evid. 104(b). Another possible route is to prove the necessary foundational elements without hearsay pursuant to a state statute. Some states have statutes that outline what constitutes *prima facie* evidence that a chemical test is reliable and complying with those statutes may not require use of hearsay; those statutes may also require advanced request by the defendant for a particular analyst to be necessary. *See, e.g.,* 29-A M.R.S. § 2431; *see* Melendez-Diaz, 557 U.S. at 325–27 (discussing said notice statutes and their potential constitutionality). States could, when available, use chemical tests that were not in any way related to the criminal process. Such would most commonly be available when an impaired driver was taken to a hospital for treatment. In such circumstances, it is unlikely that any statement necessary for the chemical test would be considered testimonial. Prosecutors, using such tests, should be prepared to lay all necessary foundation, including evidence of reliability. Other arguments are also likely still available.

[52] Laboratories should understand that their current employees might not always be their employees, and laboratories that use batch testing should consider what and how their testifying chemists reach their overall conclusions and avoid use of testimonial hearsay in reaching said conclusions (some items may not be hearsay, and some may not be testimonial). Laboratories with available budgets may want to consider audio-visual recording of all testing. If a chemical analysis is properly recorded such that a separate chemist could view the recording and conclude that the analysis was performed appropriately, then that new separate chemist may—after also reviewing the instrument data—be able to opine what drugs a biological sample contained. Any statements made in the recordings (such as product labels or the analyst talking) may be hearsay, but it is unlikely that all will be testimonial. Such recordings may be particularly important in homicides.

[53] Or other scientific/expert analysis.

In sum, prosecutors and laboratories need to work together when facing issues involving hearsay and the Confrontation Clause. The Confrontation Clause needs to be respected and honored, and the easiest way to comply with it may be to call the analyst who performed the actual chemical testing. When that is not possible, prosecutors and the laboratory personnel should determine if a substitute analyst can reach an opinion in the matter using only prior, nontestimonial statements. If an opinion by a substitute analyst can be reached, then prosecutors should be prepared to prove the nontestimonial nature of each prior statement relied upon by the substitute analyst. Establishing the nontestimonial nature of the statements requires time, effort, and clear communication—and could ultimately bring the case before the Supreme Court.

About the Author

Josh Saucier is a Maine-licensed attorney who graduated *Magna Cum Laude* from the University of Maine School of Law in 2014. During law school, he interned with the United States Attorney's Office for the District of Maine, where he developed a strong passion for prosecution.

After graduation, Mr. Saucier returned to his hometown of Millinocket and began his legal career in private practice, specializing in real estate and municipal law. He represented local towns and several timber companies before transitioning to public service in December 2015, when he joined the York County District Attorney's Office.

As an Assistant District Attorney (ADA) in York County, Mr. Saucier primarily worked out of the Springvale District Court and later became one of the county's Impaired Driver Special Prosecutors (IDSP), developing expertise in impaired driving prosecution. In 2019, he joined the Penobscot County District Attorney's Office, where he prosecuted drug trafficking, domestic violence, and other serious felony cases.

Just two weeks before Maine declared a COVID-19 State of Emergency, Mr. Saucier became the Assistant City Solicitor for the City of Bangor. In this role, he played a key part in navigating the City's pandemic response while handling a broad range of legal matters. In March 2021, he was appointed Acting City Solicitor, a position he held until a permanent solicitor was hired.

Mr. Saucier currently works for Dirigo Safety, bringing his extensive prosecution experience to support law enforcement and prosecutors across Maine. He provides Traffic Resource Prosecutor (TSRP) services through a grant with the Maine Bureau of Highway Safety, making him an invaluable asset to the Dirigo Safety team.

The Confrontation Clause and Its Impact on Traffic Safety: A Primer

FREE NDAA Live Webinar!
May 13, 2025
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Panelists include:

- **The Honorable Mary Kate Huffman**, Ohio Second Appellate District Judge and American Bar Association National Judicial Fellow
- **Sabra Jones, PhD**, National Highway Traffic Safety Administration Regional Toxicology Liaison, NHTSA Region 5
- **Deena Ryerson**, Senior Assistant Attorney General of the Oregon Department of Justice and Oregon Traffic Safety Resource Prosecutor

The Confrontation Clause impacts how and under what circumstances the testimony of witnesses for the state is admissible in criminal cases. A series of decisions from the U.S. Supreme Court, culminating in the Court's recent case, *Smith v. Arizona*, provide guidance about how those witnesses, especially forensic scientists, provide testimony. This webinar will provide a basic yet thorough analysis of the Confrontation Clause and recent Supreme Court decisions, with a focus on *Smith v. Arizona*, and how the decision impacts the practices and procedures of those working with the criminal justice system. The multi-disciplinary panel will discuss suggested practices that comply with the requirements of the Confrontation Clause and evaluate alternative means of proving an element of an offense in the absence of forensic evidence.

Registration details coming soon.