

Sixth Amendment — Confrontation Clause — Smith v. Arizona

The Sixth Amendment’s Confrontation Clause protects the right of “the accused” in a criminal prosecution “to be confronted with the witnesses against him.”¹ In one context, it ensures defendants have “some right to confront a forensic analyst” who tested evidence used against them at trial.² However, a question arises when an original analyst is absent from trial and the prosecution instead calls a *substitute expert* to offer an *independent opinion* based on the absent analyst’s work: Is the defendant’s confrontation right violated?³ Last Term, in *Smith v. Arizona*,⁴ the Supreme Court held that if a substitute expert recounts an absent analyst’s statements in support of their independent opinion, and those statements would only support their opinion if true, then those statements come into evidence for their truth and are therefore hearsay.⁵ This, in turn, means that such *basis evidence*⁶ implicates the Confrontation Clause’s ban on testimonial hearsay without an opportunity for cross-examination.⁷ In *Smith*, the Court clarified a longstanding question via commonsense reasoning and faithful adherence to precedent, upholding the Confrontation Clause’s protections for defendants and foreshadowing a Court likely to continue doing so going forward.

Before Jason Smith’s trial for drug possession, the State of Arizona submitted seized evidence appearing to be drugs to the Arizona Department of Public Safety (DPS) for testing.⁸ When they submitted the evidence, the prosecution informed DPS about Smith, his charges, and his pending trial.⁹ Forensic scientist Elizabeth Rast tested the evidence to determine whether it was drugs and produced two types of written materials.¹⁰ First, “Rast prepared typewritten notes on DPS letterhead” during the testing that “recorded the observations she made, the weights she measured, the test procedures she used, the results she obtained, and her comments and conclusions as to each evidence ‘item’ that the State submitted.”¹¹ Second, Rast prepared a signed, typewritten report on

¹ U.S. CONST. amend. VI.

² See Paul F. Rothstein & Ronald J. Coleman, *Confrontation’s Multi-Analyst Problem*, 9 TEX. A&M L. REV. 165, 167 (2021).

³ See *id.* at 167–68.

⁴ 144 S. Ct. 1785 (2024).

⁵ *Id.* at 1791, 1796–97.

⁶ To be sure, expert witnesses may base their testimony on hearsay in any number of ways. At issue in *Smith* is a specific form of “basis evidence” wherein a testifying analyst relays an absent analyst’s work as the sole means of presenting that information to the jury. See *id.* at 1800–01; see also *Williams v. Illinois*, 567 U.S. 50, 123–24 (2012) (Kagan, J., dissenting).

⁷ See *Smith*, 144 S. Ct. at 1791–92.

⁸ Appellant’s Opening Brief at 7, *State v. Smith*, No. 1 CA CR 21-0451 (Ariz. Ct. App. July 14, 2022); Brief for the Petitioner at 4, *Smith*, 144 S. Ct. 1785 (No. 22-899).

⁹ Brief for the Petitioner, *supra* note 8, at 4.

¹⁰ Appellant’s Opening Brief, *supra* note 8, at 7; Brief for the Petitioner, *supra* note 8, at 4–5.

¹¹ Brief for the Petitioner, *supra* note 8, at 4–5.

DPS letterhead with only her conclusions that the items were drugs and their weights.¹²

Though Rast was originally designated as the State's expert, she left DPS before Smith's trial.¹³ The State instead called DPS forensic scientist Gregory Longoni as a substitute expert to testify that the seized evidence was drugs.¹⁴ Longoni admitted his opinions were "based exclusively on Rast's report" and notes, along with the general scientific protocols and analysis DPS follows.¹⁵ As he testified, Longoni referred to Rast's report and notes and relayed their contents.¹⁶ Specifically, Longoni testified "[f]rom [his] review of the lab notes" that the lab's policies and practices were followed during testing and disclosed the method used to test each item.¹⁷ He then concluded that based on "what was done," his "independent opinion" was that the seized evidence was drugs.¹⁸ For each tested item, Longoni came to the same conclusion about its identity as did Rast.¹⁹

After trial, Smith moved for a judgment of acquittal, arguing that Longoni's testimony violated his Sixth Amendment confrontation right under *Bullcoming v. New Mexico*.²⁰ There, the Court held that a scientist who did not prepare a forensic report or observe the testing that produced it may not substitute for the original analyst, whose presence is required by the Confrontation Clause.²¹ However, the trial court distinguished *Bullcoming*, finding Longoni "testified of his own opinion as to what the nature of the substances was that w[ere] tested, and, therefore, [his testimony] d[id] not violate the [C]onfrontation [C]lause of the Constitution."²² Smith was convicted.²³

The Arizona Court of Appeals affirmed Smith's conviction.²⁴ It reasoned that "when an expert gives an independent opinion, the expert is the witness whom the defendant has the right to confront."²⁵ Since Longoni was subject to cross-examination, Smith's confrontation right was not violated.²⁶ The court distinguished *Bullcoming* and its predecessor, *Melendez-Diaz v. Massachusetts*,²⁷ on the basis that those cases involved

¹² See *id.* at 5.

¹³ *Id.* at 6; Appellant's Opening Brief, *supra* note 8, at 8.

¹⁴ See Brief for the Petitioner, *supra* note 8, at 6.

¹⁵ *Id.*

¹⁶ *Smith*, 144 S. Ct. at 1795.

¹⁷ See *id.* at 1799.

¹⁸ Brief for the Petitioner, *supra* note 8, at 7–9.

¹⁹ *Smith*, 144 S. Ct. at 1795–96.

²⁰ 564 U.S. 647 (2011); Brief for the Petitioner, *supra* note 8, at 9–10.

²¹ *Bullcoming*, 564 U.S. at 652.

²² Brief for the Petitioner, *supra* note 8, at 10 (alterations in original).

²³ Appellant's Opening Brief, *supra* note 8, at 8–9.

²⁴ *State v. Smith*, No. 1 CA-CR 21-0451, 2022 WL 2734269, at *1 (Ariz. Ct. App. July 14, 2022).

²⁵ *Id.* at *4 (quoting *State ex rel. Montgomery v. Karp*, 336 P.3d 753, 757 (Ariz. Ct. App. 2014)).

²⁶ *Id.*

²⁷ 557 U.S. 305 (2009).

the *admission* of testimonial documents into evidence, whereas Rast’s work products were never entered or offered into evidence.²⁸

The Supreme Court vacated and remanded.²⁹ Writing for the Court, Justice Kagan³⁰ determined that a substitute expert conveying an absent analyst’s statements as the basis of their independent opinion implicates the defendant’s confrontation rights.³¹ The Court held that if the absent analyst’s statements support the substitute expert’s opinion only if those statements are true, then they are hearsay — that is, they “come into evidence for their truth.”³² And if those statements are also found to be testimonial, then their admission violates the Confrontation Clause.³³

The Court began by tracing the arc of its Confrontation Clause jurisprudence.³⁴ It noted that the clause bars the admission of an absent witness’s statements only if they are “testimonial hearsay.”³⁵ It also observed that forensic reports admitted into evidence fall into this category, so the Confrontation Clause requires the analyst who personally performed the testing to take the stand.³⁶ The Court next explored *Williams v. Illinois*,³⁷ in which it previously confronted this issue.³⁸ There, an expert testified that she matched the defendant’s DNA profile to a DNA profile obtained from a rape kit.³⁹ To support her independent opinion that the profiles matched, she relayed the testimony of an absent analyst who tested the rape kit.⁴⁰ Unlike in prior cases, the absent analyst’s evidence — the rape kit and resulting profile — was not offered

²⁸ *Smith*, 2022 WL 2734269, at *5 (citing *Bullcoming v. New Mexico*, 564 U.S. 647, 663–65 (2011); *Melendez-Diaz*, 557 U.S. at 307–11).

²⁹ *Smith*, 144 S. Ct. at 1802.

³⁰ 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.

³¹ *Id.* at 1791.

³² *Id.* at 1791–92.

³³ *Id.* at 1791.

³⁴ *See id.*

³⁵ *See id.* at 1792 (quoting *Davis v. Washington*, 547 U.S. 813, 823 (2006)). The Court noted that this prohibition contains two separate requirements — that the statements be both “testimonial” and “hearsay.” *Id.*

³⁶ *Id.* at 1792–93 (citing *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 308, 312 (2009); *Bullcoming v. New Mexico*, 564 U.S. 647, 651–52 (2011)).

³⁷ 567 U.S. 50 (2012); *Smith*, 144 S. Ct. at 1793.

³⁸ *Smith* presented a fact pattern largely on all fours with *Williams*. In *Williams*, a substitute expert offered an opinion that the DNA profile obtained from a rape kit matched the DNA profile obtained from the defendant’s blood. *See Williams*, 567 U.S. at 123–24 (Kagan, J., dissenting). The Confrontation Clause was implicated, as while an analyst did appear in court to testify that *semen* was recovered from the rape kit, the analyst who obtained the *DNA profile* from the semen in the rape kit did not testify. *Id.* At issue was thus whether the expert’s opinion depended on the truth of the absent analyst’s report. *See id.* at 126. In *Smith*, the substitute expert’s opinion that the seized evidence was drugs implicated the Confrontation Clause because it depended on the truth of Rast’s notes and report describing how the drugs were tested and their identities. *See Smith*, 144 S. Ct. at 1799–800.

³⁹ *Smith*, 144 S. Ct. at 1793.

⁴⁰ *See id.* (quoting *Williams*, 567 U.S. at 61, 71 (plurality opinion); *id.* at 124 (Kagan, J., dissenting)).

into evidence,⁴¹ raising the question of whether the expert's testimony about the evidence was hearsay implicating the Confrontation Clause.⁴² The Court split.⁴³ The plurality found that "basis evidence" — there, the testimony about the rape kit — does not come in for its truth and therefore is not "hearsay."⁴⁴ The other five Justices disagreed, finding such basis evidence *is* introduced for its truth.⁴⁵ However, this would-be majority fractured on the issue of whether the rape kit report was "testimonial,"⁴⁶ leaving the Court's "opinions in *Williams* '[to] sow[] confusion in courts across the country.'"⁴⁷

The *Smith* Court then turned to whether Rast's statements were "hearsay."⁴⁸ After noting that it is inappropriate to define the scope of constitutional rights based on evidentiary rules,⁴⁹ the Court "conduct[ed] an independent analysis" of whether Rast's statements were admitted for their truth.⁵⁰ The Court reasoned that basis evidence, which supports an opinion only if true, must necessarily be offered for its truth; after all, its value to the factfinder as support for the opinion comes from the fact that it is true.⁵¹ Applying this principle to the facts, the Court determined Longoni's independent opinions could only be formed by accepting what Rast had reported as true, and the jury could credit Longoni's opinion only by accepting the truth of Rast's statements.⁵² Since Rast was not in the courtroom subject to cross-examination, the Confrontation Clause was implicated.⁵³ The Court noted Longoni could permissibly have testified to his personal or general knowledge of lab practices, or to hypotheticals, assuming as true facts the State would have to separately prove.⁵⁴ However, by relaying Rast's statements as

⁴¹ Compare *Melendez-Diaz*, 557 U.S. at 308, and *Bullcoming*, 564 U.S. at 655–56, with *Williams*, 567 U.S. at 62 (plurality opinion).

⁴² See *Smith*, 144 S. Ct. at 1793 (citing *Williams*, 567 U.S. at 61, 71 (plurality opinion); *id.* at 124 (Kagan, J., dissenting)).

⁴³ See *id.* at 1794.

⁴⁴ *Id.* (citing *Williams*, 567 U.S. at 78 (plurality opinion)).

⁴⁵ *Id.* (citing *Williams*, 567 U.S. at 106 n.1, 108 (Thomas, J., concurring in the judgment); *id.* at 132 (Kagan, J., dissenting)).

⁴⁶ *Id.*

⁴⁷ *Id.* (quoting *Stuart v. Alabama*, 139 S. Ct. 36, 36 (2018) (Gorsuch, J., dissenting from the denial of certiorari)).

⁴⁸ See *id.* at 1796–97 (citing *Davis v. Washington*, 547 U.S. 813, 823 (2006)).

⁴⁹ Namely, Rule 703 of the Federal Rules of Evidence permits experts to base opinions on and even disclose otherwise inadmissible facts and data. FED. R. EVID. 703.

⁵⁰ *Smith*, 144 S. Ct. at 1797–98.

⁵¹ *Id.* at 1798.

⁵² *Id.* at 1799–800.

⁵³ See *id.* at 1801.

⁵⁴ *Id.* at 1800 (citing *Williams v. Illinois*, 567 U.S. 50, 67–68 (2012) (plurality opinion); *id.* at 129 n.2 (Kagan, J., dissenting)). For instance, under Justice Kagan's view, the expert in *Williams* could have permissibly testified that *if* there were a DNA profile obtained in a scientifically sound manner from the semen in the rape kit, *then* it would be a match to the profile obtained from the defendant, leaving the State to separately prove that the DNA profile was validly obtained. See *Williams*, 567

the basis of his independent opinion, the statements came in for their truth.⁵⁵

The Court next considered whether the statements were “testimonial,”⁵⁶ but ultimately found the issue unfit for resolution: The petition for certiorari did not seek such a determination, nor had the courts below decided the question.⁵⁷ However, in dicta, the Court “offer[ed] a few thoughts” about how the courts below could address the issue on remand.⁵⁸ It suggested the Arizona Court of Appeals determine whether the statements were testimonial by applying the standard primary purpose test,⁵⁹ under which statements are testimonial if their “primary purpose . . . is to establish or prove past events potentially relevant to later criminal prosecution.”⁶⁰ It also noted the court would “need to consider exactly which of Rast’s statements are at issue,”⁶¹ whether the notes, report, or both, before deciding what the primary purpose of those statements was.⁶² The Court also suggested that given “the range of record-keeping activities that lab analysts engage in[,] . . . some records of lab analysts will not have an evidentiary purpose.”⁶³

Justice Thomas concurred in part, joining all but the majority’s discussion on whether the statements were testimonial.⁶⁴ While he agreed with the Court’s holding and decision to remand the question of whether the statements were testimonial, he asserted the primary purpose test would be inappropriate to resolve that question.⁶⁵ Instead, Justice Thomas “continue[d] to adhere to [his] view that” the appropriate touchstone for whether a statement is testimonial should be the statement’s formality, in light of the history of the confrontation right.⁶⁶ Specifically, in Justice Thomas’s view, only statements that are sufficiently solemn or formal, such as affidavits and depositions, implicate the Confrontation Clause.⁶⁷

U.S. at 129 (Kagan, J., dissenting). Following this example, here Longoni likely could have testified that *if* certain analytical methods were reliably applied to test the evidence, *then* the evidence would be drugs, leaving the State to separately prove that the evidence had been so tested.

⁵⁵ *Smith*, 144 S. Ct. at 1800–01.

⁵⁶ *Id.* at 1801.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *See id.* at 1801–02.

⁶⁰ *Davis v. Washington*, 547 U.S. 813, 822 (2006).

⁶¹ *Smith*, 144 S. Ct. at 1801.

⁶² *Id.* at 1801–02.

⁶³ *Id.* at 1802 (citation omitted).

⁶⁴ *See id.* (Thomas, J., concurring in part).

⁶⁵ *Id.* at 1803.

⁶⁶ *Id.* (quoting, inter alia, *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in the judgment)).

⁶⁷ *Id.* at 1803–04 (quoting *Williams v. Illinois*, 567 U.S. 50, 112 (2012) (Thomas, J., concurring in the judgment)).

Justice Gorsuch also concurred in part, likewise declining to join the majority's consideration of whether the statements were testimonial.⁶⁸ First, he noted that "the Court's thoughts on the subject are in no way necessary to the resolution of today's dispute."⁶⁹ He also questioned the applicability of the primary purpose test to resolve the question.⁷⁰ Justice Gorsuch offered several alternatives to the test derived from the definitions of "witnesses"⁷¹ and "bear[ing] testimony,"⁷² suggesting these alternatives be explored when the opportunity arises because the primary purpose test "may be a limitation of [the Court's] own creation on the confrontation right."⁷³ He also pressed open questions about the application of the primary purpose test, including whose perspective the test focuses on, whether it is objective or subjective, and how to evaluate multiple competing purposes.⁷⁴ Justice Gorsuch ended with a "cautionary note" to "be[] watchful of every inroad' on the accused's right to be confronted with the witnesses against him."⁷⁵

Justice Alito, joined by Chief Justice Roberts, concurred in the judgment.⁷⁶ Justice Alito began by recounting the historical restriction that experts testify only to hypotheticals⁷⁷ and detailing how the Federal Rules of Evidence replaced this paradigm.⁷⁸ He asserted the majority's holding "disinterred that procedural monstrosity" and disagreed that all basis testimony is necessarily offered for its truth, as the factfinder may use it to decide the weight to give the opinion.⁷⁹ Justice Alito challenged the Court's analysis as indicative of a lack of faith in the jury's capacity to consider basis testimony only to evaluate the opinion and not for its own truth value, which he argued is inconsistent with the commonplace practice of offering limiting instructions at trial and the Court's precedent.⁸⁰ He pressed the majority for an explanation of why basis testimony is analogous to the only other context the Court has recognized limiting instructions to be insufficient⁸¹ — a nontestifying co-defendant's directly implicating confession, in *Bruton v. United States*.⁸² However, Justice Alito ultimately agreed with the majority's decision to vacate and remand on the grounds that Longoni's testimony

⁶⁸ *Id.* at 1804 (Gorsuch, J., concurring in part).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* (quoting *United States v. Hubbell*, 530 U.S. 27, 49–50, 50 n.1 (2000) (Thomas, J., concurring); *Crawford v. Washington*, 541 U.S. 36, 51 (2004)).

⁷² *Id.* (quoting *Doe v. United States*, 487 U.S. 201, 210 (1988)).

⁷³ *Id.*

⁷⁴ *Id.* at 1804–05.

⁷⁵ *Id.* at 1805 (quoting *United States v. Burr*, 25 F. Cas. 187, 193 (C.C.D. Va. 1807) (No. 14,694)).

⁷⁶ *Id.* (Alito, J., concurring in the judgment).

⁷⁷ *Id.* at 1805–08.

⁷⁸ *Id.* at 1808–09.

⁷⁹ *Id.* at 1809 (citing FED. R. EVID. 703 advisory committee's note to 2000 amendment).

⁸⁰ *Id.* at 1809–11.

⁸¹ *Id.* at 1811.

⁸² 391 U.S. 123, 135–36 (1968).

was hearsay.⁸³ Justice Alito thought Longoni could have permissibly disclosed the information in Rast’s notes and report and offered an opinion based on them, but went too far by asserting the information therein was true, given he lacked any personal knowledge or scientific basis from which to so conclude.⁸⁴

The Court’s holding in *Smith* provides a much-needed clarification of an issue left hazy after *Williams v. Illinois* through commonsense reasoning and a faithful extension of precedent. This holding, together with the Court’s past Confrontation Clause decisions, is likely to significantly curtail the use of substitute experts and, in doing so, preserve and protect defendants’ confrontation rights. As the first Confrontation Clause case to be decided since major changes to the composition of the Court, *Smith* is both a welcome development and a glimpse at the direction the Court’s jurisprudence in this area may go from here.

In *Smith*, the Court arrived at its holding that basis evidence is hearsay through a straightforward application of logic, providing a helpful clarification of a longstanding issue. The Court’s prior attempt to address this question in *Williams* “confused more than it clarified,”⁸⁵ with lower courts splitting over whether basis evidence violated the Confrontation Clause in the opinion’s wake.⁸⁶ Even before *Williams* was decided, the “overwhelming academic view” was that disclosure of testimonial hearsay as basis evidence violated the Confrontation Clause based on the logical idea that the truth of a conclusion rests on the truth of its premises.⁸⁷ Yet the plurality opinion in *Williams* rejected this view,⁸⁸ despite a total of five Justices agreeing with it.⁸⁹ In *Smith*, a new composition of the Court got a second opportunity to clarify the issue and at last embraced this commonsense conclusion,⁹⁰ doing away with the legal fiction of the *Williams* plurality, which endorsed a prosecutorial dodge of the Confrontation Clause’s protections with “a wink and a nod.”⁹¹ This decision is a welcome clarification that should resolve the confusion amongst the lower courts left by *Williams*.

⁸³ *Smith*, 144 S. Ct. at 1811–12 (Alito, J., concurring in the judgment).

⁸⁴ *Id.*

⁸⁵ 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).

⁸⁶ See Christine Chambers Goodman, *Confrontation’s Convolutions*, 47 LOY. U. CHI. L.J. 817, 845–46 (2016).

⁸⁷ Alexander J. Toney, *The Credibility-Based Evaluative Purpose: Why Rule 703 Disclosures Don’t Offend the Confrontation Clause*, 67 RUTGERS U. L. REV. 953, 955 (2015); see Jennifer L. Mnookin, *Expert Evidence and the Confrontation Clause After Crawford v. Washington*, 15 J.L. & POL’Y 791, 816 (2007).

⁸⁸ See *Williams v. Illinois*, 567 U.S. 50, 78 (2012) (plurality opinion).

⁸⁹ See *id.* at 106 n.1, 108 (Thomas, J., concurring in the judgment); *id.* at 130 (Kagan, J., dissenting).

⁹⁰ See *Smith*, 144 S. Ct. at 1791.

⁹¹ *Williams*, 567 U.S. at 128 (Kagan, J., dissenting).

In addition to its straightforward logical underpinnings, the holding in *Smith* follows naturally from the Court's precedent. After broadly reimagining its Confrontation Clause jurisprudence in *Crawford v. Washington*,⁹² the Court had several occasions to address the application of the clause to forensic and expert testimony: First, in *Melendez-Diaz v. Massachusetts*, the prosecution, in a trial for drug distribution and trafficking, entered into evidence reports of the results of forensic testing on the seized substances.⁹³ However, the analyst who tested the substances and prepared the reports did not testify.⁹⁴ The Court held the reports were testimonial, so the Confrontation Clause required the analyst to appear and be subject to cross-examination.⁹⁵ Then, in *Bullcoming v. New Mexico*, the prosecution, in a trial for driving while intoxicated, called an analyst who did not themselves participate in the testing to introduce a blood alcohol report into evidence.⁹⁶ The Court held that this surrogate testimony was insufficient, and the defendant's right to confrontation meant they needed an opportunity to cross-examine the original analyst.⁹⁷ The substitute expert in *Smith* presented a similar scenario to the surrogate in *Bullcoming*, with the primary distinction being that the forensic report was not offered into evidence but rather relayed as basis for the expert's opinion.⁹⁸ But, for confrontation purposes, this is a distinction without a difference, as the goals of confrontation — asking the original analyst about “the particular test and testing process [they] employed’ . . . [and] that analyst’s ‘proficiency . . . and . . . veracity’”⁹⁹ — still cannot be achieved absent the original analyst. The Court's holding thus preserves what its precedent has held the clause's protection for defendants requires.

In fact, *Smith*'s holding, when taken together with the Court's precedent, may sweep even more broadly in its protections for defendants' confrontation rights by strictly circumscribing the use of substitute experts. *Smith* places basis evidence halfway towards exclusion under the two-prong “testimonial hearsay” test by holding it is “hearsay” if it provides support only if true.¹⁰⁰ The Court's past Confrontation Clause precedent likely results in finding it is “testimonial” too. Take, for instance, the facts of *Smith* itself. Though the Court found no occasion to decide whether Rast's report was testimonial, the conclusion that it is likely follows from the Court's holding in *Melendez-Diaz* that forensic

⁹² 541 U.S. 36 (2004); *see id.* at 75 (Rehnquist, C.J., concurring in the judgment).

⁹³ 557 U.S. 305, 308 (2009).

⁹⁴ *See id.* at 309.

⁹⁵ *Id.* at 310–11.

⁹⁶ 564 U.S. 647, 651 (2011).

⁹⁷ *Id.* at 652.

⁹⁸ *See Smith*, 144 S. Ct. at 1791.

⁹⁹ *Williams v. Illinois*, 567 U.S. 50, 124 (2012) (Kagan, J., dissenting) (quoting *Bullcoming*, 564 U.S. at 661, 662 n.7).

¹⁰⁰ *See Smith*, 144 S. Ct. at 1792.

reports, like “certificates of analysis” identifying tested evidence as drugs, are testimonial.¹⁰¹ The Court’s dicta on the matter notwithstanding, a straightforward application of the primary purpose test counsels the same outcome for the notes: The primary purpose of Rast’s notes was clearly “to establish or prove past events potentially relevant to later criminal prosecution.”¹⁰² After all, Rast would not have even created her notes in the first place if it weren’t for Smith’s impending trial, as she undertook the testing in conjunction with the State’s prosecution.¹⁰³ Thus, with *Smith* establishing it as hearsay and precedent establishing it as testimonial, a substitute expert’s basis evidence, like Longoni testifying to the contents of Rast’s work product, would generally be testimonial hearsay barred by the Confrontation Clause. This demands prosecutors either call the original analyst to the stand, ensuring defendants can fully exercise their confrontation rights, or else limit the substitute expert to the permissible functions laid out by the majority.

However, given that the finding that the materials here were testimonial seems to follow naturally from a straightforward application of the primary purpose test, it raises the question: Why did the Court include its dicta about some analysts’ notes not being testimonial? As Justice Gorsuch noted in concurrence, this was an unnecessary observation for the Court to make while remanding the issue.¹⁰⁴ Perhaps it was included to secure votes; at oral argument, the Justices, and in particular Justice Barrett, had an extended exchange with counsel for Smith about a hypothetical¹⁰⁵ in which “a police officer went to the [crime] scene and jotted some notes down . . . for himself[,] . . . never intending to produce it to anyone.”¹⁰⁶ Justice Barrett seemed particularly skeptical of the petitioner’s argument that those notes would be testimonial,¹⁰⁷ prompting Justice Kagan to interject that “it must depend on the facts [T]here are some notes that wouldn’t and some notes that would.”¹⁰⁸ It’s possible that Justice Kagan included the dicta to that effect in *Smith* in order to achieve the opinion’s majority. Alternatively, the dicta could signal the Court again being poised to expand the primary purpose test as a limitation on the confrontation right, as it has done in several of its

¹⁰¹ *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 308, 310 (2009).

¹⁰² *Davis v. Washington*, 547 U.S. 813, 822 (2006).

¹⁰³ *Cf. Michigan v. Bryant*, 562 U.S. 344, 365, 373–76, 378 (2011) (finding statements not testimonial where police did not know location of perpetrator but possibly testimonial where perpetrator was apprehended).

¹⁰⁴ *Smith*, 144 S. Ct. at 1804 (Gorsuch, J., concurring in part).

¹⁰⁵ See Transcript of Oral Argument at 18–22, *Smith*, 144 S. Ct. 1785 (No. 22-899), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/22-899_3e04.pdf [<https://perma.cc/APT5-XULE>].

¹⁰⁶ *Id.* at 19–20.

¹⁰⁷ See *id.* at 18–20.

¹⁰⁸ *Id.* at 21.

most recent Confrontation Clause opinions.¹⁰⁹ Regardless of the reason for its inclusion, lower courts should be careful not to overread these dicta, and instead take them at face value as unremarkable and well-settled propositions about applying the primary purpose test.

Like with these dicta, *Smith* in its entirety can be read to signal the Court's future direction on the Confrontation Clause. *Smith* is the Court's first time addressing the clause in nearly a decade,¹¹⁰ with four new Justices radically changing the composition of the Court since then.¹¹¹ Notably, Justice Gorsuch's concurrence in *Smith* appears to confirm that his views on the Confrontation Clause are closer to the rights-embracing position of the late Justice Scalia, who wrote the opinion in *Melendez-Diaz* and joined the majority in *Bullcoming* and dissent in *Williams*, than his other conservative colleagues.¹¹² The case also sees Justice Thomas continuing to stick with his idiosyncratic interpretation of how to determine whether evidence is testimonial,¹¹³ as well as Justice Alito espousing a formalistic faith in jury instructions.¹¹⁴ But aside from these outlier positions, the bulk of the Court appears united to continue down the path of upholding the right to confrontation.

Smith stands out among the Court's Confrontation Clause jurisprudence as a pro-defendant victory in a long line of cases narrowing the scope of the confrontation right.¹¹⁵ This opinion comes as helpful and much-needed guidance for the lower courts, with defendant-friendly implications likely to extend even beyond its limited holding. *Smith* sees a Court willing to place the practical costs of confrontation on the prosecution. It offers a window into how a new composition of the Court will proceed in developing the Confrontation Clause from here and gives reason to be optimistic about what lies ahead.

¹⁰⁹ See, e.g., *Michigan v. Bryant*, 562 U.S. 344, 367 (2011) (incorporating police perspective into the primary purpose inquiry); *Ohio v. Clark*, 576 U.S. 237, 246 (2015) (noting primary purpose test may be "necessary, but not always sufficient" to exclude testimonial hearsay).

¹¹⁰ See *Clark*, 576 U.S. at 237.

¹¹¹ See *Current Members*, SUP. CT. U.S., <https://www.supremecourt.gov/about/biographies.aspx> [<https://perma.cc/X2BD-L28D>].

¹¹² See *Coleman & Rothstein*, *supra* note 85, at 51 & n.225; *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 306 (2009); *Bullcoming v. New Mexico*, 564 U.S. 647, 650 (2011); *Williams v. Illinois*, 567 U.S. 50, 118 (2012) (Kagan, J., dissenting).

¹¹³ See *Smith*, 144 S. Ct. at 1803 (Thomas, J., concurring in part) (quoting, *inter alia*, *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in the judgment)).

¹¹⁴ See *id.* at 1809–11 (Alito, J., concurring in the judgment).

¹¹⁵ See, e.g., Jeffrey Bellin, *The Incredible Shrinking Confrontation Clause*, 92 B.U.L. REV. 1865, 1868 (2012) (noting the "dramatic curtailment" of the confrontation right worked by *Michigan v. Bryant*, 562 U.S. 344 (2011), and *Davis v. Washington*, 547 U.S. 813 (2006)); *Clark*, 576 U.S. at 246.