Understanding the Supreme Court's Decision in *Smith v. Arizona* and its Application to Forensic Expert Testimony

This document was created by Patricia D. Powers, Senior Attorney Advisor (AEquitas); Jonathan Kurland, Attorney Advisor (AEquitas); and Jennifer Newman, Senior Associate Attorney Advisor (AEquitas). For a more complete analysis of this issue and the cases that preceded this decision, see Teresa M. Garvey, Williams v. Illinois and Forensic Evidence: The Bleeding Edge of *Crawford*, *Strategies: The Prosecutors' Newsletter, 11* (June 2013).

> ***"Our opinions in Williams 'have sown confusion in courts across the country' about the Confrontation Clause's application to expert opinion testimony. Some courts have applied the Williams plurality's 'not for the truth' reasoning to basis testimony, while others have adopted the opposed five-Justice view. This case emerged out of that muddle."*** [1]

In *Smith v. Arizona*,[2] the Supreme Court clarified questions left open by its 2012 decision in *Williams v. Illinois*, in which it had "raised more questions than answers about when and how an expert may testify to conclusions based upon the opinions or work of other experts or technicians."[3] In our 2012 article "*Williams v. Illinois* and Forensic Evidence: The Bleeding Edge of *Crawford*,"[4] AEquitas explained the holdings in *Williams* and its predecessors, *Melendez-Diaz v. Massachusetts*[5] and *Bullcoming v. New Mexico*.[6] This article explains how the Supreme Court's decision in *Smith* built on those holdings and set forth guidelines for the future.

Resolving tension between Sixth Amendment confrontation rights and hearsay exceptions has been ongoing since the Supreme Court's 2004 decision in *Crawford v. Washington*.[7] Drawing from decades of analysis, the *Smith* Court narrowed its focus on forensic expert testimony in the absence of an original analyst. The *Smith* Court held that an expert may not testify based upon the findings of another unavailable analyst if, in doing so, the testifying expert is relying upon the truth of the findings of the unavailable analyst and this information is testimonial. The *Smith* Court remanded the case to the Arizona Court of Appeals for a specific determination of whether the original analyst's report is testimonial. In doing so, the Supreme Court offered guidelines for practitioners to follow when seeking to introduce forensic records and reports prepared by analysts other than the one testifying at trial. This decision has already impacted trial practice in both cold and current cases and should be carefully considered when prosecutors seek to call alternative experts to testify due to the unavailability of an original analyst or technician, to ensure the planned testimony will be admissible under a *Crawford* analysis.

1. *Smith v. Arizona*, 144 S.Ct. 1785, 1794 (internal citations removed).
2. *Smith v. Arizona*, 144 S.Ct. 1785 (2024).
3. *Williams v. Illinois*, 567 U.S. 50 (2024).
4. For a more complete analysis of this issue and the cases that preceded this decision, see Teresa M. Garvey, *Williams v. Illinois* and Forensic Evidence: The Bleeding Edge of Crawford, Strategies: *The Prosecutors' Newsletter, 11* (June 2013).
5. *Melendez-Diaz v. Massachusetts*, 564 U.S. 647 (2009).
6. *Bullcoming v. New Mexico*, 564 U.S. 647 (2011).
7. *Crawford v. Washington*, 541 U.S. 36 (2004).

Factual Background

The defendant in *Smith* was charged with possession of drug paraphernalia, as well as with possessing a large quantity of methamphetamine and marijuana for sale. The suspected drugs had been seized pursuant to a search warrant and sent to a crime laboratory run by the Arizona Department of Public Safety for testing. The State's request for a "full scientific analysis" referenced the defendant as the person associated with the evidence, referenced the charges brought against the defendant, and indicated the trial date.[8] The analyst who performed the testing produced a report detailing the analysis performed as well as identifying the substances as quantities of marijuana and methamphetamine. The original analyst was not called for testimony at trial because she had "stopped working at the lab for unspecified reasons."[9]

Instead of having the original analyst testify at trial, the State presented the testimony of a different analyst to provide what was characterized as an independent opinion on the ultimate issue based upon the testing performed by the first analyst. This testifying analyst's preparation for trial consisted of reviewing the original analyst's reports and notes, but there was no indication of any independent testing or interpretation of the results produced by the original analyst. The testimony at trial consisted of describing the tests performed by the original analyst and what the records prepared by the original analyst revealed about the results of that testing. There was no indication that the testifying analyst retested any of the substances involved. The defendant argued that the testimony of the analyst at trial violated the Confrontation Clause in that it was derivative of the work and analysis of the original analyst, who was not available for cross-examination.

The State responded that the testifying analyst offered an independent opinion notwithstanding their review and reference to the original analyst's records. The State submitted that the records were not offered for the truth of the matter asserted by those records (to wit, the identity and weight of the substances), but as a basis for the testifying analyst's conclusions, essentially drawing from the applicable version of Arizona's Rule of Evidence 703.[10]

The *Smith* Court analyzed the issue in two parts: (1) whether the original analyst's records relied on by the testifying analyst were offered for the truth of the matter asserted; and (2) if they were offered for the truth, then whether the original analyst's records were testimonial in nature.

On the first question, the *Smith* Court disagreed with the State and, echoing language from *Crawford*, said, "Evidentiary rules, though, do not control the inquiry into whether a statement is admitted for its truth. That inquiry, as just described, marks the scope of a federal constitutional right. And federal constitutional rights are not typically defined—expanded or contracted—by reference to non-constitutional bodies of law like evidence rules."[11] The Court held: "When an expert conveys an absent analyst's statements in support of the expert's opinion, and the statements provide that support only if true, the statements come into evidence for their truth."[12]

Analysis and Impact of *Smith v. Arizona*

Both cold and current cases may be directly impacted by the *Smith* Court's holding, especially if there is expert forensic analysis prepared by a witness who is not available for trial. The diverse fields that may be impacted by *Smith* include DNA analysis, forensic toxicology, forensic ballistics analysis, forensic bloodstain pattern analysis, forensic fingerprint analysis, and broadly any expert analysis conducted for the purpose of prosecution that is testimonial in nature.[13]

The foundation of the Court's reasoning is that an out-of-court statement relied upon by a testifying expert to issue their opinion must be rejected if that underlying statement was testimonial (i.e., prepared for prosecution) and if it is only relevant if considered for the truth asserted.[14] It is now of critical concern whether the underlying report or data is: (1) offered for the truth asserted; and (2) testimonial.

In light of *Smith*, what should a prosecutor do when the expert witness that is intended to be called at trial is referencing work done by another expert? An initial step may be to determine whether the underlying expert's analysis is testimonial in nature. This question is unlikely to implicate a medical witness (such as a forensic nurse) who relies on reports and analyses conducted by other medical providers,

8. *Smith,* 144 S.Ct. 1785 at 1795.
9. *Id.*
10. Arizona Rules of Evidence 703: Bases of an Experts Opinion Testimony.
11. *Smith,* 144 S.Ct. 1785 at 1797.
12. *Id.* at 1786.
13. For more information, see Garvey, *supra* note 4 ("As established in *Melendez-Diaz*: 'Scientific reports and certificates are treated as the equivalent of affidavits, which fall within the core class of 'testimonial statements' covered by the Confrontation Clause. Their testimonial nature also stems from the fact that the certificates were prepared 'under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'")
14. *Smith,* 144 S.Ct. 1785 at 1798.

which are generally compiled for the primary purpose of treating a patient, not in preparation for a prosecution. This type of interdisciplinary collaboration is typical in the medical field and happens independently of preparation for a criminal prosecution. This might also include situations such as a forensic pathologist or medical examiner referencing toxicology performed by an unavailable analyst, which may or may not be testimonial.

However, even when the testifying expert is involved in a field that is primarily forensic in purpose, there may still be space to distinguish that experts' reliance on reports prepared by out-of-court persons as creating non-testimonial record. For instance, in remanding the case to determine whether the records prepared by the unavailable analyst were testimonial, the *Smith* Court suggested that in determining whether the primary purpose of the original analyst's records was for prosecution, and thus testimonial, weight should be given to what degree for which the records were created for accreditation, notetaking, internal review, or other non-evidentiary purposes.[15]

In conducting this analysis, prosecutors should review records and reports relied on by the testifying forensic experts and communicate with them to determine the purpose and nature of the work. Consider an autopsy conducted due to suspicious circumstances surrounding an individual's death that is done for public health purposes, but later referenced in criminal litigation; communication would be about the involved science, the internal protocols (e.g., laboratory batch processing), and observance of science-specific protocols that may have a primary purpose other than criminal prosecution. Additionally, review would include inquiries regarding laboratory practice with more than one analyst and any supervisory involvement. Prosecutors should familiarize themselves with these protocols and understand why certain steps are taken at certain times to be able to better contextualize for the courts the reason this information was collected.

If the records of an unavailable analyst are testimonial in nature, then a prosecutor should decide whether a colorable argument can be raised that they are not being offered for the truth of the matter asserted. In *Smith*, the testifying expert did not prepare their own report, and the testifying analyst was not found to have offered any independent analysis but was rather essentially a conduit for the statements of the original analyst. However, if in a specific case it can be shown that the testifying analyst independently examined and interpreted the results produced by the scientific instruments utilized by the original analyst, then there could be a better argument that an independent analysis had been undertaken.

In those instances when the analysis of the absent expert is offered for the truth and is testimonial, then it is recommended that prosecutors consider the advice in "*Williams v. Illinois* and Forensic Evidence: The Bleeding Edge of *Crawford*." Those options are as follow:

- If a forensic sample has not been consumed, determine if re-testing is possible by the testifying expert. If re-testing necessarily involves consumption, notice should be given to the defense and the matter noted for argument and the Court's determination.
- Calling all involved analysts, particularly when an analyst has observed or supervised the work of an unavailable analyst.
- A stipulation regarding results may be possible if the defendant specifically consents to a waiver of their Sixth Amendment right to confrontation.
- A jury instruction regarding the specific and limited purpose of the evidence should also be offered.
- As referenced by the *Smith* Court, consider whether the testifying expert's opinions can be framed in terms of hypotheticals, so long as the underlying facts of a hypothetical question can be independently proved.[16]

15. *Id.* at 1802.
16. *Id.* at 1800.

Conclusion

In cases where prosecutors must find a way to present testimonial findings of an absent analyst, there may still be ways for them to present that evidence that are consistent with the Supreme Court's ruling in *Arizona v. Smith*. Prosecutors who understand which analysts might have supervised or been present for forensic testimony, as well as what each analyst's role in their office is, will be better armed to identify additional witnesses who can provide non-hearsay testimony regarding the forensic evidence they are seeking to admit.

Although it offers challenges to prosecutors and forensic experts, *Smith* also offers an opportunity for important multidisciplinary communication about the purpose, structure, and content of testimony and analysis of the requirements for successful presentation of the testimony at trial. Prosecutors who fully understand why their forensic analysts and other expert witnesses take each step that they do will be better armed to present that evidence at trial in all circumstances.

This project was supported by Grant No. 2019-MU-BX-K011 awarded by the Bureau of Justice Assistance. The Bureau of Justice Assistance is a component of the Office of Justice Programs, which also includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, the Office for Victims of Crime, and Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking. Points of view or opinions in this document are those of the author and do not necessarily represent the official position or policies of the U.S. Department of Justice. **For more information**, visit www.sakitta.org.

SAKI 15955 R1 0924