

FOR PUBLICATION

In the
United States Court of Appeals
For the Eleventh Circuit

No. 24-10289

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RODNEY LEROY BROWN,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 0:23-cr-60101-KMM-1

Before NEWSOM, LAGOA, and KIDD, Circuit Judges.

KIDD, Circuit Judge:

Rodney Brown appeals his convictions for Hobbs Act robbery and brandishing a firearm in furtherance of a crime of violence, and his sentence of 324 months of imprisonment. He makes two arguments for the first time on appeal: First, the district court

violated his Confrontation Clause rights by allowing a lab analyst to testify at trial, even though the analyst did not conduct or observe the underlying lab testing or write the relevant lab report. Second, the district court violated the Ex Post Facto Clause by using a later version of the U.S. Sentencing Commission Guidelines Manual than the one in place at the time his offense occurred, resulting in a higher guidelines range.

Because Brown raises these issues for the first time on appeal, we are limited to reviewing the district court's decisions only for plain error. We find that the district court did not commit plain error by allowing the lab analyst to testify. So we affirm his convictions. But we agree with both Brown and the government that the district court plainly erred by using the wrong version of the Guidelines Manual. As a result, we vacate his sentence and remand this case for resentencing.

I. BACKGROUND

A grand jury indicted Rodney Brown on one count of Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a), and one count of brandishing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii).

At trial, a cashier at a convenience store testified about a robbery she witnessed. That day, a robber entered the store and went to one of the drink coolers to get a bottle of soda. He then approached and entered the register area with a gun in one hand and another in his waistband. He demanded that the cashier open the register and give him money, and he threatened to shoot her

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nearby five-year-old son if she did not comply. The cashier opened the registers, and the robber put the money, which included a large number of coins, in a bag, took her purse, and left the store. He left the soda bottle that he had taken from the drink cooler on the counter. She testified that the robber was wearing all black, a hoodie, and a face mask covering the bottom half of his face, but she did not get a good look at him. Video surveillance from the store corroborated her testimony. She was unable to identify the robber in a photo array.

Detective Shaun Halleran of the Broward County Sheriff's Office testified that he responded to the robbery at the convenience store, and he reviewed both interior and exterior video footage from the store. Exterior video footage showed an individual wearing a black hoodie, black pants, and white shirt standing on the sidewalk outside the store for some time. This same individual threw a bottle by the dumpster in the parking lot and then entered the store. A few minutes later, this same individual exited the store and entered an alley behind the store. Video footage from a neighboring business that the same individual entered shortly before the robbery captured an image of the individual's face without a mask.

At an apartment complex a short distance from the store, officers found a black mask and a roll of coins consistent with those taken from the store. Officers also recovered the bottle the person discarded outside the store. They swabbed both the bottle and the black mask for DNA testing. Detective Halleran acknowledged that Brown's fingerprints were not found on any of the areas they

checked for fingerprints inside the store or on the soda bottle left on the counter. Detective Halleran testified that a state crime lab's DNA report showed two contributors on both the soda bottle recovered outside the store and the mask, though this report was not admitted into evidence.

During the investigation, law enforcement also obtained Brown's DNA and sent it to DNA Labs International ("DLI") for testing so that it could be compared to the DNA swabs obtained from the soda bottle and the mask. Daniel Aguilar, a senior DNA analyst from DLI and an expert in forensic DNA examination, testified that in his role as an analyst at DLI, he obtains DNA profiles generated from the evidence by DLI's lab, he examines those profiles and makes comparisons, and he then reports his findings. Although Aguilar was trained to conduct the lab testing of evidence, in his current role as an analyst, Aguilar was "not doing the hands-on laboratory work" examining the physical evidence himself. Rather, Aguilar explained that other persons in the lab examine the physical evidence and test the evidence for DNA. The resulting DNA profiles are then sent to the analysts for analysis and comparison.

Aguilar then testified to the general protocol and procedures DLI typically follows for testing evidence for DNA in the lab. Because a central argument in this appeal concerns his testimony, we will quote the relevant portions directly:

So what generally happens is that the evidence will get checked into a locker, a secure vault actually,

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when we receive it, and then the serologist or screener will remove that when the time comes, and they will go ahead and cut, in this case, swabs that were received. They will cut portions of those swabs into small tubes that are maybe like an inch or two long. And then we take it to the four main laboratory processes.

So those four steps are extraction, which is when we expose those swabs or the sample to solutions that break open the cells and release the DNA and purify that DNA.

The next step is quantitation, which is where we, as the name implies, we find out exactly how much DNA is in that extract that we've created.

The third step is amplification. Amplification involves—it's sort of like a biological Xerox copier where we start with, say, two copies of DNA. And then after one cycle, we have 4 copies of DNA and then we have 8 copies and 16 copies and 32 copies. With every round it doubles. So after a few rounds, we actually end up with millions and millions of copies when we only started with a few to begin with. And when we do that, we tag specific areas of it with colored dye so that we can see them later.

The fourth step that we then take it through is we take that amplified DNA and we put it through an instrument that allows us to see the DNA profile as a series of peaks. So if you imagine sort of like a heart

monitor where there's a baseline, and then when your heart beats, there's a peak. So several of those peaks will appear wherever DNA is present, and those peaks are assigned numbers and those numbers become the DNA profile.

Turning to the analyst's tasks, Aguilar stated that the forensic examination performed by the analysts at DLI were all "peer-reviewed." He explained that, generally, under this peer-review process, the first analyst, known as "the writer[,] will get that data that has been generated in the laboratory and they will make their determinations and comparisons and they will then author the report."

[I]n so doing, [the first analyst] actually go[es] through all of the steps that everybody before them already did in the laboratory. Since they're not doing the hands-on laboratory work themselves, we're all working from the same set of—the same cookbook, basically, the standard operating procedures. . . . And that individual who is writing the report will take ownership through all those documents of everything that everybody in the laboratory did before them so that when they sign that report, they own everything that happened.

A second person, a second qualified analyst, will then repeat the same process and make sure that they agree with all of the conclusions that the first analyst came to. So in this case, [the first analyst] Ms.

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Lisbeth Colon actually went through the entire process of writing the case and I came behind her and repeated the same process and I agree with all of those findings.

Aguilar testified that based on the analysis he performed of the DNA profiles in this case, Brown's DNA matched the DNA found on the soda bottle and the mask. Aguilar determined that the probability that the DNA belonged to someone other than Brown was "1 in 36 nonillion," which was a "36 with 30 zeros behind it." Brown did not object to any of this testimony. The government then rested, and the defense did not present any evidence. The jury found Brown guilty on both counts.

Brown's presentence investigation report determined that he was a career offender because the instant offense, Hobbs Act robbery, was a crime of violence, and he had two prior felony convictions for either a crime of violence or a controlled substance. United States Sentencing Guidelines Manual § 4B1.1 (Nov. 2023). The career offender enhancement increased Brown's base offense level from 20 to 32. Brown's criminal history category was VI (the highest), and, therefore, unaffected by the career offender enhancement. His advisory guidelines range was 294 to 348 months of imprisonment. The Hobbs Act robbery conviction carried a statutory maximum of 20 years of imprisonment. Meanwhile, the conviction for brandishing a firearm in furtherance of a crime of violence carried a mandatory minimum seven-year term of imprisonment and a maximum term of life, which was statutorily required to run consecutive to the sentence he received for the Hobbs Act robbery.

The district court sentenced Brown to a total of 324 months of imprisonment followed by three years of supervised release. This appeal followed.

II. STANDARD OF REVIEW

We ordinarily review constitutional claims de novo, but, where, as here, a defendant raises his constitutional challenge for the first time on appeal, we review for plain error only. *United States v. Alfonso*, 104 F.4th 815, 828 (11th Cir. 2024). “To establish plain error, a defendant must show there is (1) error, (2) that is plain, and (3) that affects substantial rights. If all three conditions are met, we may exercise our discretion to recognize a forfeited error, but only if the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.” *Id.* at 829 (citation modified).

III. DISCUSSION

We will first address Brown’s Confrontation Clause argument before turning to his Ex Post Facto Clause argument.

A. *The District Court Did Not Plainly Err in Allowing the Government’s DNA Expert To Testify*

Under the Confrontation Clause of the Sixth Amendment, “the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. CONST. amend. VI. In *Crawford v. Washington*, the Supreme Court explained that the Confrontation Clause’s “primary object” is “testimonial hearsay.” 541 U.S. 36, 53 (2004). If hearsay is “testimonial,” the Confrontation Clause forbids its introduction at trial, unless: (1) the declarant is unavailable, and

(2) the defendant had a prior opportunity to cross-examine the declarant. *Id.* at 53–54.

In *Melendez-Diaz v. Massachusetts*, the Supreme Court held that the Confrontation Clause applied to forensic “certificates of analysis” that stated that lab tests had identified an unknown substance as cocaine. 557 U.S. 305, 309–11 (2009). The Court reasoned that the certificates were testimonial because they were functionally identical to live, in-court testimony, and they were hearsay because they were offered to prove the truth of the matter asserted—that the substance seized was cocaine. *Id.* at 310–11. Thus, the Court held that, under *Crawford*, the defendant had a right to cross-examine the lab analyst certifiers. *Id.* at 311.

The Supreme Court has also found that the government violated the Confrontation Clause when it “introduce[d] a forensic laboratory report containing a testimonial certification, made in order to prove a fact at a criminal trial, through the in-court testimony of an analyst who did not sign the certification or personally perform or observe the performance of the test reported in the certification.” *Bullcoming v. New Mexico*, 564 U.S. 647, 657 (2011). The Court reasoned that the “surrogate testimony” from the other analyst was insufficient to satisfy the Confrontation Clause because the analyst “could not convey what [the certifying analyst] knew or observed” about “the particular test and testing process he employed.” *Id.* at 661. Nor could that “testimony expose any lapses or lies on the certifying analyst’s part.” *Id.* at 662.

Most recently—following Brown’s trial, but while his appeal was pending—the Supreme Court again addressed the Confrontation Clause in the context of forensic reports in *Smith v. Arizona*, 602 U.S. 779 (2024). And an “intervening decision by . . . the Supreme Court squarely on point may make an error plain.” *United States v. Jones*, 743 F.3d 826, 829–30 (11th Cir. 2014) (citation modified); see also *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) (stating that “a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final”).

In *Smith*, an analyst from a state crime lab tested items seized from the defendant’s property. 602 U.S. at 790. The analyst “prepared a set of typed notes . . . [that] documented her lab work and results,” including detailed descriptions of the tests performed on the items, whether she first ran certain tests on the testing equipment, the results of the tests, and her findings and conclusions as to the types of drugs identified. *Id.* But between the lab testing and the trial, the analyst stopped working at the lab, and the state replaced her as a witness with a second analyst, who “had no prior connection to the . . . case.” *Id.* Relying solely on the first analyst’s notes and records, the second analyst came to the same conclusions and testified to that effect at trial, referring repeatedly to the first analyst’s report and notes. *Id.* at 791. Specifically, with regard to each individual item tested, the second analyst

described the specific “scientific methods” [the first analyst] had used to analyze the [seized] substance (e.g., a microscopic examination, a chemical color

test, a gas chromatograph/mass spectrometer test). And as to each, he stated that the testing had adhered to “general principles of chemistry,” as well as to the lab’s “policies and practices[]”; so he noted, for example, that [the first analyst] had run a “blank” to confirm that testing equipment was not contaminated. After thus telling the jury what [the first analyst’s] records conveyed about her testing of the items, [the second analyst] offered an “independent opinion” of [the] identity [of the substances].

Id. at 791 (citation modified).

On appeal, the defendant argued the second analyst’s testimony violated the Confrontation Clause because the first analyst’s “statements were conveyed, via [the second analyst’s] testimony, to establish that what [the first analyst] said happened in the lab did in fact happen” (i.e., “that she used certain standard procedures to run certain tests, which enabled identification of the seized items”). *Id.* at 793. The state argued that there was no Confrontation Clause issue because the second analyst testified about “his own independent opinions, even though [he made] use of [the first analyst’s] records.” *Id.* at 791 (citation modified). The Supreme Court disagreed, focusing on the fact that the second analyst, “though familiar with the lab’s general practices, had no personal knowledge about [the first analyst’s] testing of the seized items.” *Id.* at 796. Thus, the second analyst’s testimony—that specific scientific methods were used to test certain evidence, that the lab’s policies and practices were followed, and that the items tested were certain drug substances—

“were [entirely] predicated on the truth of [the first analyst’s] factual statements.” *Id.* at 797–98. But the defendant could not ask the first analyst any questions because she was not called to testify. *Id.* at 798. Accordingly, the Supreme Court held that “[w]hen an expert conveys an absent analyst’s statements in support of his opinion, and the statements provide that support only if true, then the statements come into evidence for their truth”—i.e., the statements are hearsay and implicate the Confrontation Clause if they are also testimonial. *Id.* at 783, 798–800.

But notably, the Supreme Court cautioned that the second analyst still could have testified to certain general matters without creating a Confrontation Clause problem. For instance, because the second analyst worked in the same lab as the first analyst,

he could [have] testif[ied] 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 he not been familiar with [the first analyst’s] 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. Or . . . he might have been asked—and could have answered—any number of hypothetical questions, taking the form of: “*If or assuming* some out-of-court statement were true, what would follow from it?”

Id. at 799 (citation modified). But the second analyst’s testimony had not taken that form. Instead, the state used him “to relay what

[the first analyst] wrote down about how she identified the seized substances. [He] thus effectively became [the first analyst's] mouthpiece. He testified to the precautions (she said) she took, the standards (she said) she followed, the tests (she said) she performed, and the results (she said) she obtained.” *Id.* at 800. Thus, having determined that the testimony comprised out-of-court statements offered for the truth of the matter asserted, the Supreme Court remanded the case to the state court to determine whether the out-of-court statements were testimonial. *Id.* at 800–02.

Brown argues that under plain error review, *Smith* is clearly on point and demonstrates that Aguilar’s testimony violated the Confrontation Clause. Specifically, Brown argues that Aguilar’s testimony violated the Confrontation Clause because he based his testimony on and “acted as a surrogate witness for multiple other individuals at DLI who did not testify,” such as (1) Colon, who was the first analyst and prepared the report, and (2) the lab technicians who tested the DNA evidence and created the DNA profile.

But Brown’s case is distinguishable from *Smith*. Aguilar’s testimony reflected his own firsthand knowledge and experience; it was not predicated on Colon’s analysis. Unlike in *Smith*, Aguilar was actually involved in the analysis, “repeated the same process” as Colon, and independently reached the same conclusion that Brown’s DNA profile matched the profiles obtained from the mask and the soda bottle. In other words, Aguilar was not simply reading or relying on Colon’s report and accepting her findings as to the

DNA comparisons. Instead, he was testifying to his own conclusions based on his own comparison analysis of the DNA profiles generated from the evidence. Thus, the concern presented in *Smith*—a surrogate analyst with “no personal knowledge” or “prior connection” to the case testifying solely based on the work done entirely by a different analyst—was not present here. *Id.* at 790, 796.

Brown highlights that other persons at DLI did the hands-on lab work and generated the DNA profiles from the physical evidence, and those persons did not testify. But unlike in *Smith*, Aguilar did not testify as to the specific tests the lab used in Brown’s case or that the process followed the lab’s standard policies and procedures. Rather, Aguilar arguably avoided the pitfalls in *Smith* by testifying only generally as to how the lab typically functioned, which the Supreme Court agreed did not violate the Confrontation Clause in *Smith*. *Id.* at 799–800 (explaining that because the second analyst worked in the same lab as the first analyst, “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,” and these “forms of testimony allow forensic expertise to inform a criminal case without violating the defendant’s right of confrontation”).

And importantly, neither this Court nor the Supreme Court in *Smith*, *Bullcoming*, and *Melendez-Diaz* has held that the Confrontation Clause requires an opportunity to cross-examine *every* lab person involved in the process of generating a DNA profile. We

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also take no position on the merits of that argument in this case. We hold only that the district court did not commit plain error in allowing the testimony. *See United States v. Hesser*, 800 F.3d 1310, 1325 (11th Cir. 2015) (“[T]here can be no plain error where there is no precedent from the Supreme Court or this Court directly resolving it.”).

B. The District Court Plainly Erred in Applying a Career Offender Enhancement to Brown’s Hobbs Act Robbery Offense

By contrast, the government concedes that the district court committed plain error at sentencing by imposing a career offender enhancement using a version of the Guidelines Manual issued after the underlying offense occurred, which resulted in a higher guidelines range. The government urges us to remand this case for resentencing. We will do so.

“Although a defendant is ordinarily sentenced under the Guidelines in effect at the time of sentencing, the Ex Post Facto Clause proscribes sentencing an offender under a version of the Guidelines that would provide a higher sentencing range than the version in place at the time of the offense.” *United States v. Elbeblawy*, 899 F.3d 925, 939 (11th Cir. 2018) (citation modified).

The district court used the 2023 version of the Guidelines Manual in effect at the time of Brown’s sentencing, which included a recent amendment that reclassified Hobbs Act robbery to be a crime of violence for purposes of the career offender enhancement. *See* U.S. Sent’g Comm’n, Adopted Amendments (Effective Nov. 1,

2023), Amendment 822. But prior to that amendment, binding Circuit precedent held that Hobbs Act robbery did not qualify as a crime of violence for purposes of the career offender enhancement. *United States v. Eason*, 953 F.3d 1184, 1194–95 (11th Cir. 2020).

Brown’s offense occurred in March 2023, which was prior to the effective date of the amendment. Therefore, the district court erred in sentencing him under the 2023 Guidelines Manual. *See Elbeblawy*, 899 F.3d at 939. As a result of this error, Brown received an enhancement for which he otherwise would not have qualified. We agree with the government that this error was plain and affected Brown’s substantial rights. The error also seriously affected the fairness, integrity, and public reputation of judicial proceedings, so Brown is entitled to relief. Accordingly, we vacate Brown’s sentence and remand for resentencing using the 2021 version of the Guidelines Manual.

IV. CONCLUSION

We **AFFIRM** Brown’s conviction, but **VACATE** Brown’s sentence, and **REMAND** for resentencing.