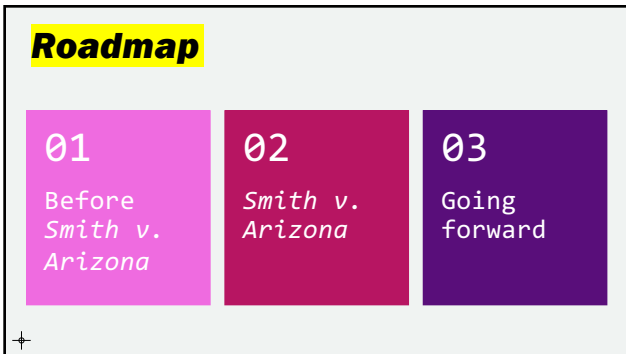




1



2



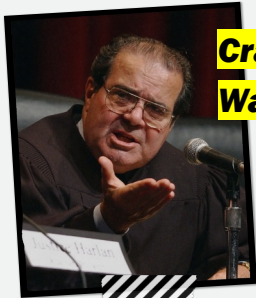
3

The Sixth Amendment

“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”

+

4



Crawford v. Washington

- A “sea change” in confrontation cases
- Overruled the Reliability Test
- Held: Testimonial hearsay is inadmissible unless the declarant is unavailable and there was a prior opportunity for cross-examination

+

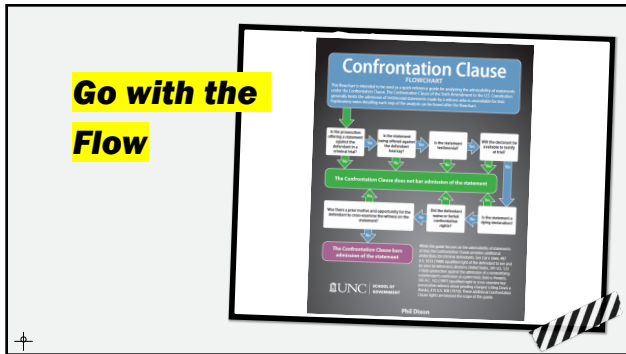
5

Confrontation is required when

1. Testimonial hearsay
2. Declarant is unavailable
3. No prior opportunity for cross-examination

+

6



7

Testimonial Hearsay

Statements are testimonial when the circumstances objectively indicate that “the **primary purpose** of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”

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

8

Melendez-Diaz

- Lab reports are testimonial
- Absent a stipulation, the State may not introduce a lab report without an opportunity for the defendant to cross-examine the author

9

Melendez-Diaz

The “power to subpoena the analysts is no substitute for the right of confrontation”

+

10

Bullcoming v. New Mexico

The State may not rely on surrogate testimony of an expert who did not conduct any analysis to introduce a lab report into evidence.

+

11

Williams v. Illinois

- Facts: Substitute analyst testified about how an analyst at a private lab determined that a DNA profile came from swabs from the victim
- 4-4-1 plurality opinion

+

12

Williams v. Illinois

- Five justices believed the substitute analyst's testimony relied on the truth of the other analyst's out-of-court statements
- One of the five justices did not believe the private lab report was testimonial
- Four justices believed the substitute analyst's testimony did not rely on the truth of the other analyst's statements

+

13

Williams v. Illinois

- According the NC Criminal Law Blog, *Williams* provided "no clear guidance"
- SCOTUS would later characterize *Williams* as "muddle" and "confusion"

+

14

State v. Ortiz-Zape

- Officers found suspected cocaine in the defendant's car
- Expert 1 tested the substance and determined it was cocaine
- Expert 2 identified the substance at trial based on Expert 1's analysis

+

15

State v. Ortiz-Zape

- The testimony of Expert 2 was proper because Expert 2 developed an independent opinion
- Expert 2 could reasonably rely on facts and data created by Expert 1
- The defendant was able to cross-examine Expert 2



16

Ortiz-Zape was issued in 2013 and has been the law in North Carolina since that time



17



18

Smith v. Arizona

+

19

The Facts

- Officers found suspected methamphetamine and marijuana in a shed owned by the defendant's father
- Expert 1 tested the substances and determined they were methamphetamine and marijuana
- Expert 2 identified the substances at trial based on Expert 1's analysis

+

20

Arizona Court of Appeals

- The testimony of Expert 2 was proper because Expert 2 developed an independent opinion
- Expert 2 could reasonably rely on facts and data created by Expert 1
- The defendant was able to cross-examine Expert 2

+

21

Sound familiar?

+

22

Smith v. Arizona

"This Court has held that the Confrontation Clause's requirements apply only when the prosecution uses out-of-court statements for 'the truth of the matter asserted' Some state courts, including the court below, have held that this condition is not met when an expert recites another analyst's statements as the basis for his opinion. Today, we reject that view."

+

23

Smith v. Arizona

- "If 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."
- In this scenario, "the defendant has no opportunity to challenge the veracity of the out-of-court assertions that are doing much of the work."

+

24

Smith v. Arizona

"[Expert 1]'s statements thus came in for their truth, and no less because they were admitted to show the basis of [Expert 2]'s expert opinions. All those opinions were predicated on the truth of [Expert 1]'s factual statements. [Expert 2] could opine that the tested substances were marijuana, methamphetamine, and cannabis only because he accepted the truth of what [Expert 1] had reported about her work in the lab—that she had performed certain tests according to certain protocols and gotten certain results."

+

25

Smith v. Arizona

- "So the State's basis evidence—more precisely, the truth of the statements on which its expert relied—propped up its whole case. But the maker of those statements was not in the courtroom, and Smith could not ask her any questions."
- "Approving that practice would make our decisions in Melendez-Diaz and Bullcoming a dead letter, and allow for easy evasion of the Confrontation Clause."

+

26

Smith is quotable

+

27

The Sixth Amendment right to confrontation “applies in full to forensic evidence”

+

28

If the court admits out-of-court statements to establish the truth of the matter asserted, “the Clause’s alarms begin to ring”

+

29

Courts should not “accept [a State’s] nonhearsay label at face value.”

+

30

Reaction to Smith v. Arizona

"The extent of impact of the *Smith* case on existing North Carolina precedent and future forensic expert practices are uncertain at the time of this publication, but **it is clear that application of *Smith* would have altered the result in some decided cases** and will call for quite different and sometimes a detailed analysis of the underlying facts relied on by the testifying expert."

North Carolina Evidentiary Foundations § 11-17

31

State v. Clark, 909 S.E.2d 566 (2024)

- Observed that SCOTUS **"flatly rejected"** an evidentiary rule that allows an expert to render an independent opinion based on "inadmissible data"
- Hearsay statements from a non-testifying analyst that are contained in a report and relied on by a substitute analyst "are testimonial"

32

Going Forward

33

Implications of Smith v. Arizona

- The reasoning of *State v. Ortiz-Zape* is no longer controlling
- The admissibility of substitute analyst testimony is harder to defend
- Other theories are emerging (e.g., machine-generated data)



34

Don't waive a confrontation issue

- Be vigilant for the use of substitute analysts
- Object when the State seeks to present the testimony of a substitute analyst



35

Notice-and-Demand Statutes

When the State submits matter (suspected drugs / blood) to the Crime Lab for chemical analysis, the report of that analysis is admissible **without the testimony of the analyst** if:

- (1) The State notifies the defendant at least 15 business days before trial that it intends to introduce the report, and
- (2) The defendant fails to file a written objection at least five business days before the trial.



36

N.C. Gen. Stat. § 90-95(g)
N.C. Gen. Stat. § 20-139.1(c1)

Object on confrontation grounds

- If you object and are overruled, the defendant will be in a much better position on appeal
- The State will have to demonstrate that the error is **harmless beyond a reasonable doubt**
- An error that violates the defendant's constitutional rights "is presumed to be prejudicial." *State v. Brown*, 306 N.C. 151 (1982)

40

Don't forget about Rule 702

- Expert testimony must be the "product of reliable principles and methods"
- Rule 702 requires "rigorous gatekeeping." *State v. Daughtridge*, 248 N.C. App. 707 (2016)
- How can the opinion of a substitute analyst be reliable if she is unable to describe how the non-testifying analyst set up the tests or calibrated the equipment?

41

A word about objections

To preserve an evidentiary argument, you have to object when the evidence is admitted and in front of the jury. *State v. Ray*, 364 N.C. 272 (2010)



42



43

State v. Lester (N.C. 2025)

- The State charged the defendant with sex crimes
- The State presented phone records to substantiate the victim's account of the offenses

44

The good (or potentially good)

- Computer-generated data is "unique because it is created entirely by a machine, without any help from humans"
- "It is this independence—this freedom from human influence or interpretation—that makes computer-generated data distinct"
- "The key point is that no human judgment contributes to producing this information - the machine simply records and reports what it measures"

45

The bad

- “The chromatograph’s raw data – showing the chemical composition of the blood sample – are simply ‘the product of a machine’”
- “A printout of those results is, in turn, just a physical representation of the machine’s pre-programmed internal processes”

+

46

How to respond to Lester?

- The section on gas chromatograph testing is (arguably) dicta
- The section is also inconsistent with *Smith v. Arizona*

+

47

Smith v. Arizona

The substitute analyst “testified to the precautions (she said) she took, the standards (she said) she followed, the tests (she said) she performed, and the results (she said) she obtained. The State offered up that evidence so the jury would believe it—in other words, for its truth.”

+

48

Smith v. Arizona

“So if the out-of-court statements were also testimonial, their admission violated the Confrontation Clause. Smith would then have had a right to confront the person who actually did the lab work, not a surrogate merely reading from her records.”

+

49

Smith v. Arizona

“[Expert 2] could opine that the tested substances were marijuana, methamphetamine, and cannabis only because he accepted the truth of what [Expert 1] had reported about her work in the lab - that she had performed certain tests according to certain protocols and gotten certain results”

+

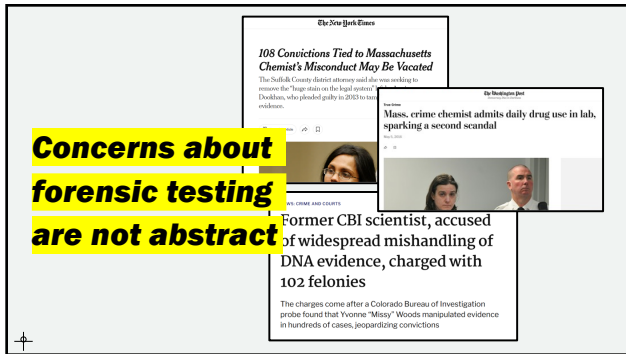
50

Smith v. Arizona

If the State could present surrogate testimony about tests performed by a non-testifying analyst, “no defendant would have a right to cross-examine the testing analyst about what she did and how she did it and whether her results should be trusted.”

+

51

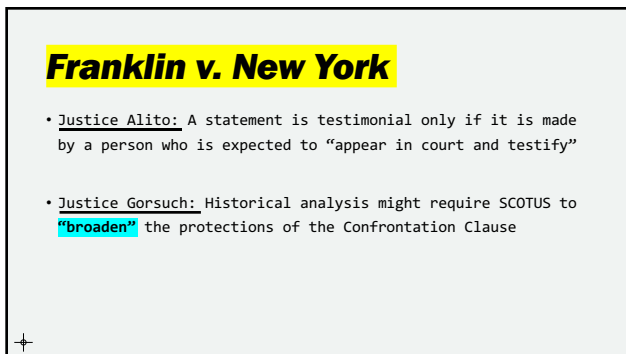


Concerns about forensic testing are not abstract

Former CBI scientist, accused of widespread mishandling of DNA evidence, charged with 102 felonies

The charges come after a Colorado Bureau of Investigation probe found that Yvonne "Missy" Woods manipulated evidence in hundreds of cases, jeopardizing convictions

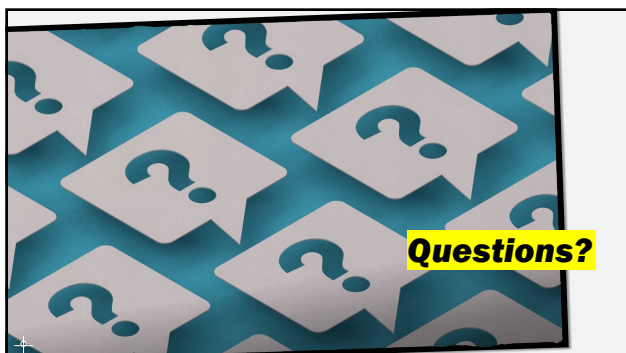
52



Franklin v. New York

- Justice Alito: A statement is testimonial only if it is made by a person who is expected to "appear in court and testify"
- Justice Gorsuch: Historical analysis might require SCOTUS to "broaden" the protections of the Confrontation Clause

53



Questions?

54



55
