

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,

Appellee

v.

Anthony M. CLARK
Hospital Corpsman
Petty Officer First Class (E-6)
U.S. Navy,

Appellant

SUPPLEMENT TO PETITION FOR
GRANT OF REVIEW

Crim. App. Dkt. No. 202400217

USCA Dkt. No. 26-0140/NA

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF
APPEALS FOR THE ARMED FORCES

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Index of Brief

Table of Cases, Statutes, and Other Authorities	iv
Issues Presented	1
Introduction	1
Statement of Statutory Jurisdiction.....	3
Statement of the Case.....	3
Statement of Facts	4
A. The Military Judge admitted documentary evidence of urinalysis testing based solely on a foundation laid by a drug lab expert who did not perform any of those tests.....	4
B. The analysts who performed the laboratory tests were not unavailable or previously subject to cross-examination.	6
C. To prove the Government’s case, the Trial Counsel then used Dr. Furman’s testimony to prove both the accuracy <i>and</i> the veracity of the lab tests in which he played no part.....	7
D. The Military Judge denied Appellant’s pre-trial motion for appropriate relief for a unanimous members panel verdict.	9
Reasons to Grant Review.....	10

I.	This Court, in line with federal and state courts nationwide, should now decide a critical question it has not addressed since <i>Smith v. Arizona</i> : whether the admission of lab results requires the live testimony of the analyst who conducted the test.	
	If so, this Court’s prior precedents in <i>United States v. Katso</i> and <i>United States v. Blazier</i> are no longer good law and lower courts’ reliance on them violates the Confrontation Clause.....	10
A.	<i>Smith v. Arizona</i> corrected the current state of Confrontation Clause jurisprudence governing admission of lab test results.....	10
B.	<i>Smith v. Arizona</i> rejected <i>Williams</i> ’s muddled “surrogate” expert “basis” testimony reasoning and re-established <i>Melendez-Diaz</i> and <i>Bullcoming</i> as the controlling law for lab analyst confrontation rights. This Court’s precedents now conflict and are no longer good law.	12
	<i>i. Smith overrules this Court’s precedent in United States v. Katso.</i>	12
	<i>ii. Smith also effectively overrules this Court’s precedent in United States v. Blazier because it reinstates Bullcoming as controlling law.</i>	15
C.	The lower court’s opinion now conflicts with two federal courts and eight state appellate courts that have interpreted <i>Smith</i> and found Confrontation Clause violations under similar facts.....	18
D.	The lower court has now repeatedly declined to find conflict between <i>Smith</i> and current military precedent, to the prejudice of Appellant’s Confrontation Clause rights.....	23
E.	The lower court’s waiver decision conflicts with this Court’s precedent in <i>United States v. Harcrow</i> and <i>United States v. Sweeney</i>	25
II.	This Court should reconsider its decision in <i>United States v. Anderson</i> and rule that military service members have a constitutional right to a unanimous members panel guilty verdict.....	27
	Conclusion	28
	Appendix	29

Certificate of Filing and Service	29
Certificate of Compliance with Rules 21(b) and 37	30

Table of Cases, Statutes, and Other Authorities

United States Supreme Court

<i>Bullcoming v. New Mexico</i> , 564 U.S. 647 (2011).....	2, 11, 15, 17
<i>Gordon v. Massachusetts</i> , 145 S. Ct. 412 (2024)	22
<i>Melendez-Diaz v. Massachusetts</i> , 557 U.S. 305 (2009)	2, 16
<i>Smith v. Arizona</i> , 602 U.S. 779 (2024)	passim
<i>Williams v. Illinois</i> , 567 U.S. 50 (2012)	1, 12, 13

United States Circuit Courts of Appeals

<i>United States v. Juhic</i> , 954 F.3d 1084 (8th Cir. 2020)	16
<i>United States v. Seward</i> , 135 F.4th 161 (4th Cir. 2025).....	17, 19, 20, 21, App. B-1
<i>United States v. Thompson</i> , 119 F.4th 445 (6th Cir. 2024)	14

United States District Courts

<i>Ganthier v. Superintendent, Green Haven Corr. Facility</i> , No. 23-CV-414 (NRM), 2025 U.S. Dist. LEXIS 165980 (E.D.N.Y. Aug. 26, 2025).....	21, App. B-1
<i>Kiles v. Hutchings</i> , No. 2:21-cv-01437-ART-NJK, 2026 U.S. Dist. LEXIS 19985 (D. Nev. Jan. 28, 2026)	22

United States Court of Appeals for the Armed Forces

<i>United States v. Anderson</i> , 83 M.J. 291 (C.A.A.F. 2023)	28
<i>United States v. Blazier</i> , 69 M.J. 218 (C.A.A.F. 2010)	12, 13, 15, 17
<i>United States v. Dillenburger</i> , No. 25-0174/NA, 2025 CAAF LEXIS 561 (C.A.A.F. July 17, 2025).....	24
<i>United States v. Flores</i> , 84 M.J. 277 (C.A.A.F. 2024)	28
<i>United States v. Harcrow</i> , 66 M.J. 154 (C.A.A.F. 2008)	25, 26
<i>United States v. Katso</i> , 74 M.J. 273 (C.A.A.F. 2015)	passim
<i>United States v. Sweeney</i> , 70 M.J. 296 (C.A.A.F. 2011).....	16, 26

United States Navy-Marine Corps Court of Criminal Appeals

United States v. Clark, No. 202400217, slip op. (N-M. Ct. Crim. App. Dec. 30, 2025)passim, App. A
United States v. Coleman, No. 202400173, 2025 CCA LEXIS 487 (N-M. Ct. Crim. App. Oct. 30, 2025).....24
United States v. Dillenburger, 85 M.J. 599 (N-M. Ct. Crim. App. 2025).. 23, 24, 26
United States v. Eneliko, No. 202400058, 2025 CCA LEXIS 410 (N-M. Ct. Crim. App. Aug. 28, 2025).....24
United States v. Taylor, No. 202400313, 2026 CCA LEXIS 37 (N-M. Ct. Crim. App. Jan. 29, 2026)24

State Supreme Courts

Commonwealth v. Gordon, 496 Mass. 554 (Mass. 2025)22, App. B-1
Commonwealth v. Walker, ___ A.3d ___, 2026 Pa. LEXIS 138 (Pa. 2026)....App. B-1
Leidig v. State, 256 A.3d 870 (Md. 2021)18
Martin v. State, 60 A.3d 1100 (Del. 2013)18
People v. Sanchez, 374 P.3d 320 (Cal. 2016).....18
State v. Hall-Haught, 569 P.3d 315 (Wash. 2025)App. B-1
State v. Gleason, 2025 ME 52 (Me. 2025)App. B-2
Watkins v. State, 320 Ga. 862 (Ga. 2025).....App. B-2
Young v. United States, 63 A.3d 1033 (D.C. 2013).....18

State Intermediary Appellate Courts

People v. Holmes, Nos. 2-24-0194 & 2-24-0195 cons., 2025 IL App (2d) 240194 (Ill. App. Ct. Dec. 15, 2025).....App. B-2
People v. Peterson, No. 364313, 2024 Mich. App. LEXIS 5764 (Mich. Ct. App. July 25, 2024).....App. B-3
State v. Clark, 909 S.E.2d 566 (N.C. Ct. App. 2024).....App. B-3
State v. Green, No. W2024-00370-CCA-R3-CD, 2025 Tenn. Crim. App. LEXIS 337 (Tenn. Crim. App. July 21, 2025).....App. B-2
State v. Hale, No. C-230420, 2024 Ohio App. LEXIS 4283 (Ohio Ct. App. Nov. 27, 2024).....App. B-3
State v. Miller, No. A24-0205, 2025 Minn. App. Unpub. LEXIS 128 (Minn. Ct. App. Feb. 24, 2025).....App. B-3
State v. Pogue, No. CR-2024-0655, 2025 Ala. Crim. App. LEXIS 2 (Ala. Crim. App. Jan. 17, 2025).....App. B-3
State v. West, No. 2023 KA 0286 R, 2026 La. App. LEXIS 39 (La. Ct. App. Jan. 9, 2026).....App. B-2

United States Code

10 U.S.C. § 866(b)(1)(A) (2024)3
10 U.S.C. § 867(a)(3) (2024)3

Rules of Practice and Procedure

C.A.A.F. R. 21(b)(5)(B)(i).....27
C.A.A.F. R. 21(b)(5)(B)(ii), (v)23
C.A.A.F. R. 21(b)(5)(C).....23

Periodicals

Leading Case: Constitutional Law: Sixth Amendment Confrontation Clause Smith v. Arizona, 138 HARV. L. REV. 365, 371 (2024)..... 1, 13, 24

Other Relevant Authorities

AMERICAN HERITAGE DICTIONARY (5th ed. 2022).....11

Issues Presented

I.

In light of *Smith v. Arizona*,¹ whether the Military Judge violated the Confrontation Clause when she admitted evidence based on the testimony of a Government surrogate drug lab expert.

II.

Whether the Military Judge violated Appellant’s constitutional right to a unanimous members panel guilty verdict.

Introduction

“[T]he truth of a conclusion rests on the truth of its premises.”²

In its sweeping 2024 *Smith v. Arizona* decision, the U.S. Supreme Court unanimously reversed over a decade of Confrontation Clause precedent. It recognized *Williams v. Illinois*—that allowed surrogate expert testimony to admit lab test results—had “sown confusion in courts across the country” and was “muddle” that “we now reject.”³ The Court then corrected the state of the law: “[*Melendez-Diaz v. Massachusetts*] prevented the introduction of a lab analyst’s

¹ *Smith v. Arizona*, 602 U.S. 779 (2024).

² *Leading Case: Constitutional Law: Sixth Amendment Confrontation Clause Smith v. Arizona*, 138 HARV. L. REV. 365, 371 (2024).

³ *Smith*, 602 U.S. at 789, 792 (referring to *Williams v. Illinois*, 567 U.S. 50 (2012)).

testimonial report sans lab analyst. [*Bullcoming v. New Mexico*] refused to accede to the idea that any old analyst—*i.e.*, a substitute who had not taken part in the lab work—would do.”⁴

As a result, fifteen years of precedents of this Court, and the lower court, are now in conflict with *Smith*’s new standard. Specifically, a substitute expert witness cannot act as a “mouthpiece” for an absent lab analyst’s testimonial statements about a lab test—even if those statements are being used to explain the basis of the expert’s opinion.⁵ Three times in the last year, the lower court failed to recognize that military precedent conflicts with *Smith*. Thus, guidance to the military as to the correct state of the law is needed. Appellant’s case presents the opportunity for this Court to realign itself and the military courts with the Supreme Court, and the bright-line rule established in *Smith*.

In doing so, Appellant would be able to exercise his constitutional right to confront the actual lab analysts who performed the lab tests that were used against him instead of a single expert who merely acted as a “mouthpiece”⁶ but neither performed nor observed any of the four tests at issue.

⁴ *Smith*, 602 U.S. at 798 (citing *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 312 (2009); *Bullcoming v. New Mexico*, 564 U.S. 647, 659-61 (2011)).

⁵ *Smith*, 602 U.S. at 792, 795, 800.

⁶ *See Smith*, 602 U.S. at 800.

Statement of Statutory Jurisdiction

Appellant timely filed a Notice of Appeal of his special court-martial conviction to the lower court.⁷ The lower court had jurisdiction under Article 66(b)(1)(A), Uniform Code of Military Justice (UCMJ).⁸ This Court has jurisdiction under Article 67(a)(3), UCMJ.⁹

Statement of the Case

A special court-martial consisting of members with enlisted representation convicted Appellant, contrary to his pleas, of eight specifications of wrongful use of a controlled substance in violation of Article 112a, UCMJ, and three specifications of larceny in violation of Article 121, UCMJ.¹⁰ The Members sentenced him to reduction to pay grade E-1, forfeiture of \$1,200 per month for twelve months, and a reprimand.¹¹ The Convening Authority approved the findings and sentence, and the Military Judge entered it into judgment.¹²

⁷ Notice of Appeal, Sept. 23, 2024.

⁸ 10 U.S.C. § 866(b)(1)(A) (2024).

⁹ 10 U.S.C. § 867(a)(3) (2024).

¹⁰ Appellate Ex. XXXVIII at 1; R. at 335, 1227.

¹¹ R. at 1428.

¹² Convening Authority's Action, Sept. 22, 2022; Entry of J., Oct. 28, 2022.

The lower court affirmed all the findings and the sentence on December 30, 2025.¹³ Appellant was served with the decision of the lower court on the same date. Appellant timely petitioned this Court for review on February 27, 2026.¹⁴

Statement of Facts

A. The Military Judge admitted documentary evidence of urinalysis testing based solely on a foundation laid by a drug lab expert who did not perform any of those tests.

At trial, the defense successfully objected to a cover memorandum on one of the urinalysis lab reports (Prosecution Exhibit 27) based on “testimonial hearsay.”¹⁵ Then the other urinalysis lab reports (Prosecution Exhibits 23 through 26)—without their corresponding cover memoranda—were admitted through the testimony of Dr. Furman, a substitute expert from the drug lab who took no part in the actual testing.¹⁶ These exhibits contained: (1) the chain of custody documents showing the receipt, movement, and processing of the specimen within the drug lab;¹⁷ (2) computer data

¹³ *United States v. Clark*, No. 202400217, slip op. at 12 (N-M. Ct. Crim. App. Dec. 30, 2025).

¹⁴ Pet. for Grant of Review, Feb. 27, 2026.

¹⁵ R. at 936, 938.

¹⁶ R. at 965, 971-72, 978, 986.

¹⁷ Pros. Ex. 23 at 12, 17-19, 45-47; Pros. Ex. 24 at 13, 15-17; Pros. Ex. 25 at 13, 16-18, 33-35; Pros. Ex. 26 at 14, 16-18, 43-45.

from the drug lab's initial urine test;¹⁸ and (3) computer data from the drug lab's confirmatory urine test.¹⁹

Since Dr. Furman did not actually do the testing or specimen handling, the basis for his testimony was the drug lab documents themselves,²⁰ and he testified about what the documents in Prosecution Exhibits 23 through 26 represented.²¹ Dr. Furman testified that those Exhibits were "litigation package[s]" in this case.²² He also testified several times that his knowledge of various facts about the sample testing was based on reading specific pages of the litigation packages, to include the testing levels themselves.²³ Regarding how he obtained the litigation packages, he testified, "I did not pull them specifically. The documentation services department pulls them and hands them to me, or whoever the expert witness was at the time . . .

'24

¹⁸ Pros. Ex. 23 at 11; Pros. Ex. 24 at 11; Pros. Ex. 25 at 11; Pros. Ex. 26 at 12.

¹⁹ Pros. Ex. 23 at 22, 49; Pros. Ex. 24 at 19; Pros. Ex. 25 at 20, 37; Pros. Ex. 26 at 21, 49.

²⁰ R. at 967 (Pros. Ex. 26); 974 (Pros. Ex. 25); 980 (Pros. Ex. 23); 988 (Pros. Ex. 24).

²¹ R. at 964-90.

²² R. at 964, 971, 977, 985.

²³ R. at 967, 996-97 (Pros. Ex. 26); 974, 998 (Pros. Ex. 25); 980, 999-1000 (Pros. Ex. 23); 988, 1000-01 (Pros. Ex. 24).

²⁴ R. at 965 (emphasis added).

Throughout that testimony, Dr. Furman made assertions about the specific lab tests allegedly performed in which he played no part, such as, “we tested . . .;” “we ran a subsequent adjunct test;” and “it was further tested”²⁵ He stated that each sample at issue went through an initial and a confirmatory test.²⁶ The cover memoranda from the litigation packages that were not admitted into evidence also stated, “[a]ll positive results are verified by two independent forensic assays, an initial immunoassay test and confirmatory analysis.”²⁷ He ultimately testified that all four samples from those Exhibits tested above the Department of Defense cut-off level for either methamphetamine and/or THC as applicable to each sample.²⁸

B. The analysts who performed the laboratory tests were not unavailable or previously subject to cross-examination.

At no time did the military judge find that the analysts who performed the testing and the employees who actually handled the specimen in this case were unavailable. Nor did Appellant ever have an opportunity to cross-examine those drug lab analysts or employees.

²⁵ R. at 996, 998-99, 1001 (emphasis added).

²⁶ R. at 996-1001.

²⁷ Pros. Ex. 23 at 1; Pros. Ex. 24 at 1; Pros. Ex. 25 at 1; Pros. Ex. 26 at 1.

²⁸ R. at 996-1001.

C. To prove the Government’s case, the Trial Counsel then used Dr. Furman’s testimony to prove both the accuracy *and* the veracity of the lab tests in which he played no part.

The Defense’s case theory at trial was based on attacking the integrity and identity of the urine samples.²⁹ In closing, the Trial Counsel argued the following regarding what the drug lab litigation packages and Dr. Furman’s testimony proved:

- “You also have Prosecution Exhibit 23 . . . This is *the* report . . . with regard to testing of *this* urine sample. This report details all of the tests that were—*that were done* on the urine sample”³⁰
- “Dr. Furman . . . explained that there were no discrepancies regarding this sample”³¹
- “. . . you have the drug lab report from *when it was received at the lab* and the accused’s urine was tested . . . You have *the actual tests that the sample went through*”³²
- “Dr. Furman explained to you that the discrepancy documentation that’s in this *litigation* pack—that’s in this packet of documents does not pertain to the accused’s sample”³³

²⁹ R. at 1199-1205.

³⁰ R. at 1175 (emphasis added).

³¹ R. at 1175.

³² R. at 1176-77 (emphasis added).

³³ R. at 1176-77 (emphasis added).

- “You have Prosecution Exhibit 25, which is the drug lab report, which, again, shows the chain of custody, how it got . . . to the lab for testing, *how it was tested at the lab . . .*”³⁴
- “Dr. Furman explained the discrepancy documentation in this package does not pertain to the accused’s sample”³⁵
- “You also have Prosecution Exhibit 26, which is *the* drug lab report with regard to *this specific sample* . . . you can see how the bottle made it to the lab, and . . . both sets of tests *that this sample underwent*”³⁶
- “Dr. Furman explained that the discrepancy documentation you see in that packet of documents does not pertain to the accused’s sample”³⁷

Regarding the integrity of the sample, the Trial Counsel emphasized in rebuttal closing:

You will not find any evidence of tampering with the accused’s sample bottles . . . even if [a tampered] sample had somehow made it to the lab, you heard *from Dr. Furman* that the intake personnel at the lab also look for evidence of tampering, that *would have* been noted in the lab report that you have as prosecution exhibits in the discrepancy documentation.³⁸

³⁴ R. at 1178-79 (emphasis added).

³⁵ R. at 1179.

³⁶ R. at 1180 (emphasis added).

³⁷ R. at 1180.

³⁸ R. at 1210 (emphasis added).

D. The Military Judge denied Appellant's pre-trial motion for appropriate relief for a unanimous members panel verdict.

Appellant raised a pre-trial Motion for Appropriate Relief requesting a unanimous members panel verdict based on his rights under the Sixth Amendment, the Due Process Clause of the Fifth Amendment, and the Equal Protection Clause of the Constitution.³⁹ The Military Judge denied the motion in light of *United States v. Causey* and *United States v. Riesbeck*.⁴⁰ Appellant proceeded nonetheless with a contested trial in front of members with enlisted representation.⁴¹

³⁹ Appellate Ex. XII at 3-12.

⁴⁰ R. at 113.

⁴¹ R. at 335.

Reasons to Grant Review

I.

This Court, in line with federal and state courts nationwide, should now decide a critical question it has not addressed since *Smith v. Arizona*: whether the admission of lab results requires the live testimony of the analyst who conducted the test.

If so, this Court’s prior precedents in *United States v. Katso* and *United States v. Blazier* are no longer good law and lower courts’ reliance on them violates the Confrontation Clause.

A. *Smith v. Arizona* corrected the current state of Confrontation Clause jurisprudence governing admission of lab test results.

If the Supreme Court’s Confrontation Clause case law stands for anything, it is this: “[*Melendez-Diaz v. Massachusetts*] prevented the introduction of a lab analyst’s testimonial report sans lab analyst. [*Bullcoming v. New Mexico*] refused to accede to the idea that any old analyst—*i.e.*, a substitute who had not taken part in the lab work—would do.”⁴² The testimony elicited in this case is precisely what that settled precedent forbids.

“To rank as testimonial, a statement must have a primary purpose of establishing or proving past events potentially relevant to later criminal

⁴² *Smith*, 602 U.S. at 798 (citing *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 312 (2009); *Bullcoming v. New Mexico*, 564 U.S. 647, 659-61 (2011)).

prosecution.”⁴³ “[T]he Confrontation Clause [does not] permit[] the prosecution to introduce a forensic laboratory report containing a testimonial certification--made for the purpose of proving a particular fact--through the in-court testimony of a scientist who did not sign the certification *or perform or observe the test reported in the certification.*”⁴⁴ “[S]urrogate testimony, . . . *could not convey* what the certifying analyst knew or observed about the particular test and testing process he employed. Nor could that testimony expose any lapses or lies on the certifying analyst’s part.”⁴⁵

To that end, the Supreme Court previously asserted in *Bullcoming*:

[The lab analyst who ran the test] certified that he received Bullcoming’s blood sample intact with the seal unbroken, that he checked to make sure that the forensic report number and the sample number ‘correspond[ed],’ and that he performed on Bullcoming’s sample a particular test, adhering to a precise protocol. He further represented, by leaving the ‘[r]emarks’ section of the report blank, that no ‘circumstance or condition . . . affect[ed] the integrity of the sample or . . . the validity of the analysis.’ *These representations, relating to past events and human actions not revealed in raw, machine-produced data, are meet for cross-examination.*⁴⁶

⁴³ *Bullcoming*, 564 U.S. at 659 n.6 (internal quotation marks and citations omitted).

⁴⁴ *Id.* at 652.

⁴⁵ *Smith*, 602 U.S. at 786 (quoting *Bullcoming*, 564 U.S. at 661) (cleaned up) (emphasis added).

⁴⁶ *Bullcoming*, 564 U.S. at 660 (quotations and alterations in original) (citations omitted) (emphasis added); see *Meet*, AMERICAN HERITAGE DICTIONARY (5th ed. 2022) (defining “meet” alternatively as an adjective meaning “Fitting; proper”). The lab analyst in *Bullcoming* who ran the test did not testify at trial. *Bullcoming*, 564 U.S. at 655-56.

B. *Smith v. Arizona* rejected *Williams*'s muddled “surrogate” expert “basis” testimony reasoning and re-established *Melendez-Diaz* and *Bullcoming* as the controlling law for lab analyst confrontation rights. This Court’s precedents now conflict and are no longer good law.

*i. Smith overrules this Court’s precedent in United States v. Katso.*⁴⁷

While in *Williams v. Illinois*, the Supreme Court allowed substitute expert opinion testimony about lab tests a mere year after *Bullcoming*,⁴⁸ the Court in *Smith* has now made clear that *Williams* was “muddle” “and we now reject it.”⁴⁹ That rejection likewise applies to this Court’s precedent in *United States v. Katso* that followed the reasoning in *Williams*.⁵⁰ In *Katso*, this Court held, “Experts may ‘review and rely upon the work of others, including laboratory testing conducted by others, so long as they reach their own opinions in conformance with evidentiary rules regarding expert opinions.’ . . . This rule is not inconsistent with [*Williams v. Illinois*.]”⁵¹ But in overruling *Williams*, *Smith* now holds, “[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

⁴⁷ *United States v. Katso*, 74 M.J. 273 (C.A.A.F. 2015).

⁴⁸ *Williams v. Illinois*, 567 U.S. 50, 78 (2012) (plurality opinion).

⁴⁹ *Smith*, 602 U.S. at 789, 792.

⁵⁰ *Katso*, 74 M.J. at 282 (quoting *United States v. Blazier*, 69 M.J. 218, 224 (C.A.A.F. 2010)).

⁵¹ *Id.*

the truth of what it asserts. How could it be otherwise?”⁵² Therefore, “[t]here is no meaningful distinction between disclosing an out-of-court statement’ to ‘*explain the basis* of an expert’s opinion’ and ‘disclosing that statement for its truth.’”⁵³ As the *Harvard Law Review* aptly put it in its commentary on *Smith*, the Court’s logic boils down to a simple concept: “the truth of a conclusion rests on the truth of its premises.”⁵⁴

This holding overrules *Katso* that allows “an expert [to] rel[y] in part upon ‘statements’ by an out-of-court declarant,” the admissibility of which “hinges on the degree of independent analysis the expert undertook in order to arrive at that [expert’s] opinion.”⁵⁵ The *Katso* Court even mirrored the above-quoted “basis testimony” concept *Smith* now rejects: “Mr. Davenport presented his own expert opinion at trial, which he formed as a result of his independent review, and clearly *conveyed the basis* for his conclusions”⁵⁶ In *Katso*, this Court also acknowledged that it was affirming this rule “to provide a clear rule for the military

⁵² *Smith*, 602 U.S. at 795 (emphasis added).

⁵³ *Id.* (quoting *Williams*, 567 U.S. at 106 (Thomas, J., concurring in judgment)) (emphasis added).

⁵⁴ *Leading Case: Constitutional Law: Sixth Amendment Confrontation Clause Smith v. Arizona*, 138 HARV. L. REV. 365, 371 (2024).

⁵⁵ *Katso*, 74 M.J. at 282 (citing *Blazier*, 69 M.J. at 224-25) (emphasis in original).

⁵⁶ *Id.* at 284 (emphasis added).

justice system” “[i]n the absence of clear guidance from the Supreme Court[.]”⁵⁷ Nine years later, *Smith* provides that guidance that the Supreme Court, itself, admits was lacking.⁵⁸

Without mentioning *Katso*, the lower court still relied on this now-abrogated rationale, including mirroring the same language from *Katso*: “After *independently reviewing* each exhibit generally and the computer-generated data specifically, [Dr. Furman] *concluded* that Appellant’s urine tested positive for methamphetamine or a combination of methamphetamine and THC.”⁵⁹ But the Supreme Court rejected this approach fifteen years ago in *Bullcoming* and has now rejected it again. As the Sixth Circuit summarized, “In *Smith*, the [Supreme] Court reasoned that the Clause’s protections apply when a substitute analyst offers ‘independent’ conclusions while conveying the substance of the underlying report.”⁶⁰ Notably, *Smith* is now in alignment with this Court’s current Chief Judge’s dissent in *Katso* that the accused “had a Sixth Amendment right to confront the initial laboratory technician . . .

⁵⁷ *Id.* at 282.

⁵⁸ *Smith*, 602 U.S. at 789 (“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.”).

⁵⁹ *See Katso*, 74 M.J. at 284; *Clark*, slip op. at 8 (emphasis added).

⁶⁰ *United States v. Thompson*, 119 F.4th 445, 455 (6th Cir. 2024) (finding Confrontation Clause claim in light of *Smith* “a close call” but declining to decide due to lack of prejudice).

regarding whether he precisely followed the required protocols for preparing the DNA samples, and thus whether he may have contaminated the evidentiary DNA sample with the known DNA sample.”⁶¹

ii. Smith also effectively overrules this Court’s precedent in United States v. Blazier because it reinstates Bullcoming as controlling law.

The lower court also held that Dr. Furman’s testimony was admissible because he was relying on machine-generated data in the litigation packages.⁶² The lower court relied on this Court’s holding in *United States v. Blazier* that “machines are not declarants—and such data is therefore not ‘testimonial.’”⁶³ But *Blazier* was decided six months *prior* to *Bullcoming*. And as *Bullcoming* states, it is not raw, machine-generated data in a vacuum that creates a Confrontation Clause problem, but representations as to “*the validity of the analysis[:]*” such “past events and human actions *not* revealed in raw, machine-produced data, are meet for cross-examination.”⁶⁴

⁶¹ *Katso*, 74 M.J. at 284 (Ohlson, J., dissenting).

⁶² *Clark*, slip op. at 8.

⁶³ *Id.* (quoting *Blazier*, 69 M.J. at 224).

⁶⁴ *Bullcoming*, 564 U.S. at 660 (emphasis added).

In other words, *how* the data is derived is what creates a constitutional right to confront the lab analyst *who ran the test that produced that data*.⁶⁵ As the Eighth Circuit held, “Machine-generated records usually do not qualify as ‘statements’ for hearsay purposes *but can become hearsay when developed with human input*.”⁶⁶ And as this Court held in *United States v. Sweeney*, “[w]here, as here, an accused’s sample tests positive in at least one screening test, *analysts must reasonably understand themselves to be assisting in the production of evidence* when they perform re-screens and confirmation tests”⁶⁷ The *Sweeney* Court also held, “the cover memorandum results certification” and “indicat[ions] that the laboratory results . . . were correctly determined by proper laboratory procedures, and that they are correctly annotated” are plainly and obviously testimonial.⁶⁸ Thus, the information underlying those rescreens and confirmation tests are testimonial under *Sweeney*, and now, under *Smith*, “[t]he ‘surrogate testimony,’ . . . ‘*could not convey* what [the certifying analyst] knew or observed’ about ‘the particular test and testing

⁶⁵ See *Smith*, 602 U.S. at 799 (otherwise “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.”).

⁶⁶ *United States v. Juhic*, 954 F.3d 1084, 1089 (8th Cir. 2020) (citing *Melendez-Diaz*, 557 U.S. at 310-11) (further holding computer-generated reports identifying potential child pornography contained inadmissible hearsay) (emphasis added).

⁶⁷ *United States v. Sweeney*, 70 M.J. 296, 302 (C.A.A.F. 2011) (emphasis added).

⁶⁸ *Id.* at 304 (reviewing for plain error).

process he employed.’ Nor could that ‘testimony expose any lapses or lies on the certifying analyst’s part[.]’”⁶⁹

Additionally, the *Blazier* Court held an expert may “*rely on*, but not repeat, *testimonial hearsay* that is otherwise an appropriate *basis for an expert opinion*, so long as the expert opinion arrived at is the expert’s own.”⁷⁰ Just like *Katso*, that rationale is now abrogated by *Smith*. “Approving that practice [of allowing substitute expert testimony] would make [the] decisions in *Melendez-Diaz* and *Bullcoming* a dead letter, and allow for easy evasion of the Confrontation Clause.”⁷¹ That holding in *Blazier*, importantly, relied heavily on cases from the Fourth Circuit, the rationale of which the Fourth Circuit, itself, now holds “is no longer tenable after *Smith*.”⁷² Thus, by abrogating *Williams*, coupled with the rationale quoted above, the Supreme Court is telling us that *Melendez-Diaz* and *Bullcoming* now control, making *Blazier* no longer good law.

To hold otherwise would create precisely the circumstance the Supreme Court decided *Smith* to guard against: “[N]o defendant would have a right to cross-examine

⁶⁹ *Smith*, 602 U.S. at 786 (quoting *Bullcoming*, 564 U.S. at 661) (quotations in original) (citations omitted).

⁷⁰ *Blazier*, 69 M.J. at 222.

⁷¹ *Smith*, 602 U.S. at 798.

⁷² *Blazier*, 69 M.J. at 222; see *United States v. Seward*, 135 F.4th 161, 169 (4th Cir. 2025); Reasons to Grant Review section I.C., *infra*.

the testing analyst about what she did and how she did it and whether her results should be trusted. In short, [the Government] wants to end run all [the Supreme Court has] held the Confrontation Clause to require. It cannot.”⁷³

C. The lower court’s opinion now conflicts with two federal courts and eight state appellate courts that have interpreted *Smith* and found Confrontation Clause violations under similar facts.

The Fourth Circuit, five state supreme courts, eight state intermediary appellate courts, and one federal district court have now applied *Smith*, found error, and abrogated prior case law, all in direct conflict with the lower court.⁷⁴ Additionally, as *Smith* notes, at least four other state supreme courts had already rejected the *Williams* “not for the truth” reasoning for “basis” testimony that this Court agreed with in *Katso*.⁷⁵

In *United States v. Seward*, the Fourth Circuit held that *Smith* stands for the proposition that “a criminal defendant has ‘a right to cross-examine the testing analyst about what she did and how she did it and whether her results should be trusted’; the ability to cross-examine *someone else* is insufficient to avoid a

⁷³ See *Smith*, 602 U.S. at 799.

⁷⁴ App. B. For the Court’s convenience and ease of reading, undersigned counsel has compiled this voluminous list of cases in Appendix B attached to this Supplement.

⁷⁵ *Smith*, 602 U.S. at 789 n.2 (citing *People v. Sanchez*, 374 P.3d 320, 333 (Cal. 2016); *Martin v. State*, 60 A.3d 1100, 1107 (Del. 2013); *Young v. United States*, 63 A.3d 1033, 1045 (D.C. 2013); *Leidig v. State*, 256 A.3d 870, 901, n.23 (Md. 2021)); *Katso*, 74 M.J. at 282.

Confrontation Clause problem.”⁷⁶ In *Seward*, the testifying DNA expert explained how familiar she was with the specific lab’s DNA testing procedures and quality assurances to ensure reliable results.⁷⁷ Likewise, the lower court here explained, “Dr. [Furman] testified regarding the NDSL’s internal controls, standards, practices, and procedures applicable to the testing of Appellant’s urine samples, specifically relating to Prosecution Exhibits 23 through 26.”⁷⁸ As *Seward* identified, “[n]ow comes the problem. . . . The DNA expert then discussed each DNA sample taken from the crime scene, testified that her ‘lab analyze[d]’ each swab (seemingly according to the procedures she had explained earlier), and provided her conclusions—all without having tested the samples herself.”⁷⁹ The lower court here identified identical testimony:

He also testified about the chain of custody and confirmed that Appellant’s urine samples associated with these exhibits were properly linked to *the tests conducted*. After independently reviewing each exhibit generally and the computer-generated data specifically, he *concluded* that Appellant’s urine tested positive for methamphetamine or a combination of methamphetamine and THC.⁸⁰

⁷⁶ *Seward*, 135 F.4th at 169 (quoting *Smith*, 602 U.S. at 799) (emphasis added).

⁷⁷ *Id.* at 168.

⁷⁸ *Clark*, slip op. at 8. NDSL stands for “Naval Drug Screening Laboratory.” *Id.* at 4.

⁷⁹ *Seward*, 135 F.4th at 168 (alterations in original).

⁸⁰ *Clark*, slip op. at 8 (emphasis added).

Seward found that the surrogate DNA expert’s testimony implicated the Confrontation Clause because, “[a]s in *Smith*, the testifying witness relied on the work produced by another analyst to reach her expert conclusions.”⁸¹ So too, here.

“To be sure, the testifying witness in *Smith* more overtly put the non-testifying analyst’s out-of-court statements on the record than the government’s DNA expert did here.”⁸² But “[t]he obvious implication—indeed, the only way the testimony makes sense—is that the [] expert was representing that the non-testifying analyst who ran the underlying tests in fact followed the procedures the [] expert had just described.”⁸³ This is precisely what occurred in Appellant’s case. And this is the same problem this Court’s current Chief Judge identified in his *Katso* dissent: “Mr. Davenport *effectively* repeated the out-of-court statements made by Mr. Fisher when he testified that Mr. Fisher had followed standard procedures in preparing the DNA samples -- a putative fact about which Mr. Davenport had no independent knowledge.”⁸⁴

The Fourth Circuit also acknowledged that its prior case law found no Confrontation Clause problem with this exact method of testifying, but “[w]e

⁸¹ *Seward*, 135 F.4th at 168 (citing *Smith*, 602 U.S. at 798).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Katso*, 74 M.J. at 286 (Ohlson, J., dissenting) (emphasis added).

conclude that approach is no longer tenable after *Smith*.”⁸⁵ So too here, and *Katso* and *Blazier*, likewise, are no longer tenable. This is because, as the Fourth Circuit announced:

[T]he government may not sidestep the Sixth Amendment problems created by having a witness testify to their opinions that are founded on a non-testifying analyst's out-of-court statements by simply omitting any questions about the analyst's work. ‘Approving that practice would make’ *Smith* and several other post-*Crawford* decisions ‘a dead letter, and allow for easy evasion of the Confrontation Clause.’⁸⁶

In lockstep with the Fourth Circuit, the United States District Court for the Eastern District of New York recently held in light of *Smith*:

Thus, whether a surrogate witness is testifying to ultimate ‘opinions’ or mere ‘data,’ the author-analyst must be produced to satisfy the accused's right to confrontation. Surrogate testimony by another analyst who understands the procedures used to generate the data, clinical observations, or other findings in the report will not suffice.⁸⁷

⁸⁵ *Seward*, 135 F.4th at 169.

⁸⁶ *Id.* at 168 (quoting *Smith*, 602 U.S. at 798).

⁸⁷ *Ganthier v. Superintendent, Green Haven Corr. Facility*, No. 23-CV-414 (NRM), 2025 U.S. Dist. LEXIS 165980, at *68 (E.D.N.Y. Aug. 26, 2025) (emphasis added).

Similarly, after the U.S. Supreme Court vacated another judgment and remanded for further consideration in light of *Smith*, the Massachusetts Supreme Judicial Court held:

[I]n light of the Supreme Court’s decision in *Smith* [A]n expert’s opinion based on an absent analyst’s test results that depends also on the truth of the analyst’s testimonial hearsay as to the processes and protocols she said she followed to obtain those results is precluded by the confrontation clause. Such expert opinion testimony, after *Smith*, is prohibited because *the relevant witness against the accused, in a constitutional sense, is the absent analyst*.⁸⁸

The United States District Court for the District of Nevada also recently agreed that, under *Smith*, it was problematic for a fingerprint analyst to testify when he “relied upon the material provided from another analyst . . . who conducted the initial examination [and, *inter alia*,] determined which candidate matched the latent prints lifted from the crime scene.”⁸⁹ That court, however, declined to decide if error occurred on *habeas corpus* procedural grounds.⁹⁰

In ruling that Appellant’s case implicated no problem whatsoever with the Confrontation Clause or *Smith*, review by this Court is warranted because the lower

⁸⁸ *Gordon v. Massachusetts*, 145 S. Ct. 412 (2024); *Commonwealth v. Gordon*, 496 Mass. 554, 575 (Mass. 2025) (emphasis added).

⁸⁹ *Kiles v. Hutchings*, No. 2:21-cv-01437-ART-NJK, 2026 U.S. Dist. LEXIS 19985, at *28 (D. Nev. Jan. 28, 2026).

⁹⁰ *Id.* at *28-29.

court is now in direct conflict with the U.S. Supreme Court, a federal circuit court of appeals, and at least one federal district court—if not two.⁹¹ When viewed in tandem with the above-cited cases from *seventeen* different states (four pre-*Smith* and thirteen post-*Smith*), the military may soon become an outlier in this rapidly-changing judicial landscape if this Court does not intervene.

D. The lower court has now repeatedly declined to find conflict between *Smith* and current military precedent, to the prejudice of Appellant’s Confrontation Clause rights.

In reaching its decision in Appellant’s case, the lower court heavily relied on the published precedent it created in *United States v. Dillenburger*.⁹² As here, *Dillenburger* presented the same surrogate drug lab expert testimony problem and the appellant argued *Smith* now prohibits such testimony.⁹³ There, the same lower court held there was no “error, plain or otherwise, based on *Smith v. Arizona* when [the surrogate lab expert] testified without objection, ‘After review of all the *testing data*, my opinion is the cocaine metabolite [] was present’ at certain levels in Appellant’s urine specimens.”⁹⁴ But again, “the truth of a conclusion rests on the

⁹¹ See C.A.A.F. R. 21(b)(5)(B)(ii), (v); C.A.A.F. R. 21(b)(5)(C).

⁹² *Clark*, slip op. at 7-9 (discussing and comparing *United States v. Dillenburger*, 85 M.J. 599 (N-M. Ct. Crim. App. 2025)).

⁹³ *Dillenburger*, 85 M.J. at 603.

⁹⁴ *Id.* at 609-10 (emphasis in original).

truth of its premises.”⁹⁵ This logical premise of *Smith* was lost on the lower court in *Dillenburg* and again in this case.

Appellant is mindful that this Court denied review of *Dillenburg*.⁹⁶ Since then, however, the judicial landscape has more robustly developed in a manner favorable to Appellant’s position.⁹⁷ Additionally, in yet a third case this year, the same lower court made the same ruling vis-à-vis *Smith* and *Dillenburg*.⁹⁸ Thus, it is evident that the lower court has now entrenched itself in a position contrary to *Smith*—and its progeny—for an issue that continues to be raised on appeal.⁹⁹

Notably, Appellant’s case materially differs from *Dillenburg* because *Dillenburg* was an innocent ingestion case.¹⁰⁰ So any Confrontation Clause violation regarding the lab tests was harmless because *Dillenburg* conceded the substance was, in fact, in his body, albeit unknowingly. Here, Appellant’s case

⁹⁵ *Leading Case: Constitutional Law: Sixth Amendment Confrontation Clause Smith v. Arizona*, 138 HARV. L. REV. 365, 371 (2024).

⁹⁶ *United States v. Dillenburg*, No. 25-0174/NA, 2025 CAAF LEXIS 561 (C.A.A.F. July 17, 2025).

⁹⁷ See Reasons to Grant Review section I.C., *supra*; App. B.

⁹⁸ *United States v. Coleman*, No. 202400173, 2025 CCA LEXIS 487, at *24-26 (N-M. Ct. Crim. App. Oct. 30, 2025).

⁹⁹ This same *Smith* issue was raised, but not decided, in at least two additional cases appealed to the lower court. *United States v. Taylor*, No. 202400313, 2026 CCA LEXIS 37, at *1 n.2 (N-M. Ct. Crim. App. Jan. 29, 2026); *United States v. Eneliko*, No. 202400058, 2025 CCA LEXIS 410, at *1 (N-M. Ct. Crim. App. Aug. 28, 2025).

¹⁰⁰ *Dillenburg*, 85 M.J. at 605-06.

theory at trial was based on attacking the integrity and identity of the urine samples.¹⁰¹ This made the accuracy and veracity of the corresponding urinalysis results highly relevant to his case—without which the Government would be unable to prove those charges. Finally, the fact that Appellant’s case involves multiple drug charges does not affect the Confrontation issue here, as *Smith* itself also involved multiple drug charges.¹⁰² Therefore, admission of the lab test results through Dr. Furman’s testimony materially prejudiced Appellant’s Confrontation Clause rights.

E. The lower court’s waiver decision conflicts with this Court’s precedent in *United States v. Harcrow* and *United States v. Sweeney*.

The lower court correctly recognized that *Smith* was decided in between the time of Appellant’s trial and his appeal, and, thus, he “receives the benefit of a change to the law that occurs between his trial and the time of his appeal” for waiver purposes.¹⁰³ In *United States v. Harcrow*, this Court found no waiver and found plain error after that appellant raised a Confrontation Clause claim based on a change in Supreme Court precedent between trial and direct appeal.¹⁰⁴ In *Harcrow*, the trial defense counsel, when asked, stated to the military judge he had “no objection” to

¹⁰¹ R. at 1199-1205.

¹⁰² *Smith*, 602 U.S. at 789.

¹⁰³ *Clark*, slip op. at 6.

¹⁰⁴ *United States v. Harcrow*, 66 M.J. 154, 157-60 (C.A.A.F. 2008).

the lab reports that were subsequently challenged on appeal.¹⁰⁵ But this Court declined to find waiver based on the presumption against waiver of constitutional issues and because the decision in *Crawford v. Washington* “opened the door for a colorable assertion of the right to confrontation where it was not previously available.”¹⁰⁶ For the exact same reasons, this Court also declined to find waiver and reviewed for plain error in *United States v. Sweeney*, which was also a Confrontation Clause claim predicated on a change in the law between trial and appeal.¹⁰⁷

Yet, here, as it did in *Dillenburg*, the lower court incorrectly held that Appellant’s Confrontation challenge to the documentary evidence of the lab tests (Prosecution Exhibits 23 through 26) was waived because “trial defense counsel declined to make an objection after being asked by the military judge.”¹⁰⁸ Not only was it lost on the lower court that this same “no objection” statement from the trial defense counsel was not waiver in *Harcrow* or *Sweeney*, but it also never considered how *Smith* created a colorable assertion to challenge the lab reports that did not previously exist at the time of trial.¹⁰⁹

¹⁰⁵ *Id.* at 156, 158.

¹⁰⁶ *Id.* at 157-58.

¹⁰⁷ *Sweeney*, 70 M.J. at 304-06.

¹⁰⁸ *Clark*, slip op. at 6-7; see *Dillenburg*, 85 M.J. at 609.

¹⁰⁹ See *Clark*, slip op. at 6-7.

The lower court then used their finding of waiver to Prosecution Exhibits 23 through 26 to justify their holding that Dr. Furman's testimony, if erroneous, caused no prejudice.¹¹⁰ Thus, contrary to the lower court's opinion, Appellant's Confrontation claims as to both the documentary evidence and Dr. Furman's testimony are entirely reviewable for plain error under this Court's precedents. Now, under *Smith* and *Seward*, that evidence was plainly erroneous and, further, was prejudicial because the Government could not prove its case without that evidence. Therefore, the lower court's finding of waiver directly and prejudicially conflicts with *Harcrow* and *Sweeney*, warranting review.¹¹¹

II.

This Court should reconsider its decision in *United States v. Anderson* and rule that military service members have a constitutional right to a unanimous members panel guilty verdict.

Appellant acknowledges that this Court recently decided in *United States v. Anderson* that court-martial defendants do not have a right to a unanimous guilty verdict under the Sixth Amendment, the Fifth Amendment Due Process Clause, or

¹¹⁰ *Id.* at 9.

¹¹¹ *See* C.A.A.F. R. 21(b)(5)(B)(i).

the Fifth Amendment component of equal protection.¹¹² Appellant requests that this Court reconsider and overrule this decision because Appellant asserts that *Anderson* was incorrectly decided. He also raises this issue to preserve it for the purpose of further appeals. Further, Appellant hereby incorporates all legal arguments raised in his pre-trial motion.¹¹³

Conclusion

Accordingly, Appellant respectfully requests that this Court grant his petition for review in order to provide the needed “crisp, clear guidance about the practical effects of those changes”¹¹⁴ that *Smith* requires to Confrontation Clause law. He also requests that this Court grant his petition for review to reconsider and overrule its decision in *Anderson*.

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¹¹² *United States v. Anderson*, 83 M.J. 291, 293 (C.A.A.F. 2023).

¹¹³ *See* Appellate Ex. XII.

¹¹⁴ *See United States v. Flores*, 84 M.J. 277, 284 (C.A.A.F. 2024) (Ohlson, C.J., concurring and dissenting).

Appendix

- A. *United States v. Clark*, No. 202400217, slip op. (N-M. Ct. Crim. App. Dec. 30, 2025).
- B. Compilation of cases interpreting *Smith v. Arizona* consistent with Appellant's position.

Certificate of Filing and Service

I certify that a copy of the foregoing was delivered to the Court and delivered to the Director, Appellate Government Division, at Code46-DAC@us.navy.mil, and to the Deputy Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, at Joshua.D.Ricafrente.civ@us.navy.mil on March 23, 2026.

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Certificate of Compliance with Rules 21(b) and 37

This Supplement complies with the type-volume limitations of Rule 21(b) because:

This Supplement contains 6,985 words, inclusive of Appendix B.

This Supplement complies with the typeface and type style requirements of Rule 37.

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This opinion is subject to administrative correction before final disposition.

United States Navy - Marine Corps
Court of Criminal Appeals

Before
KISOR, GANNON, and FLINTOFT
Appellate Military Judges

UNITED STATES

Appellee

v.

Anthony M. CLARK

Hospital Corpsman Petty Officer First Class (E-6), U.S. Navy

Appellant

No. 202400217

Decided: 30 December 2025

Appeal from the United States Navy-Marine Corps Trial Judiciary

Military Judge:
Ryan Stormer (arraignment)
Andrea K. Lockhart (trial)

Sentence adjudged 9 July 2022 by a special court-martial tried at Naval Base San Diego, California consisting of officer and enlisted members. Sentence in the Entry of Judgment: a reprimand, reduction to E-1, forfeiture of \$1,200.00 pay per month for 12 months.

For Appellant:
Lieutenant Raymond E. Bilter, JAGC, USN

United States v. Clark, NMCCA No. 202400217
Opinion of the Court

For Appellee:

Major Mary Claire Finnen, USMC
Commander John T. Cole, JAGC, USN

Judge FLINTOFT delivered the opinion of the Court, in which SENIOR Judge KISOR and Judge GANNON joined.

This opinion does not serve as binding precedent, but may be cited as persuasive authority under NMCCA Rule of Appellate Procedure 30.2.

FLINTOFT, Judge:

Contrary to his pleas, a panel of members convicted Appellant of eight specifications of wrongful use of a controlled substance and three specifications of larceny in violation of Uniform Code of Military Justice (UCMJ) Articles 112a and 121.¹

Appellant asserts three assignments of error (AOEs):

I. Did the Government violate the Confrontation Clause when it admitted evidence based on the testimony of the Government's surrogate drug lab expert;²

II. Did the military judge abuse her discretion when she admitted, over defense objection, urinalysis documents pursuant to Military Rule of Evidence (Mil. R. Evid.) 803(6);³ and

III. Did the military judge violate Appellant's constitutional right to a unanimous members panel guilty verdict.⁴

¹ 10 U.S.C. §§ 912a, 921.

² Appellant's requested relief under this AOE is to set aside the findings in Specifications 1 through 6 of Charge I and the sentence.

³ Appellant's requested relief under this AOE is to set aside the findings in Specifications 1 and 2 of Charge I and the sentence.

⁴ Appellant's requested relief under this AOE is to set aside all findings and the sentence. He raises this AOE pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). This AOE is without merit. See *United States v. Anderson*, 83 M.J. 291 (C.A.A.F. 2023); See also *United States v. Matias*, 25 M.J. 356 (C.M.A. 1987).

Finding no prejudicial error, we affirm.

I. BACKGROUND

Appellant's convictions for the wrongful use of methamphetamine and tetrahydrocannabinol (THC) stemmed from five separate urinalysis tests while he was assigned to Navy Medicine Readiness and Training Command (NMRTC) San Diego.⁵

At trial, the Government presented the testimony of Ms. Bravo to establish the foundation for Prosecution Exhibits 8 and 11, the testing registers for two of Appellant's urinalyses.⁶ Ms. Bravo served as one of the assistant urinalysis program coordinators (AUPC) at NMRTC San Diego from October 2020 through January 2022. At that time, she was an active duty Second Class Petty Officer; however, she separated from the Navy in April 2022. At the time of her testimony in June 2022, Ms. Bravo had not performed duties as AUPC or as records custodian since January 2022.⁷

During trial, Ms. Bravo testified that Prosecution Exhibit 11 was created on 3 January 2020 prior to her assuming duties as an AUPC, while Prosecution Exhibit 8 was created on 3 February 2021 during her tenure as an AUPC. She explained that, as an AUPC, she was responsible for maintaining and storing the command's urinalysis records, including testing registers and chain of custody documents, which were kept and prepared in the regular course of business of the command's urinalysis program pursuant to applicable urinalysis policies.⁸ She stated that testing registers are computer generated and are created and filled out on the day of testing. Additionally, she testified that that records for the current and previous month's tests were kept in a locked drawer within the urinalysis office.⁹

Regarding Prosecution Exhibits 8 and 11, Ms. Bravo testified that both would have been maintained and kept within the command's record-keeping system at the time of trial. She acknowledged that both records would have

⁵ Appellant was also found guilty of three specifications of Article 121, UCMJ.

⁶ Through Ms. Bravo's testimony, the Government also admitted Prosecution Exhibits 6, 9 and 10. These exhibits were the testing registers associated with the three other urinalysis tests in which Appellant's urine tested positive.

⁷ Ms. Bravo was classified as another qualified witness pursuant to Mil. R. Evid. 803(6)(D) since she was no longer in the Navy or serving as the AUPC or records custodian.

⁸ R. at 768-71.

⁹ R. at 770.

been maintained during her tenure as AUPC.¹⁰ She identified specific information contained on both exhibits, including command personnel, the date of the urinalysis, and the command's name at the top of both exhibits. Since both exhibits belonged to the command, were not dated for the current or previous month, and were less than three years old, she testified the exhibits would have been kept in the binder, organized by month and year, and located in the urinalysis office.¹¹

The Government also called Dr. Foxtrot, a chemist employed at the Naval Drug Screening Laboratory (NDSL), who was recognized as an expert in the field of forensic chemistry without objection. Specifically, when the military judge asked Defense if they had any objection to Dr. Foxtrot being recognized as an expert, they responded, “[n]o, Your Honor.”¹² Through Dr. Foxtrot's testimony, the Government established the necessary foundation and authenticated, as business records, all five drug laboratory reports associated with Appellant's positive drug test results.¹³ These five reports were identified as Prosecution Exhibits 23 through 27. Each exhibit was prepared by the NDSL's documentation services department, which retrieves the drug laboratory reports and provides them to the designated expert witness for comparison and verification, ensuring they are exact copies.¹⁴

The Government first sought to admit Prosecution Exhibit 27 into evidence. However, trial defense counsel objected to the admission of the two-page cover memorandum, arguing it constituted testimonial hearsay. The military judge sustained this objection and the cover memorandum was not admitted into evidence or published to the members. Similarly, the cover memoranda included in Prosecution Exhibits 23 through 26 were also removed and not presented to the members.¹⁵ The remainder of Prosecution Exhibits 23 through 27, consisting primarily of chain of custody documents and computer-generated testing

¹⁰ R. at 773; R. at 781-82; R. at 784-85; R. at 792.

¹¹ R. at 770; R. at 782; R. at 784.

¹² R. at 924.

¹³ The urine samples in Pros. Ex. 23 and 24 were positive for methamphetamine while the urine samples in Pros. Ex. 25 through 27 were positive for both methamphetamine and THC.

¹⁴ R. at 964-65.

¹⁵ Despite this, a redacted cover memorandum is included with each relevant prosecution exhibit in the Record of Trial.

results, were admitted into evidence after trial defense counsel did not object after being provided with the opportunity to do so by the military judge.¹⁶

Dr. Foxtrot then reviewed each exhibit and testified regarding the laboratory procedures and testing processes associated with each urine sample. He testified to the chain of custody and how the urine samples linked to each report belonged to Appellant. After reviewing the reports, Dr. Foxtrot concluded that all five of the urine samples provided by Appellant exceeded Department of Defense cutoff concentrations and tested positive for either methamphetamine or both methamphetamine and THC.

While Dr. Foxtrot stated he was not directly involved in testing the urine samples, he was listed on one of the chain of custody documents in Prosecution Exhibit 27, which Appellant does not include in his assigned error. We therefore focus only on Prosecution Exhibits 23 through 26 in this opinion.

II. DISCUSSION

A. The Government Did Not Violate the Confrontation Clause When it Admitted Evidence Based on the Testimony of Dr. Foxtrot.

1. Standard of Review

Waiver is an intentional relinquishment or abandonment of a known right.¹⁷ Whether waiver has occurred is a question of law this court reviews de novo.¹⁸ CAAF has stated, a valid “waiver leaves no error . . . to correct on appeal.”¹⁹ On the other hand, forfeiture is the failure to timely assert a right.²⁰ This Court reviews forfeited issues under a plain error standard.²¹ Plain error is a clear or obvious error that results in material prejudice to a substantial

¹⁶ Trial defense counsel also objected to pages three and four of Prosecution Exhibit 27 as cumulative with Prosecution Exhibit 16 for identification; however, the military judge overruled the objection since Prosecution Exhibit 16 had not yet been admitted into evidence.

¹⁷ *United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F. 2020) (quoting *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009)).

¹⁸ *Id.*

¹⁹ *United States v. Campos*, 67 M.J. 330, 332 (C.A.A.F. 2009).

²⁰ *Davis*, 79 M.J. at 331.

²¹ *Johnson v. United States*, 520 U.S. 461, 466-67 (1997).

right.²² By its nature, the Confrontation Clause of the Sixth Amendment implicates a substantial right, and where plain and obvious error implicates a constitutional right, the Government bears the burden to show that it was harmless beyond a reasonable doubt.²³ In a urinalysis case, stamps, signatures, and other notations on the chain of custody documents and data review sheets, and results report summaries, are not plainly and obviously testimonial in the context of review for plain error.²⁴

An appellant receives the benefit of a change to the law that occurs between his trial and the time of his appeal.²⁵ This court-martial adjourned in July 2022. Almost two years later, in June 2024, the Supreme Court of the United States decided *Smith v. Arizona*.²⁶ In *Smith*, the Supreme Court held that “[a] state may not introduce the testimonial out-of-court statements of a forensic analyst at trial, unless she is unavailable and the defendant has had a prior chance to cross-examine her.”²⁷ The Supreme Court also held that the state may not

introduce those statements through a surrogate analyst who did not participate in their creation. And nothing changes if the surrogate . . . presents the out-of-court statements as the basis for his expert opinion. Those statements, as we have explained, come into evidence for their truth—because only if true can they provide a reason to credit the substitute expert. So a defendant has the right to cross-examine the person who made them.²⁸

2. Analysis

a. Any Objection to Testimonial Hearsay in the Documents in Violation of *Crawford v. Washington* was Waived

Appellant contends the admission of Prosecution Exhibits 23 through 26, based solely on the foundational testimony of a surrogate expert who did not

²² *United States v. Dillenburger*, 85 M.J. 599, 608 (N-M. Ct. Crim. App. 2025) *rev. denied*, ___M.J. ___, No. 25-0174/NA, 2025 CAAF LEXIS 561 (C.A.A.F. July 17, 2025) (citing *United States v. McPherson*, 81, M.J. 372, 377 (C.A.A.F. 2021)).

²³ *Id.* (citing *United States v. Harcrow*, 66 M.J. 154, 160 (C.A.A.F. 2008)).

²⁴ *Id.* (citing *United States v. Sweeney*, 70 M.J. 296, 305 (C.A.A.F. 2011)).

²⁵ *United States v. Tovarchaves*, 78 M.J. 458, 462 (C.A.A.F. 2019) (citing *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987)); *See United States v. Mullins*, 69 M.J. 113, 116-17 (C.A.A.F. 2010).

²⁶ 602 U.S. 779 (2024).

²⁷ *Id.* at 802-03.

²⁸ *Id.* at 803 (citations omitted).

perform any of the testing in the reports, violated his rights under the Confrontation Clause in light of the Supreme Court's decision in *Smith v. Arizona*.²⁹ We disagree.

In March 2025, this Court issued a published opinion, *United States v. Dillenburg*, the facts of which are remarkably similar to those in Appellant's case. As in *Dillenburg*, the Government in this case presented the testimony of an expert from the NDSL who was not involved in the testing of Appellant's urine samples. During trial, Dr. Foxtrot was recognized as an expert without objection, and he authenticated Prosecution Exhibits 23 through 26, four of the five drug laboratory reports associated with Appellant's positive urine samples, as business records.

In contrast to the documentary exhibits in *Dillenburg*, however, the first two pages of each exhibit in this case included a cover memorandum signed by someone other than Dr. Foxtrot. Trial defense counsel objected to the cover memorandum that accompanied each exhibit as testimonial hearsay. The military judge sustained the objection and admitted the remainder of each exhibit without objection.³⁰

Despite *Crawford v. Washington*³¹ and *United States v. Tearman*³², Appellant waived any *Crawford* violation under the Confrontation Clause for any testimonial hearsay contained in the drug laboratory reports when trial defense counsel declined to make an objection after being asked by the military judge.³³ Thus, any testimonial hearsay objections that may have been present when Prosecution Exhibits 23 through 26 were admitted were waived.

b. Dr. Foxtrot's Testimony Was Not Testimonial Hearsay

Next, we examine whether Dr. Foxtrot's foundational testimony violated the Confrontation Clause in light of *Smith v. Arizona*. Since *Smith* had not been decided at the time of Appellant's trial, defense counsel's failure to object to this testimony does not constitute waiver, but is instead treated as a forfeiture, which we review under a plain error standard.³⁴

In *Smith*, the Supreme Court acknowledged that a surrogate expert from the same drug laboratory who did not perform the testing may still testify

²⁹ Appellant's Brief at 8.

³⁰ *But see* fn15.

³¹ 541 U.S. 36 (2004).

³² 72 M.J. 54 (C.A.A.F. 2013).

³³ *See generally* *Dillenburg*, 85 M.J. at 609.

³⁴ *See* *Harcrow*, 66 M.J. at 158.

based on personal knowledge about how the drug laboratory functions and its standards, practices, and procedures used to conduct tests.³⁵ Appellant, however, seems to argue that *Smith* limits an expert's ability to do just that.

In this case, Dr. Foxtrot testified regarding the NDSL's internal controls, standards, practices, and procedures applicable to the testing of Appellant's urine samples, specifically relating to Prosecution Exhibits 23 through 26. He also testified about the chain of custody and confirmed that Appellant's urine samples associated with these exhibits were properly linked to the tests conducted. After independently reviewing each exhibit generally and the computer-generated data specifically, he concluded that Appellant's urine tested positive for methamphetamine or a combination of methamphetamine and THC.³⁶

Additionally, to the extent Appellant argues that the holding in *Smith* also overturns a well-established line of precedent from our superior court that followed *Crawford* regarding what constitutes testimonial hearsay in forensic laboratory reports, this Court finds those arguments unconvincing. The holding in *Smith* did not address whether the underlying statements were testimonial.³⁷ Our superior court has held, “[i]t is well-settled that under both the Confrontation Clause and the rules of evidence, machine-generated data and printouts are not statements and thus not hearsay—machines are not declarants—and such data is therefore not ‘testimonial.’”³⁸ Additionally, as this Court articulated in *Dillenburger*, in a urinalysis case, stamps, signatures, and other notations on the chain of custody documents and data review sheets, and results report summaries were not testimonial, and, therefore, it is not plain

³⁵ See *Smith*, 602 U.S. at 799 (“The [Confrontation] Clause still allows forensic experts . . . to play a useful role in criminal trials. Because [the surrogate expert] worked in the same lab . . . he could testify from personal knowledge about how that lab typically functioned—the standards, practices, and procedures it used to test seized substances, as well as the way it maintained chains of custody. . . . Or had [the surrogate expert] not been familiar with . . . [the] lab, he could have testified in general terms about forensic guidelines and techniques—perhaps explaining what it means for a lab to be accredited and what requirements accreditation imposes.”) (citations omitted).

³⁶ R. at 993-1001. There is no indication in the record that Dr. Foxtrot relied on the cover memoranda to form the basis of his independent conclusions. Absent from the cross-examination were questions that may have shed light on this question including: (1) What did you do to prepare for your testimony today? (2) What documents did you review? Just as this Court refused to do in *Dillenburger*, we will not speculate further on this issue.

³⁷ See *Smith*, 602 U.S. at 803.

³⁸ *United States v. Blazier*, 69 M.J. 218, 224 (C.A.A.F. 2010).

error.³⁹ Although Appellant disputes this aspect of *Dillenburger*, which constitutes binding precedent, the Court finds Appellant’s argument to be without merit.⁴⁰

c. Any Error Here Was Harmless Beyond a Reasonable Doubt.

To the extent that any other portions of Dr. Foxtrot’s testimony may have conveyed testimonial hearsay from the exhibits, any such error was not plain or obvious and did not materially prejudice a substantial right, and, regardless, would have been harmless beyond a reasonable doubt.⁴¹

In the context of erroneous admission of testimonial hearsay, this Court focuses on whether there is a reasonable possibility that the evidence might have contributed to the conviction.⁴² In other words, this Court must be convinced that the testimonial hearsay was unimportant in light of the other evidence.⁴³ To resolve this question, the CAAF adopted a balancing test considering factors such as: (1) the importance of the uncontroverted testimony in the prosecution’s case; (2) whether the evidence was cumulative; (3) the existence of corroborating evidence; (4) the extent of confrontation permitted; and (5) the strength of the prosecution’s case.⁴⁴ We consider the “entire record” which includes evidence presented by the Defense.⁴⁵

As this Court reasoned in *Dillenburger*, the admission into evidence of Prosecution Exhibits 23 through 26 without objection heavily tilts the balance of these factors in favor of the Government.⁴⁶ Additionally, Dr. Foxtrot’s testimony describing the laboratory’s testing processes and procedures was not hearsay, and his testimony regarding the testing and chain of custody would have been largely cumulative with the exhibits already admitted without objection. Furthermore, the Government’s case was overwhelmingly strong, and any potential significance of un-confronted testimony would be low, especially

³⁹ *Dillenburger*, 85 M.J. at 608 (citing *Sweeney*, 70 M.J. at 305).

⁴⁰ *See Matias*, 25 M.J. 356.

⁴¹ We review this question de novo. *United States v. Savala*, 70 M.J. 70 (C.A.A.F. 2011) (citations omitted). Stamps, signatures, and other notations on the chain of custody documents and data review sheets, and results reports summaries, are not plainly and obviously testimonial in the context of review for plain error. *See Sweeney*, 70 M.J. at 305.

⁴² *See Tearman*, 72 M.J. at 62 (citations and internal quotation marks omitted).

⁴³ *Id.* (citing *United States v. Gardinier*, 67 M.J. 304, 306 (C.A.A.F. 2009)).

⁴⁴ *Id.* (citing *Sweeney*, 70 M.J. at 306).

⁴⁵ *See id.*

⁴⁶ *See Dillenburger*, 85 M.J. at 610.

it was corroborated by other witnesses and the drug laboratory reports themselves. As also highlighted by the Government, Appellant was not limited in his cross-examination of Dr. Foxtrot; consequently, even if some portion(s) of his testimony were uncontroverted testimonial hearsay, the Government has met its burden to show that it or they would be harmless beyond a reasonable doubt.

B. The Military Judge Did Not Abuse Her Discretion When She Admitted Urinalysis Documents Pursuant to Mil. R. Evid. 803(6).

1. Standard of Review

Appellate courts review a military judge's decision to admit evidence over defense objection for an abuse of discretion.⁴⁷ An abuse of discretion occurs when a military judge's findings of fact are clearly erroneous, or if the military judge's decision is influenced by an erroneous view of the law.⁴⁸

Mil. R. Evid. 803(6), also known colloquially as the business record exception, allows for the admission of records of a regularly conducted activity as an exception to the rule against hearsay. The proponent of the evidence must satisfy four elements:

“(A) the record was made at or near the time by – or from information transmitted by – someone with knowledge; (B) *the record was kept in the course of a regularly conducted activity of a uniformed service . . .*; (C) making the record was a regular practice of that activity; (D) all these conditions are shown by the testimony of the custodian or another qualified witness”⁴⁹

2. Analysis

Appellant contends the military judge erred when, over defense objection as to foundation, she admitted into evidence Prosecution Exhibits 8 and 11, two computer-generated urinalysis testing registers associated with Appellant's urine sample.⁵⁰ Appellant does not dispute the authenticity of either exhibit and concedes that all foundational criteria under Mil. R. Evid. 803(6) were met, except Mil. R. Evid. 803(6)(B). Specifically, Appellant contends that Ms. Bravo lacked sufficient personal knowledge to confirm that these exhibits

⁴⁷ *United States v. Frost*, 79 M.J. 104, 109 (C.A.A.F. 2019) (internal citations omitted).

⁴⁸ *Id.*

⁴⁹ Mil. R. Evid. 803(6) (emphasis added).

⁵⁰ Trial defense counsel also objected based on authenticity, but that objection is not within the scope of the AOE.

were actually kept in the command's record-keeping system. This argument is without merit.

Ms. Bravo, who served as a command AUPC and urinalysis records custodian from October 2020 to January 2022, demonstrated that she thoroughly understood the command's record-keeping process.⁵¹ Although she was no longer on active duty nor was she the records custodian at the time of trial, her testimony detailed the command's record-keeping system and process used in maintaining the records. She explained that the testing registers were created and collected on the day of each urinalysis, and she described the procedures and timelines associated with their storage. Ms. Bravo testified that it was a routine practice for the AUPCs, who were also the record custodians, to maintain and store these testing registers, including both Prosecution Exhibits 8 and 11, in accordance with urinalysis policy guidance.⁵²

Furthermore, when examining the exhibits, Ms. Bravo identified them as belonging to the command based on the names of command personnel on the documents as well as from the command markings at the top of the page.⁵³ Ms. Bravo testified the command's standard practice was to keep these documents in a binder for three years in the regular course of business. Based on the date of both exhibits, she testified that both would have been stored in a binder located in the urinalysis office, and she confirmed that these records would have been maintained during her tenure as the AUPC and records custodian.

In *United States v. Garces*, the CAAF addressed the level of knowledge required for a witness to establish the proper foundation under Mil. R. Evid. 803(6).⁵⁴ The CAAF noted that the military rule "is identical to the corresponding Federal Rule."⁵⁵ This similarity was true then and remains true today.⁵⁶ In *Garces*, the CAAF, relying in part on the federal case law, rejected the more

⁵¹ Despite not having been the AUPC or records custodian at the time of trial, Ms. Bravo had been an AUPC who served as the records custodian just a few months prior. Thus, she testified not as the current custodian, but as another qualified witness pursuant to Mil. R. Evid. 803(6)(D).

⁵² R. at 768-71.

⁵³ R. at 784; R. at 791-92.

⁵⁴ 32 M.J. 345 (C.M.A. 1991).

⁵⁵ *Id.* at 347.

⁵⁶ See generally *Kim v. JP Morgan Chase Bank N.A. (In re Kim)*, 809 F. App'x 527, 540 (10th Cir. 2020) (citing *Wallace Motor Sales, Inc. v. Am. Motors Sales Corp.*, 780 F.2d 1049, 1061 (1st Cir. 1985) ("A qualified witness is simply one who can explain and be cross-examined concerning the manner in which the records are made and kept.") (internal citations removed)).

stringent common law “intimate familiarity” standard.⁵⁷ Since *Garces*, this Court, as well as the CAAF have held that, in the case of a business record, a witness need only be generally familiar with the entity’s record-keeping system.⁵⁸ As long as the witness is generally familiar with how the records are created and can testify from personal knowledge that the records are regularly received, kept, and relied upon in the normal course of business, that is sufficient under Mil. R. Evid. 803(6).

Therefore, this Court is fully satisfied that Ms. Bravo possessed sufficient knowledge to lay the foundation for the admission of Prosecution Exhibits 8 and 11 under Mil. R. Evid. 803(6). We find no abuse of discretion in the military judge’s ruling admitting these exhibits.

III. CONCLUSION

After careful consideration of the record and briefs of appellate counsel, we have determined that the findings and sentence are correct in law and fact and that no error materially prejudicial to Appellant’s substantial rights occurred.⁵⁹

The findings and sentence are **AFFIRMED**.



FOR THE COURT:

Regina DiMaggio

REGINA D. DIMAGGIO
Chief Commissioner
By Direction

⁵⁷ *Garces*, 32 M.J. at 347.

⁵⁸ *Id.* at 347 (internal citations omitted).

⁵⁹ Articles 59 & 66, UCMJ.

Appendix B

Compilation of Cases Interpreting *Smith v. Arizona* Consistent with Appellant's Position

United States Court of Appeals for the Fourth Circuit

- *United States v. Seward*, 135 F.4th 161, 168-69 (4th Cir. 2025)
 - (finding error under *Smith*, but no prejudice)

United States District Court for the Eastern District of New York

- *Ganthier v. Superintendent, Green Haven Corr. Facility*, No. 23-CV-414 (NRM), 2025 U.S. Dist. LEXIS 165980, at *68 (E.D.N.Y. Aug. 26, 2025)
 - (holding Confrontation Clause violated and ordered new trial because surrogate witness testimony is now unconstitutional in light of *Smith*)

State Supreme Courts

- *Commonwealth v. Walker*, ___ A.3d ___, 2026 Pa. LEXIS 138, at *64-66, *79-81 (Pa. 2026)
 - (acknowledging past case law inconsistent with *Smith*, vacating and remanding due to Confrontation Clause violation under *Smith* because substitute nurse examiner became “the nurse examiners’ ‘mouthpiece’ and essentially read from the rape kit reports”) (quoting *Smith*, 602 U.S. at 800)
- *Commonwealth v. Gordon*, 496 Mass. 554, 575, 587-88 (Mass. 2025)
 - (holding Confrontation Clause violated and remanded for new trial because “expert opinion testimony, after *Smith*, is prohibited because the relevant witness against the accused, in a constitutional sense, is the absent analyst.”)
- *State v. Hall-Haught*, 569 P.3d 315, 323 (Wash. 2025)
 - (holding: (1) *Smith* abrogated prior state case law allowing for surrogate lab expert testimony; and (2) Confrontation Clause rights violated when lab report indicating THC in body was admitted into evidence without testimony from the analyst who performed the testing, causing prejudicial error)

- *State v. Gleason*, 2025 ME 52, P19, P22, P24 (Me. 2025)
 - (holding testimony from surrogate expert forensic toxicologist that relied on “a technical review of the data and the documentation in the case, which included notes made by other lab employees concerning anomalies in the data and whether protocols had been followed” implicated *Smith* and remanded case for new trial to develop the record on what statements were testimonial)
- *Watkins v. State*, 320 Ga. 862, 873 (Ga. 2025)
 - (holding absent lab analyst, Sloan’s, “test results showed the substance was in fact cocaine . . . [and] Karpf’s testimony relating the factual assertions in Sloan's report violated the Confrontation Clause under the United States Supreme Court's decision in *Smith*.”)

State Intermediary Appellate Courts

- *State v. West*, No. 2023 KA 0286 R, 2026 La. App. LEXIS 39, at *10-11, *14-15 (La. Ct. App. Jan. 9, 2026)
 - (holding Confrontation Clause violated under *Smith* because autopsy report containing “the pathologist's certification prepared in connection with a criminal investigation and prosecution” was testimonial and substitute expert testified about that report, but error was harmless)
- *People v. Holmes*, Nos. 2-24-0194 & 2-24-0195 cons., 2025 IL App (2d) 240194, at *P133, *P152 (Ill. App. Ct. Dec. 15, 2025)
 - (holding Confrontation Clause violated in light of *Smith* because surrogate lab expert “could opine that the tested plant material was cannabis only because she accepted the truth of what [a different lab analyst] had reported about his work in the laboratory—that he had conducted certain tests according to certain protocols and obtained certain results” and remanded for new trial)
- *State v. Green*, No. W2024-00370-CCA-R3-CD, 2025 Tenn. Crim. App. LEXIS 337, at *31, *37 (Tenn. Crim. App. July 21, 2025)
 - (reversed and remanded due to Confrontation Clause violation under *Smith* because “As in *Smith*, the testifying witness, Ms. Mann, relied entirely on the work produced by Ms. Stigler” in generating a Sex Offender Violation report)

- *State v. Miller*, No. A24-0205, 2025 Minn. App. Unpub. LEXIS 128, at *8-9, *18 (Minn. Ct. App. Feb. 24, 2025)
 - (holding: (1) a toxicology report was offered for its truth under *Smith*; (2) the report was testimonial; and (3) its admission into evidence caused prejudicial error)
- *State v. Pogue*, No. CR-2024-0655, 2025 Ala. Crim. App. LEXIS 2, at *23, *27-28 (Ala. Crim. App. Jan. 17, 2025)
 - (holding binding state case law allowing surrogate lab expert testimony now abrogated by *Smith* and defendant entitled to new trial)
- *State v. Clark*, 909 S.E.2d 566, 568, 570-71 (N.C. Ct. App. 2024)
 - (abrogating binding state supreme court precedent in light of *Smith*; holding surrogate lab expert testimony about drug test violated Confrontation Clause the admission of which caused prejudicial error)
- *State v. Hale*, No. C-230420, 2024 Ohio App. LEXIS 4283, at *10-11, *37-38, *44 (Ohio Ct. App. Nov. 27, 2024)
 - (holding pursuant to, *inter alia*, *Smith*, surrogate lab expert testimony about DNA test violated Confrontation Clause because underlying facts *and data* were testimonial, the admission of which caused prejudicial error)
- *People v. Peterson*, No. 364313, 2024 Mich. App. LEXIS 5764, at *17-18 (Mich. Ct. App. July 25, 2024)
 - (vacating and remanding because admission of DNA lab report without the “scientists who personally tested and prepared the DNA data” implicated *Smith* and remanded case for new trial to develop the record on what statements were testimonial)