Evidence

TEACHING MATERIALS FOR AN AGE OF SCIENCE AND STATUTES

NINTH EDITION

2024 SUPPLEMENT

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Chapter 4: The Examination of a Witness

A. The Order of the Examination of a Witness

1. Sequestration or Exclusion of Witnesses—Federal Rule 615

Page 62. Add in text at the end of the carryover paragraph from page 61 on the top of the page:

The proposed amendment took effect on December 1, 2023.

B. The Scope of the Examination of a Witness

5. The Rule of Completeness—Federal Rule 106

Page 80. Add after footnote 1 in text:

The proposed amendment took effect on December 1, 2023.

Chapter 10: Specialized Aspects of Logical Relevance: Identification of Physical Evidence

C. Demonstrative Evidence

Page 239. Add in text at the bottom of the page:

In part, the Committee made the change because the Article VI provisions govern when the information submitted to the jury qualifies as "evidence," whereas Rule 107 exhibits do not constitute evidence. Rule 107 took effect on December 1, 2024.

Chapter 12: Specialized Aspects of Logical Relevance: Assessing the Validity of Scientific Evidence

D. (Part of) the Big Picture: The Beginning and End of the Expert's Direct Examination

1. The Beginning of the Witness's Direct Examination: The Qualification of the Witness as an Expert—Federal Rule 702

Page 305. Add in text at the end of the carryover paragraph from page 304 on the top of the page:

The one exception to that general rule is when the legal test incorporates an expert standard. For example, some criminal statutes prohibit physicians from dispensing opioids "without a legitimate medical purpose." That language is a standard determined by experts, and an experienced physician's testimony could assist the jury in applying that standard to the facts of the case.

Chapter 16: Credibility: Impeachment Techniques

B. Prior Inconsistent Statements and Specific Contradiction

1. Prior Inconsistent Statements and Acts—Federal Rule 613

b. Extrinsic Evidence of a Prior Inconsistent Statement or Act—Rule 613(b)

Page 439. Replace text of the last sentence at the end of the next to last full paragraph on the page with:

The amendment took effect on December 1, 2024.

Chapter 19: Hearsay: The Exemption for a Party's Own Statements Offered Against the Party

E. Vicarious Admissions or Statements

1. Civil Cases—Federal Rules 801(d)(2)(C)-(D)

Page 553. Replace last line of text at the end of Subsection 1 with:

The amendment took effect on December 1, 2024.

Chapter 21: Hearsay: Exceptions That Require Proof of Unavailability
C. Exceptions Requiring Proof of Unavailability
3. Declarations Against Interest

Page 661. Replace last line of text at the end of the first paragraph on the page with:

The amendment took effect on December 1, 2024. However, the final version of the amendment deleted "if any, corroborating it" and substituted "that supports or undermines it."

Chapter 23: Opinion Evidence: Lay and Expert

B. Expert Opinion Testimony—Federal Rules 702-06

1. Introduction

b. The Reporting Witness

4) Proof That the Proper Test Procedures Were Used—Federal Rule 702(d)

Page 707. Replace the first sentence of text in the Subsection with:

As amended on December 1, 2023, Rule 702(d) requires the proponent to show that "the expert's opinion reflects a reliable application of the principles and methods to the facts of the case."

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c. The Interpreting or Evaluating Witness

4) The Statement of the Ultimate Opinion

Issue #3: Restrictions on Opinions About State of Mind—Federal Rule 704(b)

Page 726. Add in text at the end of Section B:

Diaz v. United States
144 S.Ct. 1727, 219 L.Ed.2d 240 (2024)

THOMAS, J. delivered the opinion of the Court.

[Deliah Diaz was charged with knowingly importing methamphetamine. When the car she was driving was stopped at the United States-Mexico border, authorities found 56 packages of methamphetamine with an estimated retail value of over $368,000. She told the police that: she was unaware of the drugs' presence in the car, the car belonged to a boyfriend she had seen only "two, three times tops," and she did not know either his phone number or where he lived. At trial, the prosecution called Special Agent Andrew Flood who testified that "most" couriers know they are transporting drugs.]

II

Federal Rule of Evidence 704 addresses "Opinion[s] on an Ultimate Issue." Rule 704(a) sets out a general rule that "[a]n opinion is not objectionable just because it embraces an ultimate issue." Rule 704(b) adds one caveat:

> "Exception: In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone."

Rule 704 departed from the once-prevailing common-law practice. Prior to Rule 704, many States applied what was known as the "ultimate issue" rule. That rule categorically barred witnesses from "stat[ing] their conclusions on" any "ultimate issue"—*i.e.*, issues that the jury must resolve to decide the case. For example, in a medical

malpractice suit, an ultimate issue may be "whether [the] plaintiff 's condition resulted solely from malpractice." In a murder case, by way of comparison, an ultimate issue may be who fired the gun that killed the victim. Under the common-law rule, a witness could not provide his answer to those ultimate issues. Witnesses remained free, however, to offer related testimony, even testimony that directly helped the jury resolve an ultimate issue. See, *e.g.*, *Furlong v. Carraher (*holding that witness could not testify about deceased's mental capacity to enter will, but could testify to her "condition of ... mind at the time the will was executed").

The logic underpinning the ultimate-issue rule was that it prevented witnesses from taking over the jury's role. See 1 K. Broun, McCormick on Evidence 80 (7th ed. 2013) (explaining that the rule's "stated justification" was to exclude testimony that "usurps the function" or "invades the province of the jury"). If a witness gave an opinion "covering the very question which was to be settled by the jury," some feared that the jury would be left with "no other duty but that of recording the finding of [the] witnes[s]."

Although the ultimate-issue rule's exact origins are unclear, legal scholars agree that several States had adopted it by the late 1800s. The rule was short lived though, and courts and commentators came to doubt its propriety within a matter of decades. Many rejected the idea that ultimate-issue testimony usurps the jury's role, since a witness's "credibility" and "the soundness of his judgment" "always remain for the jury's determination." By the 1940s, "a trend [had] emerged to abandon" the rule altogether. 1 McCormick 80. It soon became unclear whether, and to what extent, the ultimate-issue rule carried any force.

Rule 704 made clear that the ultimate-issue rule did not apply in federal courts. When Rule 704 was originally adopted in 1975, it had no exceptions: All ultimate-issue opinions were permitted.

About nine years later, in the wake of the John Hinckley, Jr., trial, Congress created the exception now found in Rule 704(b). By its terms, Rule 704(b)'s exception covers a narrow set of opinions. The exception does not apply in civil cases or affect lay witness testimony. And, it exclusively addresses mental states and conditions that are "element[s] of the crime charged or of a defense." Rule 704(b) thus proscribes only expert opinions in a criminal case that are about a particular person ("the defendant") and a particular ultimate issue (whether the defendant has "a mental state or condition" that is "an element of the crime charged or of a defense")

III

Rule 704(b) applies only to opinions about the defendant. Because Agent Flood did not express an opinion about whether Diaz herself knowingly transported methamphetamine, his testimony did not violate Rule 704(b).

Agent Flood instead testified about the knowledge of *most* drug couriers. Specifically, he explained that "in most circumstances, the driver knows they are hired ... to take the drugs from point A to point B." That opinion does not necessarily describe Diaz's mental state. After all, Diaz may or may not be like most drug couriers. Diaz herself made this point at trial. She argued that another person, an alleged boyfriend, had deceived her into carrying the drugs. Diaz supported that story during her case in chief. She presented an automobile mechanics expert who testified that there was "no way for someone to suspect or know that there was drugs hidden within th[e] car." On cross-examination, Diaz's counsel highlighted that Agent Flood was not involved in Diaz's case and that the Government itself was aware of cases involving unknowing couriers. The jury was thus well aware that unknowing couriers exist and that there was evidence to suggest Diaz could be one of them. It simply concluded that the

evidence as a whole pointed to a different conclusion: that Diaz knowingly transported the drugs. The jury alone drew that conclusion…

Diaz and the dissent argue that Agent Flood "functional[ly]" stated an opinion about whether Diaz knowingly transported drugs when he opined that couriers generally transport drugs knowingly. That argument mistakenly conflates an opinion about *most* couriers with one about *all* couriers. A hypothetical helps explain why this distinction matters under Rule 704(b). Take for example an expert who testifies at an arson trial that all people in the defendant's shoes set fires maliciously (the mental state required for common-law arson). Although the expert never spoke the defendant's name, the expert nonetheless violated Rule 704(b). That is because the expert concluded that the defendant was part of a group of people that all have a particular mental state. The phrase "all people in the defendant's shoes" includes, of course, the defendant himself. So, when the expert testified that all people in the defendant's shoes always set fires with malicious intent, the expert also opined that the defendant had that mental state. The expert thus stated an opinion on the defendant's mental state, an ultimate issue reserved for the jury, in violation of Rule 704(b).

Here, by contrast, Agent Flood asserted that Diaz was part of a group of persons that *may or may not* have a particular mental state. Of all drug couriers—a group that includes Diaz—he opined that the majority knowingly transport drugs. The jury was then left to decide: Is Diaz like the majority of couriers? Or, is Diaz one of the less-numerous-but-still-existent couriers who unwittingly transport drugs? The ultimate issue of Diaz's mental state was left to the jury's judgment. As a result, Agent Flood's testimony did not violate Rule 704(b).

Diaz and the dissent next zero in on the word "about" in Rule 704(b). They rely on dictionary definitions of "about" to argue that Rule 704(b)'s prohibition includes all testimony that " 'concerns' or is 'in reference to' whether the defendant possessed a particular state of mind." But, a word's meaning is informed by its surrounding context. A crucial part of that context is the other words in the sentence. The words surrounding "about" make clear that Rule 704(b) addresses a far narrower category of testimony than Diaz and the dissent posit. To begin, the Rule targets "opinion[s]." In other words, the testimony must be more than a general reference, and it must reach a particular conclusion. Moreover, the Rule does not preclude testimony "about" mental-state ultimate issues in the abstract. Instead, it targets conclusions "about whether" a certain fact is true: "[T]he defendant did or did not have a mental state or condition." The language as a whole thus conveys that Rule 704(b) is limited to conclusions as to the defendant's mental state.

Rule 704(a) further confirms the narrow scope of testimony prohibited by Rule 704(b). Recall that the original ultimate-issue rule excluded opinions on the ultimate issue itself. Rule 704(a) abolished that practice by permitting testimony that "embraces an ultimate issue." Because Rule 704(b) is an "exception" to Rule 704(a), it can only be understood to cover a subset of the testimony that Rule 704(a) expressly allows. In short, since Rule 704(a) permits opinion testimony that includes ultimate issues, Rule 704(b) must exclude only a subset of those same opinions.

The reading offered by Diaz and the dissent would have the exception swallow the rule. If Rule 704(b) were as broad as they suggest, it would be a standalone prohibition broader than Rule 704(a)—or even the original ultimate-issue rule. Even though the ultimate-issue rule and Rule 704(a) address opinions that include the ultimate issue itself, Rule 704(b) would prohibit all opinions even related to the ultimate issue of a defendant's mental state. The Rule as a whole makes clear that an opinion is "about" the ultimate issue of the defendant's mental state only if it includes a conclusion on that precise topic, not merely if it concerns or refers to that topic.

IV

An expert's conclusion that "most people" in a group have a particular mental state is not an opinion about "the defendant" and thus does not violate Rule 704(b). Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.

J. JACKSON, concurring.

I join the Court's opinion in full. I write separately to emphasize that, as Congress designed it, Rule 704(b) is party agnostic. Neither the Government nor the defense can call an expert to offer her opinion about whether the defendant had or did not have a particular mental state at the time of the offense. But a corollary is also true. Both the Government and the defense are permitted, consistent with Rule 704(b), to elicit expert testimony "on the likelihood" that the defendant had a particular mental state, "based on the defendant's membership in a particular group." Indeed, the type of mental-state evidence that Rule 704(b) permits can prove essential not only for prosecutors, but for defendants as well

I

This very case illustrates the significance of mental-state evidence to both parties in a criminal trial. The Government expert opined (based on his almost 30 years of experience as a special agent) that, "in most circumstances," drug couriers know that they are transporting drugs. Diaz challenged this testimony, and, today, the Court holds that the Government did not violate Rule 704(b). Notably, however, the Government was not the only party that relied on this type of mental-state evidence during the trial. Diaz called an automobile specialist who testified that a driver of her particular car would almost certainly *not* know that it contained drugs. That type of evidence is permissible under the interpretation of Rule 704(b) the Court adopts today. Moreover, as the dissent observes, Diaz might have opted to introduce other types of expert evidence related to the mental-state element. For example, Diaz could have offered expert testimony on the prevalence and characteristics of unknowing drug couriers.

Other examples provide further proof. Consider expert evidence on mental health conditions. Congress crafted Rule 704(b) to prohibit experts from opining on a particular defendant's mental state at the time of an offense, but it did not preclude experts from contextualizing a defendant's mental health condition, including by explaining the likelihood that those with a particular condition would have a particular mental state. For example, as Diaz acknowledges, the interpretation of Rule 704(b) the Court adopts today "allow[s] psychiatrists who testify as experts to ... tell the jury that when people with schizophrenia as severe as [a] defendant's commit acts of violence, it is generally because they do not appreciate the wrongfulness of their conduct."

Or consider defendants who have been subject to domestic abuse. "A number of myths and misconceptions about [battered woman syndrome] victims affect our criminal justice system," and it is clear that those mistaken views

"affect jurors." Rule 704(b) allows experts to testify about the typical mental states of those with battered woman syndrome, helping jurors to better understand how those experiencing it respond to aggression or react to violence.

II

All that said, I fully acknowledge that there are serious and well-known risks of overreliance on expert testimony—risks that are especially acute in criminal trials. But there are also safeguards outside of Rule 704(b) to prevent the misuse of expert testimony. [W]hen faced with flawed or faulty testimony concerning the mental states of groups or categories of individuals, parties can utilize the traditional tools in a lawyer's toolkit, like vigorous cross-examination and careful refutation in closing argument. Parties can also seek to employ other Rules of Evidence that might require exclusion—those that guard against irrelevant or unduly prejudicial testimony, for example, and those that require courts to bar unqualified or overreaching experts. See Fed. Rules Evid. 401, 402, 403, 702.

With this understanding of both the important uses and the potential misuses of Rule 704(b), I join the Court's opinion.

J. GORSUCH, with whom J. SOTOMAYOR and J. KAGAN join, dissenting.

Federal Rule of Evidence 704(b) prohibits an expert witness from offering an opinion "about whether the defendant did or did not have [the] mental state" needed to convict her of a crime. Following the government's lead, the Court today carves a new path around that command. There's no Rule 704(b) problem, the Court holds. The government comes away with a powerful new tool in its pocket. Prosecutors can now put an expert on the stand—someone who apparently has the convenient ability to read minds—and let him hold forth on what "most" people like the defendant think when they commit a legally proscribed act. Then, the government need do no more than urge the jury to find that the defendant is like "most" people and convict.

I

Rule 704(b) may have been a new addition to the Federal Rules of Evidence, but it reflects a much older tradition. For centuries, courts have grappled with the role expert witnesses should play at trial. See, *e.g.*, 1 S. Greenleaf, Evidence § 440 (1842). For a long stretch, many courts barred experts from offering opinions on so-called ultimate issues like *mens rea*. The Federal Rules of Evidence are no longer so strict, see Fed. Rule Evid. 704(a), except in one respect: *mens rea*. On that particular issue, Congress has concluded that jurors need no help from experts. They are fully capable of drawing reasonable inferences from the facts and deciding whether the defendant acted with the requisite *mens rea.* And in criminal trials that is their job alone.

II

To help prove that Ms. Diaz "knowingly" imported drugs, the government called to the stand Andrew Flood, one of its own employees, an agent with the Department of Homeland Security. Ms. Diaz had made no admissions to

him about her mental state, nor had Agent Flood even interviewed her. Instead, prosecutors called Agent Flood as an expert on the minds of drug couriers (yes, really). And in response to the government's questions, Agent Flood testified that, "in most circumstances, the driver knows they are hired ... to take the drugs from point A to point B."

That was a violation of Rule 704(b), plain as day. Just walk through its terms. The government called Agent Flood as an "expert witness" to address the question "whether the defendant did or did not have ... a mental state ... that constitutes an element of the crime charged." After all, whether Ms. Diaz acted "knowingly" was the only question at trial, all that separated her from a conviction. And Agent Flood proceeded to do just as he was asked offering an "opinion about" that very question.

To be sure, prosecutors thought they had a clever way around the problem. They did not ask Agent Flood to testify explicitly about Ms. Diaz's mental state. Instead, they asked the agent to testify about the mental state of people exactly like Ms. Diaz, drivers bringing drugs into the country. And that, the prosecutors argued, made all the difference.

Before us, however, even the government disavows the full implications of that reasoning. Now, it concedes, the Rule does more than bar an expert from testifying "explicitly" that the defendant had the mental state required for conviction. The Rule also bars an expert from testifying that a class of persons (say, all people carrying drugs over the border) has the legally proscribed mental state when that class includes the defendant. Likewise, the Rule bars an expert from opining that a hypothetical person who matches the defendant's description (say, a hypothetical woman who drives a car full of drugs across the border) will have the mental state required for conviction. All those opinions, the government now acknowledges, are "about" the defendant's mental state and cannot be offered consistent with Rule 704(b). On this, the Court, too, agrees.

III

So what is left? As the government sees it, Agent Flood's opinion was permissible for a different reason: because it wasn't *definitive*. So, yes, an expert cannot testify that *all* persons in a class that includes the defendant have a culpable mental state. But, the government insists, everything changes when an expert offers (as Agent Flood offered) only a *probabilistic* assessment that *most* such persons do.

I cannot see how that gambit begins to solve the government's problem. The Rule does not only prohibit an expert from stating a *definitive* opinion about the defendant's mental state (or, as the government concedes, the mental state of a class that includes her). It prohibits an expert from offering *any* opinion on the subject. Return, once more, to the Rule's terms. It bars an expert from stating an opinion "*about* whether the defendant" had "a mental state ... that constitutes an element of the crime charged." The word "about" means "[c]oncerning, regarding, with regard to, in reference to; in the matter of." Oxford English Dictionary (3d ed., June 2024). So whether an expert's opinion happens to be definitive or probabilistic makes no difference. An expert may not state any opinion concerning, regarding, or in reference to whether the defendant, while committing a charged criminal act, had the requisite mental state to convict. Period. Lest any doubt remain, the Rule takes pains to emphasize, "[t]hose matters are for the trier of fact alone."

Just imagine if Agent Flood had explicitly addressed Ms. Diaz and said she "most likely knew" she was carrying drugs. Would that testimony be permissible under Rule 704(b)? Of course not. Probabilistic though the testimony

may be, an expert who says that an individual defendant "most likely" had the requisite mental state for conviction offers an opinion about, concerning, regarding, or in reference to her mental state. On that, no dispute exists. So how can it be, as the government insists, that an expert may offer the probabilistic assessment that "most" people like the defendant know they are carrying drugs? The only difference between the two opinions is that the first addresses the defendant "explicitly," the second a class that includes her.

But what if he said, as the government initially proffered, that drivers "generally" know? Or that they "almost always" know? Or perhaps an expert puts a finer point on it: "In my experience, 99% of drug couriers know." When cases like those come to us, likely one of two things will happen. We will draw some as-yet unknown line and say an expert's probabilistic testimony went too far.

IV

Nor is it any secret that the government has a long track record of success in proving *mens rea* the old-fashioned way by presenting circumstantial evidence and appealing to reasonable inferences. This case illustrates how it can be—and regularly is—done. To persuade the jury that Ms. Diaz knew about the drugs, the government could point to the amounts involved—54 pounds of drugs worth over $360,000. It could also point to the holes in her story. She claimed the car was her boyfriend's, but then said she had met him only "three times tops," did not know his phone number, and did not know where he lived. The government could point out, too, that when cell phones were found in the car, Ms. Diaz maintained one of them belonged to a friend, someone she would "rather not" identify. As well, the government could highlight her statement that the phone was "locked" and she did not "have access to it." And the government could then ask a jury to infer from all these facts that Ms. Diaz knew exactly what she was doing. As it argues to us, the government was free to argue to a jury, asking it to conclude that Ms. Diaz's story was "transparently flimsy." Day in and day out, the government secures convictions for the knowing importation of drugs in just this way. There was no need to gild the lily by calling to the stand an "expert" in mindreading.

There are sound reasons why Rule 704(b) operates as it does. The problem of junk science in the courtroom is real and well documented. See *Daubert v. Merrell Dow Pharmaceuticals, Inc*; see also P. Huber, Galileo's Revenge: Junk Science in the Courtroom 15–17 (1991). And perhaps no "science" is more junky than mental telepathy. After Hinckley's trial, Congress recognized as much when it adopted Rule 704(b) to remove from federal courtrooms experts who claim to know what was inside a man's head at a particular moment in the past when he committed a particular act.

V

The risk of unfair prejudice can be exacerbated where, as here, the professed expert "carries with [him] the imprimatur of the [g]overnment." *United States v. Young*, 470 U.S. 1, 18 (1985). A witness like that "may induce the jury to trust [the witness's] judgment rather than its own view of the evidence. *United States v. Scheffer*, 523 U.S. 303, 314 (1998) (plurality opinion) (experts like these may attain an "aura of infallibility").

As part of its "gatekeeping" functions, a federal court must ensure that any expert testimony it permits is reliable, grounded on widely accepted principles, and will " 'assist the trier of fact to understand the evidence.' " *Kumho*

Tire Co, 526 U.S., at 147 (quoting Fed. Rule Evid. 702(a) (1999)). I struggle to see how a witness claiming to offer an opinion about another person's (or class of persons') thoughts at a particular moment in the past can meet any of those standards. No one, at least outside the fortuneteller's den, can yet claim the power to conjure reliably another's past thoughts.

Nor does testimony like that help the jury understand " 'experience[s] confessedly foreign in kind to [its] own.' " *Kumho Tire Co.*, 526 U.S., at 149 (quoting L. Hand, Historical and Practical Considerations Regarding Expert Testimony, 15 Harv. L. Rev. 40, 54 (1901)). In a criminal trial, expert testimony about DNA testing or the chemical composition of illegal drugs may sometimes help a jury understand facts they do not encounter in daily life. But none of that holds true when it comes to the job of assessing whether a defendant's story about her state of mind is credible or (as the government puts it) "transparently flimsy." Jurors are more than up to performing that task, and they hardly need the help of some clairvoyant.

Questions

1. Earlier in this chapter, we discussed the "G2i" problem—distinguishing between generalizations and inferences as to the individual. In many cases, although the state of the empirical data justifies a generalization about a class of persons or objects, there is no validated diagnostic criterion for determining whether an individual case is an illustration of the generalization. Is the *Diaz* case an example of the G2i problem? On the one hand, the experiential data available to Agent Flood might have justified a generalized inference that "most" couriers know that they are transporting illegal drugs. That testimony might rest on specialized knowledge available only to someone with Flood's background. On the other hand, does Flood have any special expertise that qualifies him to opine that Ms. Diaz knew? If not, perhaps the last step—going from the G to the I – must be left to the trier of fact.

2. If there is no such expertise, would that explain why Flood should not be permitted to testify even that Ms. Diaz "probably" knew? Justice Gorsuch sees no meaningful distinction between that form of testimony and Flood's testimony that "most" drug couriers know. Do you agree?

3. If you were the prosecutor, what foundation would you lay in order to convince the judge that Flood possessed the specialized knowledge to support the generalization about drug couriers' knowledge. Is it enough that Flood has personally stopped many drug couriers in the past or shared experiences with other agents who have done so? If not, what additional testimony would you attempt to elicit to lay the necessary foundation? What if Flood knows that many of the arrested couriers ultimately confessed? Or flunked polygraph examinations? Or were implicated by other drug traffickers? Or were convicted?

4. *Diaz* includes a statutory interpretation debate. Citing a dictionary, Judge Gorsuch argues for a broad interpretation of "about" in the text of Rule 704(b). Justice Thomas responds that in context, 704(b) should be read more narrowly. What do you think of Justice Thomas' argument that "if 704(b) were as broad as [the dissenters] suggest, it would be a standalone prohibition broader than Rule 704(a)—or even the original ultimate-issue rule. Even though the ultimate-issue rule and Rule 704(a) address opinions that include the ultimate issue itself, Rule 704(b) would prohibit all opinions even related to

the ultimate issue of a defendant's mental state"? As we emphasized in Chapter 2, in the textualist era, contextual arguments are entitled to great weight.

Chapter 24: The Best Evidence Rule: The Admissibility of Copies, Summaries, Etc.

E. Adequate Excuse for Nonproduction of the Original—Federal Rules 1004-07

Rule 100

Page 747. Replace last paragraph of text at the end of Note 2 with:

As Chapter 10 pointed out, the Advisory Committee later decided to convert proposed Rule 611(d) to Rule 107. The Committee reasoned that while Article VI deals with information that constitutes evidence, illustrative exhibits are not evidence. Consequently, the reference in Rule 1006(c) to "Rule 611(d)" was changed to "Rule 107." Rule 107 took effect on December 1, 2024.

Chapter 31. Constitutional Overrides—Confrontation, Compulsory Process, and Due Process

B. Negative Overrides: Excluding Otherwise Admissibility Evidence

Page 984. Add in text at the end of Note 8:

Smith v. Arizona
144 S.Ct. 1785, 219 L.Ed.2d 420 (2024)

J. KAGAN delivered the opinion of the Court.

[Jason Smith was charged in Arizona state court with possession of illegal drugs. Before trial, a state laboratory employee, Elizabeth Rast, analyzed samples seized from Smith. She prepared both typed notes and a signed report. The materials described her test procedures and her findings that the samples contained illegal drugs. However, she did not testify at trial. Instead, the prosecution called another laboratory employee, Gregory Longoni. Longoni had not been involved in the original testing of the samples, and he did not retest the samples. He purported to testify to his independent opinion that the samples contained illegal drugs, but he also acknowledged that he was relying on Rast's testing and findings.]

The Sixth Amendment's Confrontation Clause guarantees a criminal defendant the right to confront the witnesses against him. The Clause bars the admission at trial of "testimonial statements" of an absent witness unless she is "unavailable to testify, and the defendant ha[s] had a prior opportunity" to cross-examine her. *Crawford v. Washington*. And that prohibition applies in full to forensic evidence. So a prosecutor cannot introduce an absent laboratory analyst's testimonial out-of-court statements to prove the results of forensic testing. See *Melendez-Diaz v. Massachusetts*.

The question presented here concerns the application of those principles to a case in which an expert witness restates an absent lab analyst's factual assertions to support his own opinion testimony. This Court has held that the Confrontation Clause's requirements apply only when the prosecution uses out-of-court statements for "the truth of the matter asserted." *Crawford*, 541 U.S. at 60, n. 9. Some state courts, including the court below, have held that this condition is not met when an expert recites another analyst's statements as the basis for his opinion. Today, we reject that view. When 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. As this dispute illustrates, that will generally be the case when an expert relays an absent lab analyst's statements as part of offering his opinion. And if those statements are testimonial too—an issue we briefly address but do not resolve as to this case—the Confrontation Clause will bar their admission.

I

A

The Clause's prohibition "applies only to testimonial hearsay"—and in that two-word phrase are two limits. *Davis v. Washington*. First, in speaking about "witnesses"—or "those who bear testimony"—the Clause confines itself to "testimonial statements," a category whose contours we have variously described. *Id.*, at 823, 826; see *id.*, at 822 (statements "made in the course of police interrogation" were testimonial when "the primary purpose of the interrogation [was] to establish or prove past events potentially relevant to later criminal prosecution"); *Melendez-*

Diaz, 557 U.S. at 311 (testimonial certificates of the results of forensic analysis were created "under circumstances which would lead an objective witness reasonably to believe that the statement[s] would be available for use at a later trial"); *infra*, at ——. Second and more relevant here, the Clause bars only the introduction of hearsay—meaning, out-of-court statements offered "to prove the truth of the matter asserted." *Anderson v. United States*, 417 U.S. 211, 219 (1974). When a statement is admitted for a reason unrelated to its truth, we have held, the Clause's "role in protecting the right of cross-examination" is not implicated. *Tennessee v. Street*, 471 U.S. 409, 414 (1985); see *Anderson*, 417 U.S., at 220. That is because the need to test an absent witness ebbs when her truthfulness is not at issue.

Not long after *Crawford*, the Court made clear that the Confrontation Clause applies to forensic reports. In *Melendez-Diaz v. Massachusetts*, state prosecutors introduced "certificates of analysis" (essentially, affidavits) stating that lab tests had identified a substance seized from the defendant as cocaine. But the State did not call as witnesses the analysts who had conducted the tests and signed the certificates. We held that a "straightforward application" of *Crawford* showed a constitutional violation. The certificates were testimonial: They had an "evidentiary purpose," identical to the one served had the analysts given "live, in-court testimony." And the certificates were offered to prove the truth of what they asserted: that the seized powder was in fact cocaine. So the defendant had a right to cross-examine the lab-analyst certifiers.

Two years later, the Court relied on *Melendez-Diaz* to hold that a State could not introduce one lab analyst's written findings through the testimony of another. In *Bullcoming v. New Mexico*, 564 U.S. 647, 651–652 (2011), an analyst tested the blood-alcohol level of someone charged with drunk driving, and prepared a "testimonial certification" reporting that the level was higher than legal. But by the time the driver's trial began, that analyst had been placed on unpaid leave. So the State instead called a different analyst from the same lab to testify as to what the certification said. The substitute analyst had similar qualifications, and knew about the type of test performed. But the Court held that insufficient to satisfy the Confrontation Clause. The "surrogate testimony," the Court explained, "could not convey what [the certifying analyst] knew or observed" about "the particular test and testing process he employed."

The very next Term brought another case in which one lab analyst related what another had found—though this time on the way to stating her own conclusion. In *Williams v. Illinois*, 567 U.S. 50 (2012), state police sent vaginal swabs from a rape victim known as L. J. to a private lab for DNA testing. When the lab sent back a DNA profile, a state analyst checked it against the police department's database and found that it matched the profile of prior arrestee Sandy Williams. The State charged Williams with the rape, and he went to trial. The prosecution chose not to bring the private lab analyst to the stand. Instead, it called Sandra Lambatos, the state analyst who had searched the police database and found the DNA match. Lambatos had no first-hand knowledge of how the private lab had produced its results; she did not even know whether those results actually came from L. J.'s vaginal swabs (as opposed to some other sample). But she spoke repeatedly about comparing Williams's DNA to the DNA "found in [L. J.'s] vaginal swabs." So in addition to describing how she discovered a match, Lambatos became the conduit for what a different analyst had reported—that a particular DNA profile came from L. J.'s vaginal swabs. Williams objected, at trial and later: He thought that, just as in *Bullcoming*, crucial evidence had been admitted through a surrogate expert, thus violating his right of confrontation.

This Court granted Williams's petition for certiorari, but failed to produce a majority opinion. Four Members of the Court approved the Illinois Supreme Court's approach to "basis evidence," and agreed that Lambatos's recitation of the private lab's findings served "the legitimate nonhearsay purpose of illuminating the expert's thought process."

But the remaining five Members rejected that view. Those five stated, in two opinions, that basis evidence is generally introduced for its truth, and was so introduced at Williams's trial. Justice Thomas explained that "the purportedly limited reason for [the basis] testimony—to aid the factfinder in evaluating the expert's opinion—necessarily entail[ed] an evaluation of whether [that] testimony [was] true": "[T]he validity of Lambatos'[s] opinion ultimately turned on the truth of [the private lab analyst's] statements." (concurring in judgment). A dissent for another four Justices agreed: "[T]he utility of the [private analyst's] statement that Lambatos repeated logically depended on its truth." (opinion of Kagan, J.). And the State could not avoid that conclusion by "rely[ing] on [Lambatos's] status as an expert." Those shared views might have made for a happy majority, except that a different Confrontation Clause issue intruded. Justice Thomas thought that the private lab report was not testimonial because it lacked sufficient formality, so affirmed the Illinois Supreme Court on that alternative ground. The bottom line was that Williams lost, even though five Members of this Court rejected the state court's "not for the truth" reasoning.[1]

Our opinions in *Williams* "have sown confusion in courts across the country" about the Confrontation Clause's application to expert opinion testimony. *Stuart v. Alabama*, 586 U. S. ——, ——, 139 S.Ct. 36, 36–37 (2018) (Gorsuch, J., dissenting from denial of certiorari). 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.

B

Rast prepared a set of typed notes and a signed report, both on DPS letterhead, about the testing. The notes documented her lab work and results. They disclosed, for each of eight items: a "[d]escription" of the item; the weight of the item and how the weight was measured; the test(s) she performed on the item, including whether she first ran a "[b]lank" on the testing equipment; the results of those tests; and a "[c]onclusion" about the item's identity. The signed report then distilled the notes into two pages of ultimate findings, denoted "results/interpretations." After listing the eight items, the report stated that four "[c]ontained a usable quantity of methamphetamine," three "[c]ontained a usable quantity of marijuana," and one "[c]ontained a usable quantity of cannabis." The State originally planned for Rast to testify about those matters at Smith's trial.

But with three weeks to go, the State called an audible, replacing Rast with a different DPS analyst as its expert witness. In the time between testing and trial, Rast had stopped working at the lab, for unexplained reasons. And the State chose not to rely on the now-former employee as a witness. So the prosecutors filed an amendment to their "final pre-trial conference statement" striking out the name Elizabeth Rast and adding "Greggory Longoni, forensic scientist (substitute expert)." Longoni had no prior connection to the Smith case, and the State did not claim otherwise. Its amendment simply stated that "Mr. Longoni will provide an independent opinion on the drug testing performed by Elizabeth Rast." And it continued: "Ms. Rast will not be called. [Mr. Longoni] is expected to have the same conclusion."

[1] The Court also failed to reach agreement on the testimonial issue. The four Justices who accepted the state court's "not for the truth" view also concluded that the report was not testimonial. See *Williams*, 567 U.S., at 81–86 (plurality opinion). But they did so for reasons different from Justice Thomas's. Compare *ibid.* with *id.*, at 110–117 (opinion concurring in judgment). The result was that no single rationale for affirmance garnered a majority.

And he did come to the same conclusion, in reliance on Rast's records. Because he had not participated in the Smith case, Longoni prepared for trial by reviewing Rast's report and notes. And when Longoni took the stand, he referred to those materials and related what was in them, item by item by item. As to each, he described the specific "scientific method[s]" Rast had used to analyze the 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 Rast had run a "blank" to confirm that testing equipment was not contaminated. After thus telling the jury what Rast's records conveyed about her testing of the items, Longoni offered an "independent opinion" of their identity. More specifically, the opinions he offered were: that Item 26 was "a usable quantity of marijuana," that Items 20A and 20B were "usable quantit[ies] of methamphetamine," and that Item 28 was "[a] usable quantity of cannabis."

After Smith was convicted, he brought an appeal focusing on Longoni's testimony. In Smith's view, the State's use of a "substitute expert"—who had not participated in any of the relevant testing—violated his Confrontation Clause rights. The real witness against him, Smith urged, was Rast, through her written statements; but he had not had the opportunity to cross-examine her.

II

Smith's confrontation claim can succeed only if Rast's statements came into evidence for their truth. As earlier explained, the Clause applies solely to "testimonial *hearsay*." And that means the Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Crawford*, 541 U.S., at 60, n. 9. So a court analyzing a confrontation claim must identify the role that a given out-of-court statement—here, Rast's statements about her lab work—served at trial. On that much, indeed, the entire *Williams* Court agreed. Amid all the fracturing that case produced, every Justice defined its primary question in the same way: whether the absent analyst's statements were introduced for their truth. The parties here likewise concur in that framing. If Rast's statements came in to establish the truth of what she said, then the Clause's alarms begin to ring; but if her statements came in for another purpose, then those alarms fall quiet.

Where the parties disagree, of course, is in answering that purpose question. Smith argues that the "for the truth" condition is satisfied here, just as much as in *Melendez-Diaz* or *Bullcoming*. In his view, Rast's statements were conveyed, via Longoni's testimony, to establish that what she said happened in the lab did in fact happen. Or put more specifically, those statements were conveyed to show that she used certain standard procedures to run certain tests, which enabled identification of the seized items. The State argues that Rast's statements came into evidence not for their truth, but instead to "show the basis" of the in-court expert's independent opinion.. And to defend that characterization, Arizona emphasizes that its Rule of Evidence 703 (again, like Illinois's) authorizes the admission of such statements only for that purpose—*i.e.*, to "help[ ] the jury [to] evaluate" the opinion testimony.

Evidentiary rules, though, do not control the inquiry into whether a statement is admitted for its truth. That inquiry, as just described, marks the scope of a federal constitutional right. And federal constitutional rights are not typically defined—expanded or contracted—by reference to non-constitutional bodies of law like evidence rules.[4]

[4] One qualification is appropriate. If an evidentiary rule reflects a long-established understanding, then it might shed light on the historical meaning of the Confrontation Clause. But that could not possibly be said of Rule 703—the rule Arizona cites to support the introduction of basis evidence. On the contrary, that rule is a product of the late-20th century, and was understood

The confrontation right is no different, as *Crawford* made clear. "Where testimonial statements are involved," that Court explained, "the Framers [did not mean] to leave the Sixth Amendment's protection to the vagaries of the rules of evidence." Justice Thomas reiterated the point in *Williams*: "[C]oncepts central to the application of the Confrontation Clause are ultimately matters of federal constitutional law that are not dictated by state or federal evidentiary rules." (opinion concurring in judgment). We therefore do not "accept [a State's] nonhearsay label at face value. Instead, we conduct an independent analysis of whether an out-of-court statement was admitted for its truth, and therefore may have compromised a defendant's right of confrontation.

[T]ruth is everything when it comes to the kind of basis testimony presented here. If 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 the truth of what it asserts. How could it be otherwise? "The whole point" of the prosecutor's eliciting such a statement is "to establish—*because of the [statement's] truth*—a basis for the jury to credit the testifying expert's" opinion. *Stuart*, 586 U. S., at ——, 139 S.Ct. at 37 (Gorsuch, J., dissenting from denial of certiorari) (emphasis in original). Or said a bit differently, the 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. So "[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." A State may use only the former label, but in all respects the two purposes merge.

Or to see the point another way, consider it from the factfinder's perspective. In the view of the Arizona courts, an expert's conveyance of another analyst's report enables the factfinder to "determine whether [the expert's] opinion should be found credible." *Karp*, 236 Ariz. at 124, 336 P.3d at 757. That is no doubt right. The jury cannot decide whether the expert's opinion is credible without evaluating the truth of the factual assertions on which it is based. See D. Kaye, D. Bernstein, A. Ferguson, M. Wittlin, & J. Mnookin, The New Wigmore: Expert Evidence § 5.4.1, p. 271 (3d ed. 2021). If believed true, that basis evidence will lead the jury to credit the opinion; if believed false, it will do the opposite. But that very fact is what raises the Confrontation Clause problem. For the defendant has no opportunity to challenge the veracity of the out-of-court assertions that are doing much of the work.

Rast's statements came in for their truth, and no less because they were admitted to show the basis of Longoni's expert opinions. All 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 had performed certain tests according to certain protocols and gotten certain results. And likewise, the jury could credit Longoni's opinions identifying the substances only because it too accepted the truth of what Rast reported about her lab work (as conveyed by Longoni). If Rast had lied about all those matters, Longoni's expert opinion would have counted for nothing, and the jury would have been in no position to convict. So the State's basis evidence—more precisely, the truth of the statements on which its expert relied—propped up its whole case. But the maker of those statements was not in the courtroom, and Smith could not ask her any questions. Approving that practice would make our decisions in *Melendez-Diaz* and *Bullcoming* a dead letter, and allow for easy evasion of the Confrontation Clause.

III

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from the start to depart from past practice. See … Advisory Committee's Notes on Fed. Rule Evid. 703, 28 U. S. C. App., p. 393.

What remains is whether the out-of-court statements Longoni conveyed were testimonial. As earlier explained, that question is independent of everything said above: To implicate the Confrontation Clause, a statement must be hearsay ("for the truth") and it must be testimonial—and those two issues are separate from each other. The latter, this Court has stated, focuses on the "primary purpose" of the statement, and in particular on how it relates to a future criminal proceeding.[5] A court must therefore identify the out-of-court statement introduced, and must determine, given all the "relevant circumstances," the principal reason it was made. *Bryant*, 562 U.S., at 369.

But that issue is not now fit for our resolution. The question presented in Smith's petition for certiorari did not ask whether Rast's out-of-court statements were testimonial. Instead, it took as a given that they were. That presentation reflected the Arizona Court of Appeals' opinion. As described earlier, that court relied on the "not for the truth" rationale we have just rejected. It did not decide whether Rast's statements were testimonial. Nor, to our knowledge, did the trial court ever take a stance on that issue. Because "we are a court of review, not of first view," we will not be the pioneer court to decide the matter. And indeed, we are not sure if there remains a matter to decide. Smith argues that the State has forfeited the argument.

But we offer a few thoughts, based on the arguments made here, about the questions the state court might usefully address if the testimonial issue remains live. First, the court will need to consider exactly which of Rast's statements are at issue. In this Court, the parties disputed whether Longoni was reciting from Rast's notes alone, or from both her notes and final report. In Arizona's view, everything Longoni testified to came from Rast's notes; although he at times used the word "report," a close comparison of the documents and his testimony reveals (the State says) that he meant only the notes. Smith disagrees, taking Longoni's references to the "report," as well as the notes, at face value. According to Smith, Longoni "relied on both" documents and in fact "treated them as a unit," with the notes "attached" to the report as "essentially an appendix." Resolving that dispute might, or then again might not, affect the court's ultimate disposition of Smith's Confrontation Clause claim. We note only that before the court can decide the primary purpose of the out-of-court statements introduced at Smith's trial, it needs to determine exactly what those statements were.

In then addressing the statements' primary purpose—why Rast created the report or notes—the court should consider the range of recordkeeping activities that lab analysts engage in. After all, some records of lab analysts will not have an evidentiary purpose. The United States as *amicus curiae* notes, for example, that lab records may come into being primarily to comply with laboratory accreditation requirements or to facilitate internal review and quality control. Or some analysts' notes may be written simply as reminders to self. In those cases, the record would not count as testimonial. To do so, the document's primary purpose must have "a focus on court." And again, the state court on remand should make that assessment as to each record whose substance Longoni conveyed.

IV

Our holding today follows from all this Court has held about the Confrontation Clause's application to forensic evidence. 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. Neither may the State introduce those statements through a surrogate analyst who did not participate in their creation. And nothing changes if the

[5] Given that focus, the mine-run of materials on which most expert witnesses rely in forming opinions—including books and journals, surveys, and economic or scientific studies—will raise no serious confrontation issues. See Brief for United States as *Amicus Curiae* 13–17 (giving examples of classic expert-basis evidence). That is because the preparation of those materials generally lacks any "evidentiary purpose." *Melendez-Diaz*, 557 U.S., at 311.

surrogate—as in this case—presents the out-of-court statements as the basis for his expert opinion. Those statements 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.

That means Arizona does not escape the Confrontation Clause just because Rast's records came in to explain the basis of Longoni's opinion. To address the additional issue of whether Rast's records were testimonial (including whether that issue was forfeited), we remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

J. THOMAS, concurring in part.

I join the Court in all but Part III of its opinion. The Sixth Amendment's Confrontation Clause provides: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." This Clause bars the admission of an absent witness's testimonial statements for their truth, unless the witness is unavailable and the defendant previously had an opportunity to cross-examine that witness. See *Crawford v. Washington*. Today, the Court correctly concludes 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."

But, a question remains whether that analyst's statements were testimonial. I agree with the Court that, because the courts below did not consider this question, we should remand for the Arizona Court of Appeals to answer it in the first instance. But, I disagree with the Court's suggestion that the Arizona Court of Appeals should answer that question by looking to each statement's "primary purpose." I continue to adhere to my view 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."* *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in judgment). As I have previously explained, "[w]itnesses ... are those who bear testimony. And testimony is a solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Davis*, 547 U.S., at 836. This understanding is grounded in "[t]he history surrounding the right to confrontation," which "was developed to target particular practices that occurred under the English bail and committal statutes passed during the reign of Queen Mary, namely, the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." Rather than attempt to divine a statement's "primary purpose," I would look for whether the statement is "similar in solemnity to the Marian examination practices that the Confrontation Clause was designed to prevent." *Williams*, 567 U.S., at 11. In my view, the Arizona Court of Appeals should consider on remand whether the statements at issue have the requisite formality and solemnity to qualify as testimonial. If they do not, the Confrontation Clause poses no barrier to their admission.

J. GORSUCH, concurring in part.

* The Confrontation Clause "also reaches the use of technically informal statements when used to evade the formalized process." *Davis v. Washington*, 547 U.S. 813, 838 (2006) (Thomas, J., concurring in judgment in part and dissenting in part).

I am pleased to join the Court's opinion holding that, when an expert presents another's statements as the "basis" for his own opinion, he is offering those statements for their truth.

I cannot join, however, the Court's discussion in Part III about when an absent analyst's statement might qualify as "testimonial." … Nor am I entirely sure about the guidance found in Part III. The Sixth Amendment protects the accused's "right ... to be confronted with the witnesses against him." As the Court sees it, whether a statement being offered for its truth and tendency to inculpate a defendant triggers that right depends "on the 'primary purpose' of the statement, and in particular on how it relates to a future criminal proceeding." I cannot help but wonder whether that is correct

I am concerned about the confusion a "primary purpose" test may engender. Does it focus, for example, on the purposes an objective observer would assign to a challenged statement, the declarant's purposes in making it, the government's purposes in " 'procur[ing]' " it, or maybe still some other point of reference? Even after we figure out a statement's purposes, how do we pick the primary one out of the several a statement might serve? Or determine in exactly what way that purpose must "relat[e] to a future criminal proceeding"? And if we fail to find some foothold in text and historical practice for resolving these questions, how can judges answer them without resort to their own notions of what would be best?

J. ALITO, with whom C.J. ROBERTS joins, concurring in the judgment.

Today, the Court inflicts a needless, unwarranted, and crippling wound on modern evidence law. There was a time when expert witnesses were required to express their opinions as responses to hypothetical questions. But eventually, this highly artificial, awkward, confusing, and abuse-laden form of testimony earned virtually unanimous condemnation. More than a century ago, judges, evidence scholars, and legal reform associations began to recommend that courts abandon the required use of hypotheticals, and more than 50 years ago, the Federal Rules of Evidence did so. Now, however, the Court proclaims 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. Instead, the Court suggests that such experts revert to the form that was buried a half-century ago. There is no good reason for this radical change.

I

To explain why I think the Court has gone far astray, I begin with a brief look at the history of expert testimony—and particularly, why the hypothetical-question requirement was replaced by the (superior) mode of testimony allowed by the Federal Rules of Evidence

A

Throughout the 19th and into the 20th century, experts generally testified in the form of an opinion in response to a hypothetical question. An attorney would ask an expert to assume that certain facts were true and would then

query whether a particular conclusion could conceivably follow. See 3 S. Saltzburg, M. Martin, D. Capra, & J. Berch, Federal Rules of Evidence Manual § 703.02[1] (13th ed. 2023).

This procedure was highly artificial because it bore little resemblance to the way in which experts actually form opinions. And the procedure surely did not conform to the way lay jurors think and speak.

The procedure's aim was to prevent a jury from jumping to the conclusion that the facts packed into the hypothetical were true, but it is questionable whether the practice achieved that objective. [There are] many problems with hypothetical questioning.

For one, hypothetical questions were "difficult for the attorneys to frame, for the court to rule on, and for the jury to understand." M. Ladd, Expert Testimony, 5 Vand. L. Rev. 414, 425 (1952). Like the question above, the hypotheticals were often "so built up and contrived" that they were impossible for either the jury or the expert to follow. 1 J. Wigmore, Evidence 1095 (2d ed. 1923) (1 Wigmore 2d); accord, Ladd 427. One case involved a hypothetical that extended over "eighty-three pages of typewritten transcript, and an objection involved in fourteen pages more of the record." *Treadwell v. Nickel*, 194 Cal. 243, 266 (1924). For another, lawyers often used hypotheticals as a preview of their closing arguments. Because opposing counsel often disagreed for strategic reasons about which facts should be included in a hypothetical, constructing a hypothetical that the judge would permit was often a tricky and contentious business. If counsel did not include enough facts to satisfy opposing counsel, the hypothetical would be met with an objection, and its sufficiency would provide grist for an appeal. F. Rossi, Expert Witnesses 114 (1991). The threat of dragging out litigation led counsel to make their hypotheticals even longer and more confusing.

By the early-20th century, this form of testimony was scorned. In the second edition of his treatise, issued in 1923, Wigmore proclaimed the hypothetical question "that feature which does most to disgust men of science with the law of Evidence." Professor Charles T. McCormick described hypotheticals as "an obstruction to the administration of justice." Some Observations Upon the Opinion Rule and Expert Testimony, 23 Texas L. Rev. 109, 128 (1945) (McCormick).

This state of affairs sparked efforts to eliminate hypothetical questions as a requirement. Change began first in the courts, which allowed experts to sit through trial and then provide their opinion " 'upon the evidence.' " 3 C. Chamberlayne, Modern Law of Evidence §§ 2482, 2483 (1912). More formalized rule changes soon followed. In 1937, the Commissioners on Uniform State Laws incorporated a provision in their Model Expert Testimony Act that permitted experts to give their opinions without preliminarily disclosing their underlying facts or data. In 1972, the Federal Rules of Evidence followed suit with Rules 703 and 705, and many States made similar changes.

B

What replaced hypotheticals was the procedure exemplified by the Federal Rules of Evidence.[1] Rule 703 provides that an expert's opinion may be based on "facts or data in the case that the expert has been made aware of or

[1] I refer to the Federal Rules to illustrate the consequences of the Court's opinion. The witness in this case testified in an Arizona state court, and his testimony was therefore governed by the relevant state rules, which are virtually identical to the

personally observed." And "[u]nless the court orders otherwise," Rule 705 permits the expert to "state an opinion—and give the reasons for it—without first testifying to the underlying facts or data."

These facts or data need not be "admissible" in evidence, and they are not admitted for the truth of what they assert. Fed. Rule Evid. 703. Instead, these facts or data *may*, under some circumstances, be disclosed to the jury for a limited purpose: to assist the jurors in judging the weight that should be given to the expert's opinion. However, this is not allowed unless the court determines that "their probative value in helping the jury evaluate the [expert's] opinion substantially outweighs their prejudicial effect." And to prevent the jury from improperly relying on basis testimony for the truth of the matters it asserts, a judge *must* instruct the jury upon request to consider such evidence only to assess the quality of the expert's testimony (*i.e.*, to determine whether an expert's statements are reliable). See Advisory Committee's Notes on Fed. Rule Evid. 703; Fed. Rule Evid. 105 ("If the court admits evidence that is admissible ... for a [limited] purpose—but not ... for another purpose—the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly").

This modern system is more honest because it reflects how experts actually form opinions. See Advisory Committee's Notes on Fed. Rule Evid. 703, at 393 (describing the Rule as "designed to ... bring the judicial practice in line with the practice of the experts themselves when not in court"). It is simpler and less likely to confuse. And it avoids many of the pitfalls of the old procedure. It may not be perfect—and evidence scholars have proposed a variety of reforms—but it is unquestionably better than the old regime it replaced.

II

The Court seems to think that *all* basis testimony is necessarily offered for its truth. This is just plain wrong. What makes basis evidence "useful" is the assistance it gives the fact-finder in judging the weight that should be given to the expert's opinion. See Advisory Committee's Notes on Rule 703 (basis testimony may be brought before a jury to help it "evaluate the ... opinion"). And a trial judge must, upon request, instruct the jury to consider it only for that purpose. If a judge rules that basis evidence is *not* admitted for its truth and so instructs the jury, where does the Court discern a Confrontation Clause problem?

The only possible explanation is that the Court believes that juries are incapable of following such an instruction, but that conclusion is inconsistent with commonplace trial practice and with a whole string of our decisions. It is a routine matter for trial judges to instruct juries that evidence is admitted for only a limited purpose. And this Court has repeatedly upheld that practice—even in "situations with potentially life-and-death stakes for defendants" and even with respect to statements that are "some of the most compelling evidence of guilt available to a jury," *Samia v. United States*, 599 U.S. 635, 646–647 (2023). These decisions "credi[t] jurors by refusing to assume that they are either 'too ignorant to comprehend, or were too unmindful of their duty to respect, instructions' of the court." Indeed, we have described the assumption " 'that juries will follow the instructions given them by the trial judge' " as " 'crucial' " to "the system of trial by jury." *Marshall v. Lonberger*, 459 U.S. 422, 438, n. 6 (1983).

Federal Rules. Of course, the Arizona courts are free to interpret those rules as they see fit, and I do not address the question whether the witness's testimony was proper under Arizona law.

Our cases have recognized only one situation in which a limiting instruction is insufficient: where a defendant is directly incriminated by the extrajudicial statements of a non-testifying codefendant. *Bruton v. United States*, 391 U.S. 123 (1968). We have declined to extend that exception, and the evidence in question in *Bruton* cases is worlds away from an expert's basis testimony. If the Court thinks otherwise, it needs to explain why basis testimony falls into the *Bruton* category and creates a greater risk of juror confusion than all the other situations in which the Court has assumed that jurors are capable of following limiting instructions

III

The Court's assault on modern evidence law is not only wrongheaded; it is totally unnecessary. Today's decision vacates the Arizona court's judgment because the testifying expert's testimony was hearsay. I agree with that bottom line, but not because of the majority's novel theory that basis testimony is always hearsay. Rather, I would vacate and remand because the expert's testimony is hearsay under any mainstream conception, including that of the Federal Rules of Evidence. [At this point in his opinion, Justice Alito quoted passages in Longoni's testimony where he believed the prosecution overreached and clearly offered Rast's statements for the truth of their contents.] As it happens, I agree with the Court that Longoni stepped over the line and at times testified to the truth of the matter asserted. The prosecution asked Longoni on several occasions to describe the tests that Rast performed or to swear to their accuracy, and Longoni played along. He stated as fact that Rast followed the lab's "typical intake process" and that she complied with the "policies and practices" of the lab. He also testified that Rast used certain "scientific method[s]" to analyze the samples, such as performing certain tests or running a "blank." By asserting these facts as true, Longoni effectively entered inadmissible hearsay into the record, thus implicating the Confrontation Clause. The Court could have said that—and stopped there.

For more than a half-century, the Federal Rules of Evidence and similar state rules have reasonably allowed experts to disclose the information underlying their opinion. Because the Court places this form of testimony in constitutional doubt in many cases, I concur only in the judgment.

Questions

1. Justice Alito strongly defends Rule 703. However, does *Smith* expose the fundamental illogic of applying 703 in cases such as *Smith?* In effect, Longoni testifies to a conditional opinion: If Rast's findings are correct, then my opinion is that the samples consisted of illegal drugs. As a matter of logic, how can the trier of fact accept the truth of Longoni's opinion without positing the truth of Rast's findings? Like the lower courts, Justice Alito insists that an expert such as Longoni should be allowed to consider statements such as Rast's notes and report to establish the "basis" of his opinion. It is true that even if Rast's statement were false, Longoni's receipt of her statements would make his conclusion more reasonable. However, this is not a malpractice case in which the issue is the reasonableness of Longoni's conclusion. Isn't the question the accuracy of Longoni's opinion?

2. Will Justice Kagan's opinion rob Rule 703 of all or most of its utility? To be sure, the Confrontation Clause analysis does not apply either in a civil case or to non-testimonial statements in a criminal case. However,

as a practical matter, what is left of the Rule in a run-of-the-mill criminal case when it is clear that the out-of-court declarant made his or her statement for prosecutorial purposes?

3. Justice Gorsuch raises the nagging question of the proper test for determining whether a statement is testimonial under *Crawford.* He asks whether the dispositive question should be: Rast's perspective, the perspective of an objective observer considering the role Rast's notes and report played in the prosecutorial process, or the government's objective in procuring Rast's analysis. Does Justice Kagan's opinion lend any clarity to that question. Which perspective do you favor? Why?

4. What impact will the majority's decision have on the operation of forensic laboratories? Will it place an undue burden on them and strain their already thin resources? Counter to this argument, even in *Smith,* one laboratory employee, Longoni, had to testify. That will typically be the case. At the very least is the decision likely to affect the organization of laboratories, especially their arrangements for providing trial testimony? If you were the director of a forensic laboratory, what internal procedural changes would you implement in light of *Smith?*

5. Could the use of modern technology such as teleconferencing and two-way CCTV reduce any excessive burden that *Smith* might otherwise impose on laboratories? Note, *Mitigating the Prosecutors' Dilemma in Light of* Melendez-Diaz: *Live Two-Way Videoconferencing for Analyst Testimony Regarding Chemical Analysis,* 11 NEV. L. J. 793 (2011). It is true that some courts have held that the Confrontation Clause precludes presenting expert testimony in that fashion. *United States v. Bordeaux,* 400 F.3d 548 (8th Cir. 2005). However, there is a plausible argument that the use of such technology comports with the Confrontation Clause. Scott, *Confrontation Compromise: How Modern State Rules of Evidence Could Ensure Transparent Forensic Reports,* 56 CRIM. L. BULL. 670, 703 (2020); Comment, *Confronting Confrontation in a FaceTime Generation: A Substantial Public Policy Standard to Determine the Constitutionality of Two-Way Live Video Testimony in Criminal Trials,* 75 LA. L. REV. 175, 177, 211 (2014)(two-way video is an adequate "approximation of true physical confrontation").