No. 25-689

IN THE

Supreme Court of the United States

GEORGE SHARROD JOHNS,

Petitioner,

v.

GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF OF *AMICUS CURIAE* DUI DEFENSE LAWYERS ASSOCIATION FILED IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE DUIDLA[1]

The DUI Defense Lawyers Association (DUIDLA) is a nonprofit professional organization of lawyers with approximately 850 members throughout North America. Amicus Curiae DUIDLA has a strong interest in the promulgation and enforcement of fair and constitutional DUI laws that create a safe society, but still protect the civil liberties of our populace. Its mission is to protect and ensure by rule of law those individual rights guaranteed by the state and Federal Constitutions in DUI-related cases: to resist the constant efforts that are made to curtail these rights, and to encourage cooperation between lawyers engaged in the furtherance of these objectives. DUIDLA seeks to fulfill this mission through educational programs and other assistance; to serve as the Constitution's first and last line of defense; and to assist attorneys and public defenders in obtaining advanced training in DUI-related areas through our education scholarship grants.

Concerned with the practical problems presented to law enforcement, judges, defense attorneys, and the public, DUIDLA works to prevent the erosion of the Fourth, Fifth, and Sixth Amendment rights of DUI arrestees. This is especially true when a State agency proffers a substitute analyst to provide expert testimony in a DUI trial in direct violation of the Confrontation

1. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other Amicus and their counsel made a monetary contribution to the preparation or submission of this brief. Notice to both parties of intent to file this brief was provided in accordance with the requirements of Rule 37.

Clause and this Court's established precedent in *Smith v. Arizona*, 602 U.S. ___ (2024).

DUIDLA is particularly interested in cases focusing on the United States Supreme Court's decision in *Smith* and seeks to ensure that the Court's decision in that case is upheld for citizens accused of DUI. DUIDLA submits this brief to ensure that all citizens accused of DUI are afforded the full panoply of guaranteed constitutional rights at trial, including the right to confront and cross-examine the author of any scientific report that may be used as "basis" evidence for the testimony of a surrogate analyst.

SUMMARY OF ARGUMENT

Prior to this Court's decision in *Smith v. Arizona*, trial courts across the country permitted juries in DUI cases to consider scientific testimony from an unseen, unchallenged, and uncredentialed witness—through a surrogate witness providing hearsay in the form of an independent opinion. In what should have been a straight application of *Smith*, the Georgia Supreme Court instead established a "Smith bypass" where the State was allowed to circumvent the right to explain, confront, and rebut the scientific measurements that were created by a lab technician in this case and allow a surrogate witness who allegedly formed an "independent opinion" to render an expert opinion, which violates the Confrontation Clause. It was not hearsay at all, the Georgia Supreme Court reasoned, since the witness was a "peer-reviewer" who didn't submit the original report into evidence. The Georgia Court rationalized that the witness was someone who routinely reviewed the documentation of

other lab employees, which they posited was a practice that is common at labs throughout the country. But their reasoning runs afoul of *Smith v. Arizona* and the right to Confrontation.

The Sixth Amendment affords citizens the right to confront the witnesses against them. It is now well-established that the Sixth Amendment extends its protections to testimonial lab reports involved in the prosecution of citizens arrested for DUI. *Bullcoming v. New Mexico*, 564 U.S. 647 (2011). Were the Georgia Supreme Court's ruling to stand, any lab report would be able to be come into evidence through a "peer-reviewer," without the defendant being able to ask any questions about how any of the facts reviewed came to light. As this Court noted in *Smith*, Arizona already tried that, in what this Court called, "an end run [around] all we have held the Confrontation Clause to require." *Smith, supra.*

This Court should grant Mr. Johns' Petition for Certiorari for two reasons: first to correct the decision below, which directly contravenes this Court's holding in *Smith*. Second, the petition should be granted because allowing the Georgia Supreme Court decision to stand would reduce this Court's prior decisions from *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), *Bullcoming*, *supra*, and *Smith*, *supra*, to dead letter law, and allow the Confrontation Clause to be circumvented by shrewd semantics.

ARGUMENT

I. PERMITTING "PEER-REVIEWER" TESTIMONY VIOLATES THE CONFRONTATION CLAUSE AND *SMITH V. ARIZONA*.

From the record before this Court, it is clear that Dr. Sullivan, testifying in a "peer-reviewer" capacity, relied upon more than her independent review of photographs taken during the autopsy. She testified about the decedent's age, race, gender, weight, and height, and described his wounds in a way that went beyond what could be gleaned from merely looking at photographs. She also testified that his blood had been drawn and sent to toxicology for testing.

While Dr. Sullivan could likely tell the decedent's race and gender from the photographs, substantial portions of her testimony came from the report that was drafted by the actual pathologist, Dr. Aiken, who did not testify. Dr. Sullivan had no personal knowledge of the measurements that were made, nor was she able to say whether the measurements were made in a way that followed accepted practices.

But the trial court allowed the testimony as an "independent opinion," in large part because of her role as a "peer-reviewer" at the laboratory. She testified she reviewed the initial report and based her testimony, at least in part, on it. She had no role in the actual autopsy itself.

In its review of this practice, the Georgia Supreme Court's decision was premised on two points—first, that since the report wasn't admitted, the Confrontation Clause wasn't implicated; second, since no one was blatantly restating anything anyone else said, it wasn't hearsay.

A. *Smith v. Arizona* Controls and This Decision Cannot be Allowed to Stand.

It is clear from the record that the basis of Dr. Sullivan's testimony was Dr. Aiken's report. Deciding not to introduce the report into evidence and to have the witness refrain from stating, "Dr. Aiken wrote . . . " were shrewd decisions on the part of the prosecutor, but that doesn't make the testimony any less objectionable.

In *Smith*, this Court took Arizona to task for allowing Longoni to opine about the nature and identity of several substances (marijuana, methamphetamine, and cannabis) only because "he accepted the truth of what Rast had reported about her work in the lab." *Smith, supra*. That was not an independent opinion, and the one offered here is not, either.

> "On [Arizona's] view, a surrogate analyst can testify to all the same substance—that is, someone else's substance—as long as he bases an "independent opinion" on that material. And [according to Arizona] that is true even if, as here, the proffered opinion merely replicates rather than somehow builds on, the testing analyst's conclusions. . . . Properly understood, the Clause still allows forensic experts like Longoni to play a useful role in criminal trials. Because Longoni worked in the same lab as Rast, 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."

Smith, supra.

Further, it does not matter that the statements in the report were not formally introduced into evidenced. That didn't happen in *Smith* and should not be the dispositive question. The question there, just as it is here, is whether the substance of the statements is provided to the jury. This Court's prior decision in *Douglas v. Alabama*, 380 U.S. 415 (1965) held that formal admission isn't necessary to implicate the Confrontation Clause. Were that to be the case, the Confrontation Clause would be reduced to lip service; allowing the State to avoid it by simply having anyone with the "peer-reviewer" label form an independent opinion by violating the Constitution by tiptoeing around this Court's holding in Smith, and offering summary reviews of anything anyone else wrote that may or may not be true. That was the thrust of the *Smith* decision, and it controls the decision here as well.

B. Permitting an Exception for "Peer-Reviewer" Testimony Does Not Satisfy the Confrontation Clause.

Even prior to *Smith*, several states had rejected the idea that a "peer-reviewer" or supervisor was permitted to testify in a surrogate capacity. In *State of New Mexico v. Navarette*, 294 P.3d 435 (N.M. 2013), the court held the testimony of a supervising medical examiner was insufficient to meet the guarantees of the Confrontation Clause when that investigator did not participate in testing. In *State v. Frazier*, 735 S.E.2d 727 (W.Va. 2012), West Virginia held the same, noted that a supervising medical examiner could not testify based on the autopsy report of another examiner, even when the report wasn't offered into evidence.

Most recently, and subsequent to the *Smith* decision, the Appellate Court of Illinois, Second District, rejected the State's attempt to distinguish the use of a "peer-reviewer" from the requirements of the Smith holding, noting that the witness had not participated in any of the testing that was done, and that there was no way for the "peer-reviewer" to become aware of any issues involved with the testing process. As such, the Confrontation Clause was not satisfied. *People of Illinois v. Dion R. Holmes*, 2025 IL App (2d) 240194 (Dec. 15, 2025).

By slapping the "peer-reviewer" label on anyone with laboratory credentials who can interpret a scientific report, the substance of any document could be admitted through a purported "independent opinion" without the rigorous scrutiny that the Confrontation Clause envisions. As *Smith* noted, had Rast lied about everything, Longoni's "independent opinion" would have been for naught, and the jury would have been grossly misled, and "in no position to convict." *Smith, supra.* So too here.

II. ALLOWING 'PEER-REVIEWED' TESTIMONY FOSTERS AN ATMOSPHERE THAT SHIELDS THE INCOMPETENT OR FRAUDULENT ANALYST AND ENCOURAGES A COVER UP.

There are more than 1.5 million DUI arrests every year[2]. In the vast majority of those cases, the scientific evidence is one of two primary pieces of proof supporting the State's case. Allowing the Georgia Supreme Court rule to stand will open the door that *Smith* (and *Bullcoming*) already closed, and allow surrogate analysts, now with the

2. https://www.nhtsa.gov/sites/nhtsa.gov/files/a20guide2.pdf

title of "peer-reviewer" to testify to toxicological results that they themselves did not obtain.

By removing the underlying report writer from scrutiny, the Georgia Supreme Court rule would foster an atmosphere where fraudulent or incompetent analysts would be shielded from cross-examination and any honest analyst looking to expose the problematic lab practices could be sidelined.

A. Lab Scandals Are Pervasive and Ongoing; "Peer-Reviewer" Testimony Would Not Uncover Such Problems.

In what is easily the most well-known lab scandal, a Boston, Massachusetts lab technician named Annie Dookhan admitted to "dry-labbing" and falsifying results (by changing negatives into positives) for years, after testing more than 40,000 samples. Ms. Dookhan ultimately pleaded guilty to multiple charges and went to prison in 2013[3].

At the time Ms. Dookhan was involved in producing fraudulent and deceptive crime laboratory reports, Massachusetts had an evidentiary scheme that allowed the lab reports to be admitted with little challenge. No one could tell by looking at her reports that she had not done the testing or that she had lied about her results. Had the "peer-reviewer" rule been in place, no one would have been able to tell what Ms. Dookhan had done (or not done, in some cases)—that is, her paperwork was seemingly

3. https://eji.org/news/20000-wrongful-drug-convictions-dismissed/

impeccable, and even if it wasn't admitted, anyone basing an independent opinion on it would be providing false information to the jury.

B. "Peer-Reviewer" Rule Could Encourage a Cover Up.

Ms. Dookhan is far from a lone wolf. Recently, the Denver Police Department reported in January of 2025 that it will now review more than 420 cases going back to 2013 that were handled by Yvonne Woods, a former forensic scientist at the Colorado Bureau of Investigation (CBI) crime lab[4]. Ms. Woods was charged with 102 separate crimes, including forgery[5]. The investigation revealed that Ms. Woods allegedly deleted and altered DNA evidence, concealing DNA and/or possible contamination and falsely reporting no male DNA was found in sexual assault cases where trace amounts were later determined to be present. Additionally, Ms. Woods altered mathematic calculations to support her declarations of "no male DNA."

Ms. Woods was employed at CBI for nearly thirty years. She was considered "a star in the profession."[6] In the internal affairs report outlining the Woods investigation, at least one of Woods' colleagues reported seeing her throw evidence in the trash, and did not report it because

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4. https://www.coloradopolitics.com/2025/08/22/denver-police-crime-lab-triples-number-of-cases-under-review-in-cbi-scandal/

5. https://cbi.colorado.gov/sections/administration/media-relations/yvonne-missy-woods-investigation

6. https://www.cpr.org/2025/01/22/former-cbi-forensic-scientist-yvonne-woods-charged-over-100-felonies/

of Woods' favored status.[7] The report also revealed that Woods was accused of data manipulation in 2018, and removed from casework, but no one told the laboratory leadership and she was reinstated. *Id.* Whether anyone at the crime lab told the district attorneys or the appropriate defense bar remains unknown.

It is not hard to imagine a setting where a favored analyst, one who is considered a star would be permitted to perhaps arrive a few minutes late at work without any penalty, and anyone else at the lab would be reluctant to bring it up. But in Woods' case, so pervasive was her star status that her known malfeasance was concealed from the leadership of CBI for five years, until she was caught doing it again.

Both Ms. Woods and Ms. Dookhan serve as stark reminders of what can happen if the "peer-reviewer" rule were to be permitted. In Woods' case, her colleagues did report her, and although she was temporarily removed, she was later reinstated and allowed to keep doing what she had been doing, without anyone in leadership being informed. The crime lab scandals make it clear that there should never be a "peer-reviewer" exception to the Confrontation Clause, and that Georgia's decision would permit countless cases to be presented to juries with a wink and nod instead of the having the evidence withstand the crucible of cross-examination.

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7. https://www.criminallegalnews.org/news/2024/sep/1/years-warnings-ignored-dna-analyst-colorado-crime-lab-allegedly-cut-corners-her-misconduct-casts-doubt-thousands-cases/

III. PERMITTING "PEER-REVIEWER" TESTIMONY IGNORES THE TRUTH BEHIND SCIENTIFIC TESTING IN DUI CASES

In a DUI case, where the scientific test result is one of two key pieces of evidence in the government's case, permitting "peer-reviewer" testimony would ignore the truth behind scientific testing in DUI cases. From the moment blood is drawn to the moment the test result is revealed, the process is controlled by humans, and presents a significant risk for error. Were a "peer-reviewer" to testify based on an assessment of previously prepared paperwork from another person, there would be no way for the jury to assess whether the result was trustworthy.

A. Chromatography is a Complex Scientific Process and the Risk of Human Error is Significant.

The process of testing blood for a prohibited alcohol concentration is done using a scientific process called chromatography. Chromatography is a laboratory technique by which the volatile elements in the blood are separated, identified, and measured, using special equipment and procedures.

Prior to opening any evidence associated with a case, a testing analyst will prepare a set of vials to serve as the calibrators and controls for the particular "batch run," a term used to describe a grouping of cases that are tested together. The analyst usually prepares several calibrators and controls for the batch run, each one involving precise

measurements of liquid using known quantities of ethanol, or other volatile alcohols.

The first procedure that the testing analyst will complete in a subject case is to open and review the blood evidence. Usually, this is a cardboard box, sealed and labeled with a case number, a suspect's name, and the date of the blood draw, containing two tubes of blood, again labeled with the case number, the suspect's name, and the date of the blood draw. The testing analyst will examine the evidence, looking for any issues associated with tampering with the sample, such as checking the box for tears or cuts in the seal, or leaks in the blood tubes.

Assuming there are no identifiable issues with the blood tubes, the analyst will then select one tube and remove a portion of the blood inside for testing. That entails opening the tube, removing some blood, portioning out a certain amount of the blood into a device called an auto-pipetter/diluter, and then pipetting out a very precise amount of blood that has been diluted with a precise amount of a solution of deionized water and n-propanol into a small glass vial. This process is completed twice for each case, and a typical batch run can include 40 subject cases at a time.

The analyst then places the calibrators, controls, and subject vials on to designated locations on the chromatograph in a precise order before finally beginning the analysis. Given the precision required, the multitude of steps involved, and the focus necessary to be able to complete the process accurately, no mere review of paperwork would be sufficient to generate an opinion about whether the result obtained was reliable or valid.

Additionally, when the results are printed, a document known as a chromatogram, there are often unidentified substances that are revealed in the subject samples, as well as the controls. The testing analyst would be uniquely able to identify any causes for these unidentified substances, such as issues with the preparation of the vials, issues with the machine, issues with the blood test kit, and so on. Again, no mere review of the paperwork would be able to reveal the cause for such problems.

All a "peer-reviewer" witness would be able to do is look at the result provided and assume everything was done correctly. Since the testing analyst (or in this case, Dr. Aiken) isn't present to testify, there is no way to assess the skills and qualifications of the person who performed that test, or obtained the result. That is, there is no way to confront the witness or what the witness had done. The reliability of the basis testimony cannot and should not be presumed.

B. The Qualifications of the Testing Analyst are Required Foundational Evidence to Evaluate any Basis Testimony.

As this Court noted in *Smith*, a surrogate analyst testifying to an "independent opinion" based upon the testing analyst's conclusions is an end run around the Confrontation Clause. But Georgia's "peer-reviewer" rule has the potential to be a shrewd semantic method to evade the protections of the Sixth Amendment. Allowing the Georgia "peer-reviewer" rule would permit the State to weave the unavailable testing analyst's statements into the "independent opinion" by mere allusion.

Were such a practice allowed to stand, the jury would be deprived of knowing basic information about the procedures in the case:

- Whether the analyst had an independent recollection of testing the sample, or whether the analyst would be relying only on the paperwork;

- Whether the analyst saw any evidence of tampering or contamination in the sample;

- Whether there have been any historical issues with the instrument prior to testing;

- Whether the instrument was properly calibrated, the method and laboratory procedures properly followed, and whether precautions were taken to reduce errors.

Consider what such a practice would do, in terms of qualifying an expert. It would prevent the jury from knowing:

- Where the analyst went to college;

- What the analyst's grades were in organic chemistry;

- How many times, if any, has the analyst had to have remedial training;

- How many prior errors have been made by the analyst while conducting tests;

- Whether the analyst was ever reprimanded at work for poor performance;
- Whether there has ever been a corrective action report caused by the analyst;
- Whether the analyst was ever pressured to provide certain results in cases.

There is too great a risk for error, and too great a chance for mishandling of scientific evidence to allow for a conviction based on hearsay, even if it is dressed up as a "peer-reviewer" independent opinion. "[Since] measurements have long been critical in drunk driving prosecutions . . . [t]he testimony about the forensic scientist's measurement is usually the most important evidence in the [DUI] case." Imwinkelried, E., Prof., *The Importance of Forensic Metrology in preventing Miscarriages of Justice: Intellectual Honesty About the Uncertainty of Measurement in Scientific Analysis*, 7 John Marshall L.J. 332, at p. 338 (2014). Without the ability to cross-examine the author of the basis testimony, the defendant is left without one of the most cherished rights that any accused citizen is afforded—a meaningful opportunity to present a full and complete defense and confront the witnesses against them.

CONCLUSION

To permit the Georgia Supreme Court's decision to stand would be to reduce the protections of the Sixth Amendment Confrontation Clause and evade its provisions by "having a note-taking policeman recite the unsworn hearsay testimony of the declarant, instead of having

the declarant sign a deposition." *Davis v. Washington*, 547 U.S. 813, 826 (2006). The "peer-reviewer" testimony permitted in the case below is in direct contradiction of this Court's decision in *Smith v. Arizona*, and for that and the other foregoing reasons, certiorari should be granted and the decision of the Georgia Supreme Court should be reversed.

Respectfully submitted,

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