SUPREME COURT NO. 102405-3

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SAMANTHA HALL-HAUGHT,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR ISLAND COUNTY

The Honorable Carolyn Cliff, Judge

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR REVIEW

JARED B. STEED
Attorney for Petitioner
NIELSEN KOCH & GRANNIS, PLLC
The Denny Building
2200 Sixth Avenue, Suite 1250
Seattle, Washington 98121
206-623-2373

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES (CONT'D)

Page

RULES, STATUTES AND OTHER AUTHORITIES

A. INTRODUCTION

By letter dated June 25, 2024, this Court permitted supplemental briefing addressing the effect of Smith v. Arizona, 602 U.S. __ , 144 S. Ct. 1785, __ L.Ed.2d __ (2024) on the Confrontation Clause issue presented in the petition for review. Smith clarifies that a surrogate witness may not present the testimonial out-of-court statements of a non-testifying forensic analyst as the basis for the surrogate's expert opinion without violating the Confrontation Clause. Smith provides additional support for why Hall-Haught's confrontation rights were violated, necessitating review and reversal of her conviction.

B. SUPPLEMENTAL ISSUE

Did the testimony of a surrogate expert witness violate Hall-Haught's confrontation rights under the analysis in Smith?

C. SUPPLEMENTAL STATEMENT OF THE CASE

The applicable facts are set forth in the petition for review, with supplemental facts cited in the argument section below.

D. SUPPLEMENTAL ARGUMENT

The testimony of surrogate witness Harris violated Hall-Haught's confrontation rights under the analysis in *Smith*.

A person accused of a criminal offense has the right to confront the witnesses against him. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22. The confrontation clause bars admission of testimonial statements by a witness who does not appear at trial, unless the witness is unable to testify, and the accused had a prior opportunity for cross-examination. Davis v. Washington, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006); Crawford v. Washington, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). "And that prohibition applies in full to forensic evidence." Smith, 144 S. Ct. at 1791.

Here, Washington State Patrol forensic scientist, Mindy Krantz, tested samples of Hall-Haught's blood and prepared the admitted toxicology report which concluded the blood contained Tetrahydrocannabinol (THC). RP 480-83, 486-87; Ex. 43. Krantz did not testify, however. Instead, lab supervisor, Katie Harris, testified as surrogate witness. Harris did not perform any physical testing tasks herself. Rather, Harris reviewed the contents of the case file, including Krantz's testing data, to form her "own independent conclusion" that Hall-Haught's blood contained THC. RP 467-83. The issue is whether Harris's testimony violated Hall-Haught's confrontation rights. As explained below, the answer is yes.

In Smith, supra, a five justice majority of the U.S. Supreme Court clarified the Confrontation Clause's application to forensic evidence. It did so, because its prior fractured opinions in Williams v. Illinois, 567 U.S. 50, 132 S. Ct. 2221, 183 L. Ed. 2d 89 (2012), "'have sown confusion in courts across the country' about the Confrontation Clauses' application to expert opinion

testimony." Smith, 144 S. Ct. at 1794 (quoting Stuart v. Alabama, 586 U.S. __ , __ , 139 S. Ct. 36, 36-37, 202 L. Ed. 2d 414 (2018)). Smith held that when an expert conveys an absent analyst's statements in support of their own opinion testimony, the statements are admitted for their truth, and if those statements are also testimonial, then the Confrontation Clause bars their admission. Id. at 1791, 1802. As Smith explained:

> 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. See Crawford, 541 U.S., at 68, 124 S. Ct. 1354; Melendez-Diaz, 557 U.S., at 311, 129 S.Ct. 2527.[1] Neither may the State introduce those statements through a surrogate analysist who did not participate in their creation. See Bullcoming, 564 U.S., at 663, 131 S.Ct. 2705.[2] And nothing changes if the surrogate—as in this case—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

[1] Melendez-Diaz v. Massachusetts, 557 U.S. 305, 324, 129 S. Ct. 2527, 174 L.Ed.2d 314 (2009).

[2] Bullcoming v. New Mexico, 564 U.S. 647, 664, 131 S. Ct. 2705, 180 L.Ed.2d 610 (2011).

> credit the substitute expert. So a defendant has the right to cross-examine the person who made them.

Smith, 144 S. Ct. at 1802.

At issue in Smith was the trial testimony of forensic analyst, Greggory Longoni. Longoni had no prior connection to Smith's case, but his "independent opinion" testimony was offered as a substitute for Elizabeth Rast, the forensic analyst who had performed the drug testing and issued the report which concluded the items seized by police contained methamphetamine, marijuana, and cannabis. Smith, 144 S. Ct. at 1795.

Relying on Rast's records, Longoni reached the same conclusion as Rast. Id. Longoni, however, had no personal knowledge about Rast's testing of the seized items. Rather, his knowledge came from his familiarity of the lab's general practices and his review of Rast's records. Id. at 1795, 1799-1800. Longoni's testimony referenced Rast's records, what they contained, and what they conveyed about her testing protocols.

Id. Longoni then offered "independent opinions" "which were no more than what Rast herself had concluded." Id. at 1799.

The Smith Court rejected the argument that Rast's statements came into evidence not for their truth, but instead to show the basis of Longoni's "independent opinion." Id. at 1797. Rather, Rast's statements necessarily came in for their truth because they were admitted to show the basis for Longoni's expert opinions. Id. at 1799. As the Court explained, "[a]ll those opinions were predicated on the truth of Rast's factual statements. Longoni could opine that the tested substances were marijuana, methamphetamine, and cannabis only because he accepted the truth of what Rast had reported about her work in the lab—that she performed certain tests according to certain protocols and gotten certain results." Id. at 1799-1800. Longoni "effectively became Rast's mouthpiece." Id. at 1801.

The same is true here. The blood testing was conducted by Krantz, who also generated the data, lab notes, and conclusions concerning the THC amount. RP 459-63; Ex. 43.

Harris did not personally conduct the extraction, create the samples that went into the chromatography, conduct any testing of the blood herself, and acknowledged that her "own independent conclusions" were based entirely on her review of the case file, which included Krantz's data, test results, and report. RP 460, 463, 467-69, 476-77, 496. Harris explained general and procedural testing principles and testified that "documentation within the case file" demonstrated that Krantz had followed all appropriate "extraction and testing protocols[.]" RP 476-77, 483.

Just as in Smith, Harris could opine the tested blood contained THC only because she accepted the truth of what Krantz had reported about her lab work, including that certain tests and protocols had been correctly followed and gotten certain results. And the jury necessarily credited Harris's opinions about the blood containing THC because it too accepted the truth of what Harris reported about her lab work, as conveyed by Harris. Smith, 144 S. Ct. at 1799-1800.

Although the Court of Appeals did not have the benefit of Smith, the conclusion it reached in Hall-Haught's case is now clearly erroneous under that case. The Court of Appeals correctly recognized that under the Confrontation Clause a laboratory supervisor may not parrot the conclusions of his or her subordinates. Slip Op. at 5 (citing State v. Lui, 179 Wn.2d 457, 483, 315 P.3d 493 (2014)).

But the Court of Appeals went on to reason that Harris did not merely parrot the conclusions of Krantz because, "[i]nstead, she was 'rely[ing] on technical data prepared by others when reaching [her] own conclusions,' which is permitted without the testimony of each analyst." Slip. Op. at 6 (quoting Lui, 179 Wn.2d at 483). Thus, the Court of Appeals concluded that Hall-Haught's confrontation rights were not violated because "only the 'ultimate expert analysis, and not the lab work that leads into that analysis' is subject to the confrontation clause requirement." Slip. Op. at 5 (quoting Lui, 179 at 490). But Smith clarifies the prosecution cannot escape

the Confrontation Clause by admitting a non-testifying analyst's records to explain the basis for the "independent conclusion" reached by a surrogate expert. Smith, 144 S. Ct. at 1802.

Because the Court of Appeals' reasoning turns on this Court's opinion in Lui, further review of that opinion in light of Smith is also instructive. Lui drew a Confrontation Clause distinction between those witnesses who engaged in direct analysis of raw data, such as DNA and temperature numbers, and those witnesses who took statements from toxicology and autopsy reports prepared by other non-testifying experts. 179 Wn.2d at 463, 486, 488-89, 494-97.

As this Court explained, the latter, "did not bring his expertise to bear on the statements or add original analysis – he merely recited a conclusion prepared by nontestifying experts." Id. at 494. Accordingly, the surrogate witness "testified to statements taken directly from the [] report about which he had no personal knowledge." Id. Like Smith, this Court agreed that under such circumstances the surrogate expert "was merely a

mouthpiece for the conclusions of an absent analyst." Lui, 179 Wn.2d at 494; see Smith, 144 S. Ct. at 1801. Accordingly, this Court held that surrogate witness testimony about the toxicology and autopsy reports violated the Confrontation Clause. Lui, 179 Wn.2d at 495-97.

Whether the Lui court's conclusion regarding the admissibility of the DNA and temperature numbers is still sound under Smith is debatable. The Lui court made clear that its decision was "consistent with the five justices in Williams who agree that experts may rely on and disclose independent DNA laboratory results when testifying about their own conclusions without violating a defendant's confrontation rights." Lui, 179 Wn.2d at 478 (citing Williams, 132 S. Ct. at 2240 (plurality opinion); 2255 (Thomas, J., concurring in judgement)). But, as already discussed, Smith has now called into question the reasoning of Williams. Smith, 144 S. Ct. at 1802. Washington courts have held that article I, § 22 provides

the same confrontation right protections as the Sixth Amendment. Lui, 179 Wn.2d at 469-70 (citing cases).

The only remaining question is whether the out-of-court statements Krantz conveyed were testimonial. Smith did not reach this issue because the petition for certiorari did not present that question. 144 S. Ct. at 1802. Hall-Haught however, has squarely asserted that Krantz's testimony was testimonial because the testing and subsequent testimony was done to aid the State's investigation and prosecution of Hall-Haught. Petition at 12 (citing Exs. 42-43). Significantly, the prosecution's answer to the petition for review does not contend otherwise. Nor could it. The record is clear that the primary purpose of the out-of-court statements introduced at Hall-Haught's trial were to enable creation of, and testimony about, the toxicology report that was used as evidence against her. See Smith, 144 S. Ct. at 1792 (citing Bullcoming, 564 U.S. at 666; Melendez-Diaz, 557 U.S. at 317-20; Crawford, 541 U.S. at 52; Davis, 547 U.S. at 822). The testing protocols and data composed by Krantz were necessary

and deliberate steps in the creation of the toxicology report, which in turn allowed Harris to explain the basis for her "independent conclusion":

> Q: And based on your review of the file in – in this case, did it appear that the extraction and the testing protocols for the quantitative tests were done correctly?
> A: Yes.
> . . . .
> Q: And based on that review, what were the values for THC and carboxy THC that were found in the quantitative test?
> A: THC the value is 1.5 nanograms per mil and for carboxy THC, it was 14 nanograms per mil.

Slip. Op. at 7 (quoting RP 484).

In the alternative, however, this Court should still accept review of Hall-Haught's case to reverse the Court of Appeals and remand so that a full assessment as to each record whose substance Krantz conveyed can be assessed for its primary purpose. Smith, 144 S. Ct. at 1801-02.

The Court of Appeals improperly concluded that Harris's surrogate testimony did not violate the Confrontation Clause. In addition to the reasons argued in the petition, Smith provides

additional support for why Hall-Haught's confrontation rights were violated. This Court should accept review under RAP 13.4(b)(1), (2), and (3), and reverse Hall-Haught's conviction.

E. CONCLUSION

For the reasons discussed above, and in the petition for review, Hall-Haught respectfully asks this Court to grant review and reverse her conviction.

I certify that this document contains 2,023 words, excluding those portions exempt under RAP 18.17.

DATED this 31st day of July, 2024

Respectfully submitted,
NIELSEN KOCH & GRANNIS, PLLC

JARED B. STEED
WSBA No. 40635
Attorney for Petitioner

NIELSEN KOCH & GRANNIS P.L.L.C.

July 31, 2024 - 4:35 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	102,405-3
Appellate Court Case Title:	State of Washington v. Samantha Hall-Haught
Superior Court Case Number:	21-1-00010-7

The following documents have been uploaded:

- 1024053_Briefs_20240731163501SC409363_6068.pdf
  This File Contains:
  Briefs - Appellants Supplemental
  The Original File Name was State v. Samantha Hall-Haught 102405-3.Supplemental BOP.pdf

A copy of the uploaded files will be sent to:

- ICPAO_Webmaster@islandcountywa.gov
- Sloanej@nwattorney.net
- d.carman@islandcountywa.gov
- gregb@islandcountywa.gov
- office@davidcarmanlaw.com

Comments:

Sender Name: Jamila Baker - Email: Bakerj@nwattorney.net
Filing on Behalf of: Jared Berkeley Steed - Email: steedj@nwattorney.net (Alternate Email:)

Address:
2200 6th Ave, Ste 1250
Seattle, WA, 98121
Phone: (206) 623-2373

Note: The Filing Id is 20240731163501SC409363