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This discussion publication is the work of an expert working group of forensic scientists and lawyers convened by CFSO for purposes of educating forensic science service providers regarding the Smith v. Arizona *United States Supreme Court decision. Primary authors and significant contributors included Amie Ely, J.D. (First Assistant Attorney General of Oklahoma), Raymond Valerio, J.D. (Assistant District Attorney and Director of Forensic Sciences, Queens County District Attorney's Office), and Kenneth Melson, J.D. (Consortium of Forensic Science Organizations). Other significant authors and contributors are not named but are thanked for their important contributions.*

***Smith v. Arizona*: What It Means, What It Doesn't, and Some Thoughts for Next Steps**

On June 21, 2024, the U.S. Supreme Court issued its decision in *Jason Smith v. Arizona*. The *Smith* case, which garnered significant attention in criminal justice and forensic science communities, represents the Court's most recent pronouncement regarding the Sixth Amendment confrontation clause requirements in criminal trials. The Court addresses what is sometimes called "surrogate testimony": testimony by a substitute expert witness who did not complete the examination(s) about which she is testifying. The decision offers some clarity on issues that the Court grappled with in a series of other forensic science-related confrontation clause cases[1]—in particular, *Williams v. Illinois*, which the Court itself acknowledged has "sown confusion in courts across the country." *Smith v. Arizona*, Slip Op. at 7, https://www.supremecourt.gov/opinions/23pdf/22-899_97be.pdf.

This piece generally describes the *Smith* decision—including what it did and did not address—and offers some observations about ways to seek to comply with its general directives, both in cases where the analysis has already been completed, and in considering future processes in forensic laboratories and medical examiner's and coroners' offices. The primary audience is the forensic community, including forensic scientists across a variety of disciplines and forensic pathologists; together, these will be referred to as "Forensic Witnesses," with subgroups of "Testing Forensic Witness" (e.g., the forensic pathologist who completed an autopsy, or a forensic scientist who completed the analysis) and "Testifying Forensic Witness" (a substitute witness who, in light of the unavailability of the Testing Forensic Witness, is asked to testify at a trial[2]).

Some caveats are necessary: First, nothing here is intended to provide guidance about existing (1) state caselaw; (2) lab-specific requirements; (3) discipline-specific practices; (4) prosecutor-specific requests; and (5) judge-specific orders, all of which may vary. Second, as courts across the country begin to apply *Smith*, it is likely that there will be some variation in the lessons they derive—and apply—much as there has been in the application of previous Supreme Court cases addressing confrontation clause rights vis-à-vis Forensic Witnesses. Finally, the proposals here are initial thoughts; they are not meant to be proscriptive or directive, and deviation from these suggestions may well be warranted in individual cases.

[1] *Williams v. Illinois*, 567 U. S. 50 (2012); *Bullcoming v. New Mexico*, 564 U. S. 647, (2011); *Melendez-Diaz v. Massachusetts*, 557 U. S. 305 (2009).

[2] Confrontation clause rights, at least under the U.S. Constitution, are more limited in pretrial hearings than at trial. *Barber v. Page*, 390 U.S. 719, 725 (1968); *United States v. Lattimore*, 525 F. Supp. 3d 142, 149 (D.D.C. 2021). During pretrial hearings, videoconferencing, hearsay, and surrogate testimony may not offend a criminal defendant's right to confront the witnesses against him. This piece focuses on testimony at trial.

This document is a discussion paper to provoke dialogue among lawyers and scientists when facing a substitute witness situation.

I. The Supreme Court's Conclusion: "A Prosecutor Cannot Introduce an Absent Laboratory Analyst's Testimonial Out-of-Court Statements to Prove the Results of Forensic Testing."

a. Background on the Case

i. The Facts

Jason Smith was arrested by Arizona police in December 2019 and charged with, among other things, possessing methamphetamine and marijuana for sale. Slip Op. at 8. The Arizona Department of Public Safety ("DPS") crime lab was directed to do a "full scientific analysis" of the alleged drugs. *Id.* The request for that analysis described Jason Smith as the individual "associated" with the substance, listed his charges, and noted that a trial date had been set. *Id.* Testing Forensic Analysis Elizabeth Rast communicated with prosecutors about the case and ran the tests those prosecutors requested. *Id.*

Rast then typed notes and prepared a signed report, both on DPS letterhead. *Id.* Prosecutors planned to call Rast to testify at Smith's trial. *Id.* at 9. At some point, however, Rast stopped working at the lab for unexplained reasons. *Id.*

Three weeks before trial, prosecutors notified defense counsel they instead intended to call Greggory Longoni to testify as a "substitute expert." *Id.* Although Longoni had no prior connection to the Smith case, prosecutors claimed he would "provide an independent opinion on the drug testing performed by Elizabeth Rast." *Id*. He did not retest the evidence.

Testifying Forensic Witness Longoni reviewed Rast's report and notes before he testified and referred to both materials during his testimony. *Id.* He described Rast's methods and stated that her testing adhered to both the laboratory's policies and general chemistry principles. *Id.* He then concluded that the items in question did, indeed, contain methamphetamine and marijuana. *Id.* at 10.

Smith was convicted. *Id.*

ii. The Arizona Court of Appeals Decision

Smith appealed his conviction to the Arizona Court of Appeals, arguing that the use of a substitute expert violated his confrontation clause rights. *Id.* at 10. The State of Arizona argued that Testifying Forensic Witness Longoni provided the jury with "'his own independent opinions' even though making use of Rast's records." *Id.* (citation omitted).

The Arizona Court of Appeals affirmed the conviction, concluding that the underlying facts from Rast's notes and reports were "used only to show the basis" of Testifying Forensic Witness Longoni's expert opinion, and were not elicited to "provide their truth." *Id.* (citation omitted). As a result, Longoni was testifying about his own independent opinions and Smith was entitled to confront only him, and the State was not required to call Rast to testify so Smith could cross-examine her. *Id.*

b. The Supreme Court's Analysis

The Supreme Court reversed Smith's conviction and remanded the case to Arizona state courts to analyze, in the first instance, whether Smith's constitutional rights to confront the witnesses against him were violated because (1) he was not provided the opportunity to cross-examine Testing Forensic Expert Rast

and (2) the materials Testifying Forensic Expert Longoni relied on—Rast's notes and/or report—were "testimonial" statements, that is, prepared for the primary purpose of criminal litigation, and when admitted into evidence by the substitute witness for their truth became "testimonial hearsay"[3] in violation of the confrontation clause. The Court emphasized that the confrontation clause bar on out of court statements consists of two separate elements: testimonial statements and hearsay. *Id.* at 2-3 and 19.

i. A Testifying Forensic Scientist Cannot Testify to Out-of-Court Statements Made by a Testing Forensic Witness if the Statements Were Testimonial Hearsay.

Smith rejected the argument that a Testifying Forensic Scientist can avoid the confrontation clause by testifying about a Testing Forensic Witness's out-of-court statements only to show a basis for the independent opinion reached by the Testifying Forensic Witness. Rather, "[i]f an expert for the prosecution conveys an out-of-court statement in support of his opinion, and the statement supports that opinion only if true, then the statement has been offered for the truth of what it asserts." *Id.* at 14. And if those "out-of-court statements were also testimonial, their admission violated the confrontation clause." *Id.* at 19.

Determining how to introduce "basis evidence" without violating the confrontation clause or traditional hearsay rules is at the crux of the *Smith* case because basis evidence, only if true, supports the Testifying Forensic Scientist's "independent opinion." *Id.* at 6. Justice Kagan noted that "[i]f believed true, that basis evidence will lead the jury to credit the opinion; if believed false, it will do the opposite." *Id.* at 15. The court referenced the Brief for the United States as *Amicus Curiae* at pages 13-17, as giving examples of classic expert-basis evidence. *Id.* at n. 5 (citing https://www.supremecourt.gov/DocketPDF/22/22-899/290163/20231120160246446_22-899npacUnitedStates.pdf).

The State argued that the Testing Forensic Scientist's notes were admitted to show the basis of the expert's independent opinion, not for their truth, relying on the State's Rule of Evidence 703. *Id.* at 12. Arizona's Rule of Evidence 703, Bases of an Expert's Opinion Testimony, is identical to the Federal Rule of Evidence 703, and to the many state rules that have adopted the Federal Rules of Evidence.

Arizona Rule 703 states in part:

> An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.[4]

Justice Kagan rejected the State's argument saying that "federal constitutional rights are not typically defined—expanded or contracted—by reference to non-constitutional bodies of law like evidence rules." *Id.*[5] Thus, testimonial documents may no longer be disclosed to the jury as basis evidence, regardless of whether the probative value of those documents outweighs their prejudicial effects. State court decisions that approved of Testifying Forensic Scientists serving as substitute witnesses for Testing Forensic Witnesses should be scrutinized to ensure that they do not rely upon reasoning the Court has now rejected.

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[3] Hearsay statements are out-of-court assertions offered for their truth.

[4] https://casetext.com/rule/arizona-court-rules/arizona-rules-of-evidence/article-vii-opinions-and-expert-testimony/rule-703-bases-of-an-experts-opinion-testimony.

[5] Although concurring in the judgment, Justice Alito disagreed with the majority view concerning Rule 703. *Id.* (Alito J., concurring in judgment, at 7 *et seq.*).

Decisions that broadly permit a Testifying Forensic Witness to testify about "basis evidence" that was prepared by a Testing Forensic Witness to be used against a criminal defendant—as analyzed at greater length below—to support the Testifying Forensic Witness's expert opinion are likely no longer good law.

ii. "Testimonial Hearsay" Remains the Test—Or the "Primary Purpose Test" Lives On

Smith reaffirmed that the primary purpose test[6] should be used to determine if statements by Forensic Witnesses are testimonial.[7] If the primary purpose of a statement was its potential later use in criminal proceedings, it is testimonial. If its primary purpose was not for later courtroom use, it is not testimonial. In the forensic context—and when prosecutors ensure the record so reflects—statements made for the purpose of complying with record keeping activities, laboratory standard operating procedures, accreditation requirements, internal review, quality control, or notes to self, are likely not testimonial. *Id.* at 21.

The Supreme Court thus remanded the case to the Arizona state courts to decide whether the materials upon which the Testifying Forensic Witness relied were "testimonial."[8] As a result, Arizona state courts will analyze whether any of the information in Rast's notes and reports was testimonial and hearsay, and whether there was any reversable error. To guide that analysis, Justice Kagan framed the question as "*why* [the Testing Forensic Witness] created the report or notes" upon which the Testifying Forensic Witness relied. To answer that question, the Arizona courts will "consider the range of recordkeeping activities that lab analysts engage in." *Id.* at 21. Again, the court by way of example noted that records that "would not count as testimonial" are those created:

- "to comply with record keeping activities";
- to comply with laboratory operating procedures;
- "primarily to comply with laboratory accreditation requirements";
- "to facilitate internal review and quality control"; and
- as "notes . . . written simply as reminders to self."

Id. at 21.[9]

As Justice Kagan noted, the examples are not exhaustive. *Id.* at 18. Others may include "raw data" such as machine generated data, as discussed in Part III(a)(iv) below.[10]

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[6] Justice Thomas disagrees, and it is his view that " 'the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.'" Slip. Op. Thomas, J., concurring in part, at 1-2.

[7] The Court did not address whether there are circumstances where statements can be determined not to be testimonial on any other basis. *See Ohio v. Clark*, 576 U.S. 237, 245 (2015).

[8] The Court also directed the state courts to determine whether Arizona forfeited the argument of whether the notes and report were testimonial. *Id.* at 20.

[9] Other resources that expert witnesses typically rely upon that are not testimonial (because "preparation of those materials generally lacks any 'evidentiary purpose'") include books and journals, surveys, and economic or scientific studies. *Id.* at 19 n.5.

[10] The U.S. Deputy Solicitor General opined that "raw data is very unlikely to be testimonial". *Smith v. Arizona* oral argument at 51, lines 6-7 (January 10, 2024). Even the Petitioner in *Smith* agrees that gas chromatography-mass spectrometry ("GCMS") data is not testimonial, according to the Deputy Solicitor General. *Id*. at 35, lines 18-20, https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/22-899_3e04.pdf.

II. Topics the Supreme Court Did Not Address

As Jason Smith was charged with a controlled substance offense, and the conclusion of just one Testing Forensic Witness was analyzed, the Supreme Court did not address issues raised by various amici, including: (1) the scope of "testimonial"; (2) which analysts are necessary witnesses when multiple forensic scientists have participated in the analysis of the sample; and (3) whether any form of relaxed confrontation clause analysis could ever be appropriate in situations where, for example, a now-deceased forensic pathologist autopsied a murder victim—or, put another way, address concerns about the confrontation clause imposing as a functional statute of limitations for murder the lifetime of the autopsying forensic pathologist.[11]

a. The Scope of "Testimonial"

The precise scope of what writings are testimonial and what are non-testimonial will await the development of future case law that teases out the "primary purpose" for which different documentation has been prepared. Leadership at forensic science labs and medical examiner/coroner offices, as well as attorneys, will be well-served to start thinking about the *reasons* for which different documents are prepared.

b. Batch Processing

For most laboratories, multiple analysts may participate in the "assembly line processing" of evidence known as "batch processing." Each analyst "perform[s] his or her task in accordance with accepted procedures" with no knowledge as to how the data that is generated may ultimately affect the conclusions reported by the analyst who testifies in a subsequent criminal proceeding.[12] At the conclusion of the assembly line process, the reporting analyst gathers and analyzes the generated raw data and accompanying quality control records and generates the subsequently reported conclusions regarding that analysis.

Federal and state courts have held that the prosecution need not call every participating analyst involved in a batch processing case.[13] There are some states with adverse case law, and laboratories should defer to their prosecutors regarding those requirements (but this would likely already be known to the laboratory).

To avoid confrontation clause pitfalls, Testifying Forensic Witnesses should assist prosecutors in developing a very clear understanding of (1) the "assembly line process" for that analysis/discipline; (2) which documents are generated as part of that process and for what purpose; (3) what guidance/supervision may be provided by the Testifying Forensic Witness during the process; and (4) what data or controls are reviewed to confirm that the expected results have been obtained. Prosecutors must be able to establish with the trial court that the Testifying Forensic Witness would not be "functioning as a conduit for the conclusion of others." *People v. Jordan*, 223 N.E.3d 773, 778 (N.Y. 2023) (quoting *John*, 27 N.Y.3d at 315). Motions *in limine* may be brought by the prosecution so that the

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[11] *See, e.g.*, *Williams v. Illinois*, 567 U.S. 50, 98 (2012) ("Is the Confrontation Clause effectively to function as a statute of limitation to murder?" (Breyer, J., concurring)).

[12] *Williams*, 567 U. S. at 85 (2012).

[13] *See, e.g.*, *United States v. Robinson*, No. 2:22-cr-00212-TL, 2023 U.S. Dist. LEXIS 165537 (W.D. Wash. Sep. 18, 2023); *United States v. Peshlakai*, No. CR21-1501, 2023 U.S. Dist. LEXIS 111275, 2023 WL 4235671, at *11 (D.N.M. June 28, 2023); *United States v. Kaszuba*, 823 F. App'x 77, 79 (3d Cir. 2020); *Chavis v. Delaware*, 227 A.3d, 1079,1093 (Del. 2020); *People v. John*, 27 N.Y.3d 294, 33 N.Y.S.3d 88, 52 N.E.3d 1114, 1127 (N.Y. 2016); *State v. Lui*, 179 Wn.2d 457, 315 P.3d 493, 506 (Wash. 2014); *State v. Lopez*, 45 A.3d 1, 16 (R.I. 2012).

trial court may rule on the issue in advance of trial, rather than subpoenaing and requiring every forensic scientist who participated in the analysis to appear.[14]

c. Truly Unavailable Witnesses

As it treated Testing Forensic Witness Rast as "unavailable" with relatively little analysis, the Supreme Court did not grapple with the question Justice Breyer posed about the lifespan of an autopsying forensic pathologist serving as a de facto statute of limitations for murder. *Williams*, 567 U.S. at 98. It accordingly seems unlikely the Court will relax its "primary purpose" analysis in the face of an essential Forensic Witness who is truly unable to be located or even dead. Thus, unless a Testing Forensic Witness was previously subject to cross-examination by a defense attorney representing the charged defendant, *Smith*, Slip Op. at 2, prosecutors and Testifying Forensic Witnesses would be well-served to follow the recommendations below even in cases where the original Testing Forensic Witness is deceased or otherwise clearly unavailable.

III. Thoughts for Next Steps

This section provides some common-sense, risk-reducing approaches to consider with (1) existing cases—that is, those that have already been analyzed—and (2) future laboratory or medical office processes.

While this piece focusses on the "testimonial" part of the "testimonial hearsay" analysis, it is important not to lose sight of the typical boundaries to the admission of even non-testimonial hearsay. While there are exceptions to the general proposition that an out-of-court statement cannot be introduced to prove the truth of the matter asserted, the safer course will always be to produce the original Testing Forensic Witness.

a. Existing Cases

i. In-Person Testimony by the Original Analyst(s)

Whenever possible, the Testing Forensic Witness should make herself available for trial. On average, fewer than 5% of criminal prosecutions result in trial.[15] While requiring testimony from a Testing Forensic Witness who has moved away from the jurisdiction may appear inefficient, it is the best way to comply with the dictates in *Smith* and related cases, ensure that a defendant's confrontation clause rights are respected, and preserve convictions.

Laboratories, medical examiner offices, and coroner offices should encourage their current employees to testify in cases they completed for previous employers. Current employers should support that testimony by not requiring those employees to take leave to testify in support of their prior casework. Travel expenses can be covered by the subpoenaing party so that the financial burden does not fall to the new employer or the employee. This may well require developing a culture across multiple offices that recognizes that responsibility for a case extends through adjudication—not just analysis. In the long run,

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[14] Although *Smith* does not address any "multiple analyst" scenario, there is a helpful hint on which to draw. Justice Kagan—the author of *Smith*—did comment on the multiple analyst question in her *Williams* dissent. She wrote "none of our cases—including this one—has presented the question of how many analysts must testify about a given report." She then parenthetically notes "[t]hat may suggest that in most cases a lead analyst is readily identifiable." *Williams v. Illinois*, 567 U.S. 50, 109 n.4 (2012).

[15] Jeffrey Q. Smith & Grant R. MacQueen, Going, Going, But Not Quite Gone: Trials Continue to Decline in the Federal and State Courts. Does It Matter?, 101 Judicature 4, 32-34 (2017), https://www.phillipsnizer.com/siteFiles/24092/Article-Judicature-GoingGoingGone-JQSmith-Winter2017.pdf.

that will also save employers from the need to retest samples because the Testing Forensic Witness will return to testify, rather than requiring her former colleagues to reanalyze the evidence.

ii. Absent Former Employees

There will be times when former employees resist testifying in a case in which they conducted the analysis. If the former employee is in-state, a subpoena should suffice. If the former employee is no longer in the state where the case is being prosecuted, prosecutors should consider utilizing the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings. Every state has enacted a version of the uniform act. A step-by-step guide to employing the act can be found at https://www.naag.org/attorney-general-journal/subpoenaing-out-of-state-witnesses/. This process may take time to accomplish so the laboratory should notify the prosecutor's office as soon as it becomes apparent that the former employee will not appear willingly.

iii. Retesting

When a Testing Forensic Witness is unavailable, it will be prudent to discuss the benefits and costs of retesting the evidence—assuming that is even possible. (As a corollary to this, it is prudent to preserve enough evidence for retesting, when that is possible.)

iv. When Surrogacy is Necessary

The prosecutor should consider calling "an analyst who witnesses, performed or supervised the generation of the defendant's DNA profile, or who used his or her independent analysis on the raw data,[16] as opposed to a testifying analyst functioning as a conduit for the conclusions of others." *Jordan*, 223 N.E.3d at 776 (quoting *John*, 27 N.Y.3d at 315). This will mean different things for different disciplines. In some cases, such as fingerprint comparison, the raw data are the questioned and known prints, and thus a reexamination may alone resolve the issue of testimonial documents because the prints themselves are raw data. One advantage of reviewing only the raw data (machine generated) is that the Testifying Forensic Witness can testify that he was not influenced by any other information in the case file and his opinion is truly independent.

Importantly, the *Smith* court did not discuss what documents, records, testimonial statements, or data may be reviewed by the Forensic Testifying Witness in preparation of his independent conclusion.[17] Therefore, it may be permissible for the Testifying Forensic Witness to review the entire case file including testimonial documents.[18] However, the Testifying Forensic Witness is limited in what can be offered as basis evidence in court. It will be prudent for Testifying Forensic Witnesses to consult with laboratory counsel and/or the case's prosecutor.

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[16] The trial court in *People v. Peterson*, 24 Mich. App. LEXIS 5764, (July 15, 2024) (unpublished) held that the DNA "data generated to be analyzed [was not] testimonial in nature" and did not require the testimony of each individual laboratory technician. The Michigan Court of Appeals remanded the case to the trial court because the parties simply referred to "raw data" and it was not clear what that included. See below, where it is emphasized that pretrial conferences are an important opportunity to tease out these terms.

[17] If non-testimonial hearsay is to be disclosed to the jury as basis evidence, it is still subject to a hearsay objection unless permitted by state or federal law.

[18] Although pre-*Smith*, but consistent with it on confrontation grounds, the court in *State v. Lebrick*, 223 A.3d 333 (Conn. 2020) stated that, while acknowledging concerns about reviewing testimonial statements, "courts have held that expert witnesses may base their opinions on the testimonial findings of other experts without violating the confrontation clause if those underlying findings are not themselves put before the jury. . . ." *Id.* at 355.

v. Fact v. Expert Testimony

The Testifying Forensic Witness can be a hybrid witness, testifying as both a fact witness based on his own knowledge of the laboratory's processes and as an expert witness as to his expert, independent conclusion. This type of testimony has been characterized by the courts as "dual testimony."[19]
On the other hand, the prosecution may want to consider presenting two witnesses; a fact witness to describe the laboratory's operating procedures (not only do forensic standards require these procedures but accreditation requires them also) and the Testifying Forensic Witness to present the basis evidence and scientific conclusion. The fact witness's testimony would be in accord with FRE 406. Habit; Routine Practice, or the state's equivalent rule. The two-witness approach may minimize the possible unintentional reference by the Testifying Forensic Witness to testimonial statements of the Testing Forensic Witness. Fact testimony in either situation may provide the jury with circumstantial evidence for concluding that the Testifying Forensic Witness's laboratory correctly conducted the underlying analysis.[20] Prosecutors and laboratory witnesses will have to discuss these concepts and explore their state law to determine which is the better approach.

vi. Using Hypothetical Questions

The Testifying Forensic Expert could also be asked hypothetical questions. Justice Kagan, writing for the majority, said that the Longoni could have been asked, and could have answered, any number of hypothetical questions. *Smith*, Slip Op. at 18; *but see id.*, Alito, J., concurring at 1 (attacking the use of hypotheticals). The prosecution, however, would still have to separately prove the facts asserted in the hypothetical if it wishes the jury to consider those facts.

vii. Preparation of Testifying Forensic Witness

As with all expert testimony, the prosecutor and expert must meet before trial or any hearing to discuss issues concerning the testimony of the expert. Witness preparation is always important, and the lack of it was displayed in the *Smith* case where the Testifying Forensic Witness failed to be precise about his language, conflating data, notes, and reports, and causing confusion on appeal. *Id.* at 20.

But communication goes both ways. It is also critical that prosecutors understand the laboratory workflows used to produce the test results at issue in each case. The expert should be ready to educate the prosecutor on the purpose for which each document is prepared during the analysis process. That knowledge will help prosecutors make informed decisions about calling only witnesses with first-hand knowledge of the facts they will elicit during direct examination. In this way, prosecutors can properly calibrate their questions to elicit both essential case-specific facts and more general testimony about customary testing practices and procedures followed in every case. This type of general testimony, offered by a witness with personal knowledge of a laboratory's workflow, is often sufficient to fill foundational gaps. It should also avoid a hearsay objection.

For example, if a prosecutor wants to elicit case-specific testimony about every step in a DNA typing process, that strategy may require testimony from each technician who performed an individual methodology in that process (extraction, quantitation, amplification, separation, etc.). Calling multiple witnesses may be necessary to avoid a valid hearsay objection. However, case-specific testimony from

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[19] For example, in *United States v. Christian*, 673 F.3d 702 (7th Cir. 2012), a case involving investigative agent expert testimony about drug trafficking, the court discussed the dual role of an expert and the confusion it might create for the jury and the jury instructions that should be given by the court.
[20] See the Department of Justice's oral argument as *amicus curiae* at page 32 *et seq.* in *Smith v. Arizona* and its *amicus brief* at page 22.

laboratory personnel about the more technical aspects of a testing process is often neither legally necessary nor helpful to the jury.[21]

As such, rather than eliciting case-specific testimony about non-essential facts, if a prosecutor asks certain general questions about customary/routine laboratory practices and procedures followed in every case, a hearsay objection can be avoided. This is because the testifying expert will have first-hand knowledge of those routine practices. The *Smith* majority noted this type of testimony (had it been offered by Longoni) would satisfy constitutional concerns.

Preparation is key. In the wake of *Smith*, prosecutors and laboratories must work together to understand their respective goals, roles, and limitations. This is best accomplished through both inter-office collaboration and pretrial preparation. Interoffice collaboration promotes a systemic understanding of laboratory workflows, expert roles, and the overall testing process. This facilitates a general understanding of how each forensic discipline works in a given laboratory. Relying on this basic understanding, pre-trial conferences can be used to correctly scope questions to elicit both the essential case-specific facts and general testimony about routine, customary, or systemic laboratory practices that can serve to both fill foundational gaps and avoid hearsay objections.

b. Considerations for Processes Going Forward

Laboratories, medical examiner and coroner offices, and Forensic Witnesses may be able to adjust their processes for future cases to reduce the risk of a confrontation clause violation. With the same caveats as above regarding state laws, laboratory processes, discipline requirements, prosecutor requests, and judge orders, potential practices to consider include:

- Laboratories and medical examiner/coroner offices might consider whether, if staffing permits, to involve additional analysts in key analyses to give flexibility in witnesses who can be called to testify.
- Laboratories, to ensure that retesting is an option, should, when possible, avoid consuming samples and maintain chain of custody.
- Analysts should fully document their analyses. In the event the Testing Forensic Scientist is not available, ensuring that a Testifying Forensic Scientist will have materials ranging from laboratory notes to, when possible, photographs, data, or other contemporaneous evidence, may decrease potential confrontation clause issues.
- In *Smith*, the testing analyst's notes and report were referred to by Longoni as a "unit." *Id.* at 9. It may be easier to argue that the notes are non-testimonial if they are not presented as a unit with the report. This may require a modification of the Laboratory Information System (LIMS) so that the notes and the report are separate documents, properly recognizing that the notes are "reminders to self."
- Forms and reports should avoid implying that an analysis was completed in connection with the prosecution of a particular individual, but perhaps should reference the relevant accreditation or laboratory protocol.

Finally, some disciplines—particularly forensic pathology and forensic toxicology—have public health obligations that are important to consider when analyzing whether a document is likely to be "testimonial." For example, Medical Examiner/Coroner (ME/C) work in the public health arena to investigate and autopsy unnatural and unexpected deaths including suicides and accidents. A small part of

[21] In certain DNA cases, the prosecutor may want to elicit testimony from a stage of testing that the Testifying Forensic Witness did not conduct. If, for example, the Testifying Forensic Witness discusses machine-generated data such as the quantity of DNA, and that Testifying Forensic Witness did not perform that step of DNA testing, this testimony regarding machine-generated data should not be considered testimonial hearsay.

an ME/C's practice involves homicides. Most ME/Cs operate separately and independently from law enforcement and are instead allied with the public health system. As such, autopsy reports by forensic pathologists are typically prepared as a normal business record, not by edict of law enforcement officials or the criminal justice system. They are typically not created for courtroom or criminal purposes but are instead medical records. Forensic pathologists' testimony is typically strictly related to what happened to the decedent, and these doctors should typically not be provided with, or provide, factual data directly linking a defendant as the perpetrator of a crime. In the event surrogate forensic pathologist testimony is required, it is essential that the prosecutor sponsoring the testimony understand and be prepared to explain the strong arguments that ME/C reports are non-testimonial.

IV. Conclusion

Smith is the latest in a line of Supreme Court cases that tend to generally limit surrogate testimony. The Supreme Court has instructed prosecutors and laboratory personnel that testimonial hearsay violates the confrontation clause, even when it is framed as the evidence providing the basis for the expert's conclusion.

Forensic Witnesses should make every effort to make themselves available to testify about the cases in which they were the Testing Forensic Witness, and professional obligations should be treated as extending through the conclusion of a criminal case.

Testifying Forensic Witnesses may not simply adopt Testing Forensic Witnesses' conclusions. Instead, they should engage in their own independent analysis of the underlying evidence, when possible; be mindful about the reports and notes they review and about which they testify; and consult with laboratory counsel and/or the trial prosecutor.

Laboratory personnel must understand policies and procedures, such as those required by an accreditation or certification body, and by laboratory quality assurance protocols. Documentation of each step in an examination may well fall into one of the categories considered non-testimonial and, if presented correctly, non-hearsay.

Prosecutors, laboratories, and other stakeholders must have conversations when it is necessary to call a Testifying Forensic Witness who did not analyze the evidence. The *Smith* decision and this paper give some guidance about the issues they should discuss. That discussion requires conversations before a pre-trial conference—and, in the best case, even before the Testifying Forensic Witness decides what materials to review in preparation to testify. Areas to address include which foundational questions to ask the witness and the documents the Testifying Forensic Witness should review and/or testify about to arrive at an independent opinion.

Left unanalyzed by *Smith* and its predecessors are questions about batch processing, medical examiners' and coroners' reliance upon toxicology results to determine manner and cause of death, and other analyses that benefit from specialization in a chain of expertise, as well as the full scope of what "testimonial" encompasses. Consequently, prosecutors would be well-served to expect an increase in litigation regarding these issues.

Smith is an important reminder about the potential challenges with surrogate testimony; only by approaching these issues thoughtfully can the forensic science community satisfy the sometimes-evolving understanding of what the confrontation clause requires.