Key Takeaways From High Court's Substitute Expert Decision

By **Joshua Naftalis and Melissa Kelley** (July 1, 2024)

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On June 21, the U.S. Supreme Court issued a unanimous decision in Smith v. Arizona, holding that the U.S. Constitution's confrontation clause bars the introduction at trial of "an absent laboratory analyst's testimonial out-of-court statements to prove the results of forensic testing," unless that witness is "'unavailable to testify, and the defendant ha[s] had a prior opportunity' to cross-examine" the witness.[1]

The court explained that "[w]hen an expert conveys an absent analyst's statements in support of the expert's opinion, and the statements provide that support only if true, then the statements come into evidence for their truth."[2]

The court vacated Jason Smith's narcotics conviction because it found that the hearsay statements of the original analyst were admitted for their truth — i.e., to show that the lab tests found the presence of illegal narcotics — but remanded the case for determination of whether those statements were testimonial.[3]

Although this case arose in the context of narcotics testing, what remains to be seen is how its reasoning will affect the use of expert witnesses in other types of criminal cases, including white collar prosecutions.

Background

Smith was arrested and charged with narcotics offenses. In preparation for trial, prosecutors sent what appeared to be drugs and other paraphernalia that were seized from Smith at the time of his arrest to a crime lab for analysis. A laboratory analyst, Elizabeth Rast, tested the items, concluded they contained illegal narcotics, and prepared a set of typed notes and a signed report.[4]

Prosecutors originally planned to call Rast to testify at trial. But because Rast had stopped working at the lab prior to trial, prosecutors instead called a replacement expert, Greggory Longoni.

Longoni, who had no prior connection to the case, prepared for his testimony by reviewing Rast's notes and report, and referred to Rast's notes and report when he took the stand to testify.

Longoni purported to offer an "independent opinion," but simply testified about the scientific methods that Rast had used to conduct her analysis, how the testing "adhered to 'general principles of chemistry,' ... the lab's 'policies and practices,'" and Rast's conclusions that the seized items contained illegal narcotics.

Smith was convicted at trial.[5] On appeal, Smith argued that prosecutors' use of Longoni as a "substitute expert" violated his rights under the confrontation clause. Smith contended that Rast was the real witness, through her written statements, but Smith did not have the

opportunity to cross-examine her.

In 2022, the Arizona Court of Appeals rejected his confrontation clause challenge and affirmed his conviction.[6]

The Supreme Court's Decision

In its seminal 2004 decision in Crawford v. Washington, the Supreme Court held that the Sixth Amendment's confrontation clause bars the admission of an absent witness's out-of-court statements unless the witness is unavailable and the defendant had a prior chance to subject them to cross-examination. The court explained that confrontation is "the only indicium of reliability sufficient to satisfy constitutional demands."[7]

In Smith, Justice Elena Kagan authored the Supreme Court's decision. She began by highlighting the background against which the court was considering the case: three recent decisions that addressed the applicability of Crawford to expert witness testimony.

In its 2009 Melendez-Diaz v. Massachusetts decision,[8] Justice Kagan noted, "the Court made clear that the Confrontation Clause applies to forensic reports."[9] In that case, prosecutors introduced certificates that set forth the results of drug lab tests, rather than calling the lab analysts who had conducted the tests.

The court held that because these lab "certificates were testimonial," a "'straightforward application' of Crawford showed a constitutional violation."[10]

In its 2011 Bullcoming v. New Mexico decision, the court held that a prosecutor "could not introduce one lab analyst's written findings through the testimony" of a substitute analyst.[11]

And in its 2012 Williams v. Illinois decision, the court was presented with the same issue as in Smith, with "one lab analyst relat[ing] what another had found — though this time on the way to stating her own conclusion."[12]

The resulting decision was "muddle[d]," according to Justice Kagan, as the court failed to produce a majority opinion.[13] Five justices determined that such "basis testimony" was offered for its truth, in violation of the confrontation clause, but one of the five affirmed the conviction on other grounds.[14]

The court granted certiorari in Smith to clean up the confusion that followed Williams.[15]

Turning to the facts of Smith's case, Justice Kagan explained that because the confrontation clause "applies only to testimonial hearsay," a determinative question was whether the absent analyst's out-of-court statements were admitted for their truth — i.e., as mentioned above, to show that the lab tests found the presence of illegal narcotics.

The court concluded they were, writing: "[T]ruth is everything when it comes to the kind of basis testimony presented here. ... [T]he truth of the basis testimony is what makes it useful to the prosecutor; that is what supplies the predicate for — and thus gives value to — the state expert's opinion."[16]

That left whether Longoni's statements were testimonial. The court declined to decide the question because Smith's certiorari petition did not raise the issue, but rather "took as a given" that they were.

The court thus remanded the case back to the state court with a "few thoughts" that "the state court might usefully address." According to Justice Kagan, the testimonial inquiry "focuses on the 'primary purpose' of the statement, and in particular on how it relates to a future criminal proceeding."

That determination, Justice Kagan wrote, requires a court to consider which of Rast's statements were at issue — i.e., her notes alone, or both her notes and the final report — and the range of recordkeeping activities that lab analysts engage in.[17]

Three justices filed concurring opinions, two of which discussed Justice Kagan's suggestions about how the Arizona court should assess whether the absent analyst's written notes and report were testimonial.

Justice Clarence Thomas disagreed with the majority opinion's suggestion that the lower court should determine whether Longoni's statements were testimonial "by looking to each statement's 'primary purpose.'"[18] He explained that "the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions."[19]

Justice Neil Gorsuch, too, questioned whether the court's primary-purpose test was correct, writing that it may be a "limitation of our own creation on the confrontation right," and warning against the confusion that the test could engender in practice.[20]

Justice Samuel Alito filed a third concurring opinion, which was joined by Chief Justice John Roberts. While he agreed with vacatur of the conviction, he disagreed with "the majority's novel theory that basis testimony always is hearsay."[21]

That conclusion, according to Justice Alito, "inflicts a needless, unwarranted, and crippling wound on modern evidence law" by "proclaim[ing] that a prosecution expert will frequently violate the Confrontation Clause when he testifies in strict compliance with the Federal Rules of Evidence and similar modern state rules."[22]

Justice Alito said that he "would vacate and remand because the expert's testimony is hearsay under any mainstream conception, including that of the Federal Rules of Evidence."[23]

Conclusion

The court's unanimous opinion, which was largely expected, is significant because it restricts prosecutors' ability to use substitute experts.

Prosecutors generally use substitute experts in forensic fields, like drug and DNA testing, because of the burden of retesting items and the unavailability of the expert who conducted the initial testing. As such, Smith will directly affect narcotics and violent crime prosecutions.

Before Smith, forensic test results were often stipulated into evidence, forgoing the need to even call a substitute expert. Defense lawyers may be less willing to agree to such a stipulation now, as prosecutors may now have more difficulty offering the results of forensic tests into evidence.

Smith's reasoning applies to all expert witness testimony. It remains to be seen how the

decision will affect white collar cases, where substitute experts are less prevalent. That said, creative defense lawyers could seek to exploit Smith to their advantage.

In complex white collar prosecutions, such as for accounting fraud and market manipulation, prosecutors often call a testifying expert who is supported by a team of nontestifying experts. These nontestifying experts do the bulk of the analysis, and the testifying expert typically relies on them in presenting opinion testimony at trial.

An argument could be made that because the testifying expert is basing their opinion on an absent expert's work, Smith is implicated. The question will be whether the statements on which the testifying expert bases their opinion are offered for their truth and are testimonial.

Thus, while at first blush Smith would seem to be a blue collar case, white collar practitioners should consider its potential applicability in their cases, too.

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[1] 602 U.S. __ (2024), slip op. at 1 (quoting Crawford v. Washington, 541 U.S. 36, 53-54 (2004)).

[2] Smith, slip op. at 2.

[3] Id. at 22.

[4] Id. at 8.

[5] Id. at 9.

[6] Id. at 10.

[7] 541 U.S. at 53-54, 68.

[8] 557 U.S. 305 (2009).

[9] Smith, slip op. at 3.

[10] Melendez-Diaz, 557 U.S. at 312.

[11] 564 U.S. 647, 661-63 (2011).

[12] 567 U.S. 50, 86 (2012).

[13] Smith, slip op. at 7.

[14] 567 U.S. at 86-99.

[15] Smith, slip op. at 7.

[16] Id. at 11, 14.

[17] Id. at 19-22.

[18] Id. (Thomas, J., concurring), slip op. at 1-3.

[19] Id. at 2 (quoting White v. Illinois, 502 U.S. 346, 365 (1992)).

[20] Id. (Gorsuch, J., concurring), slip op. at 1-3.

[21] Id. (Alito, J., concurring), slip op. at 12.

[22] Id. at 1.

[23] Id. at 12.