Evidence

A Context and Practice Casebook

Third Edition

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Hello All,

Below please find a brief update to *Evidence: A Context and Practice Casebook*. You will find updates for *Smith v. Arizona* and *Diaz v. United States*, as well as a clarification of my analysis of FRE 609 and updated versions of FRE 106, 615, and 702.

As always, please feel free to contact me with any questions or comments. I hope you have a great semester.

Smith v. Arizona (Part I)

Smith v. Arizona's central holding is easy to distill and, I think, law students will understand its practical ramifications. It also may have opened up some uncertainty on the definition of "testimonial" statements due to the majority's somewhat vague articulations of the test. Based on that, I think writing up an analysis, rather than providing students with a fifteen-page excerpt, is the preferable course. This first analysis should be inserted on p. 475, immediately before Section D and immediately after the discussion of Williams v. Illinois:

Smith v. Arizona

In *Smith v. Arizona*, the Supreme took a step in clarifying the confusing *Williams* decision. Police discovered Jason Smith hiding in a shed with large quantities of what appeared to be drugs. He was charged with various drug offenses, and the state sent the seized items to a crime lab for scientific analysis. Analyst Elizabeth Rast ran forensic tests on the items and concluded that they contained usable quantities of methamphetamine, marijuana, and cannabis. Rast prepared a set of typed notes and a signed report about the testing. The state originally planned for Rast to testify about those matters at Smith's trial, but Rast stopped working at the lab prior to trial. So the state substituted another analyst, Greggory Longoni, to "provide an independent opinion on the drug testing performed by Elizabeth Rast." *Smith v. Arizona*, 144 S.Ct. 1785, 1795 (2024). At trial, Longoni conveyed to the jury what Rast's records revealed about her testing, before offering his "independent opinion" of each item's identity. Smith was convicted and argued on appeal that his Confrontation Clause rights were violated.

Writing for seven members of the Court, Justice Kagan began her analysis by exploring whether the out-of-court statements were offered to prove the truth of the matter asserted. If they were not, the Confrontation Clause would not be implicated because "the need to test an absent witness ebbs when her truthfulness is not at issue." *Id.* at 1792. The state argued that Rast's statements were offered not for their truth but to "show the basis" of Longoni's independent opinion (an argument that four justices accepted in *Williams*). Justice Kagan rejected that argument and concluded that

> [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? …. 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.

Id. at 1798. Thus, because Longoni could only opine that the tested substances were marijuana, methamphetamine, and cannabis because he accepted the truth of what Rast had reported about her work in the lab, her reports were offered for their truth. Indeed, if Rast had lied, Longoni's expert opinion would have counted for nothing.

Due to the procedural posture of the case, whether Rast's reports were testimonial was not before the court, yet the majority opinion did "offer a few thoughts" on the matter in which five of the justices agreed. Justice Kagan noted that "testimonial" hearsay "focuses on the primary purpose of the statement, and in particular on how it relates to a future criminal proceeding." *Id.* at 1801. Earlier in the opinion, she noted three separate tests for "testimonial" statements based upon whether the statement was a police interrogation, an ongoing emergency, or a certificate of results of forensic analysis. *Id.* at 1792. Justice Gorsuch did not join this portion of the opinion and noted the confusion that a primary purpose test engenders. Does it focus on an objective observer, the declarant's purpose, and/or the government's purpose in procuring it? If one can figure out a statement's purpose, how does one pick the primary one? *Id.* at 1804 (Gorsuch, J., concurring).

Thus, *Smith* may hint at future tension over the definition of "testimonial" statements that upcoming cases may need to resolve. Is there a general definition for the term or is it defined by its context? Whose purpose governs? Resolution of these issues awaits another day.

Smith v. Arizona (Part II)

As Smith clarified Williams and the book spends a good deal of time deconstructing Williams in Chapter 10, the Author's Note on page 540 can be amended as follows, with a Smith analysis in place of Williams:

Author's Note: Confrontation Clause and Expert Evidence

As you might recall from Bullcoming v. New Mexico in Chapter 8, Justice Sotomayor issued a concurring opinion that stressed the limited scope of the majority's holding. In particular, Justice Sotomayor made clear that the Court's holding in Bullcoming did not necessarily extend to a situation "in which an expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence." Justice Sotomayor's concurrence alluded to Federal Rule of Evidence 703, which permits a testifying expert witness to discuss "facts or data" that are not admitted into evidence as long as experts in the particular field would reasonably rely on those kinds of facts.

This scenario would play out if a prosecutor, instead of offering a testimonial written report, decided to call an expert who would base her opinion on the report without offering it into evidence. So, on the one hand, FRE 703, if its mandates were met, would allow this testimony because it is considered reliable. The Confrontation Clause, however, focuses on cross-examination, not reliability, as its procedural mandate. As the author of the testimonial report is not being cross-examined, the Confrontation Clause would seem to be violated. So, if an expert

formulates her opinions based upon reliable, but testimonial, hearsay, how should the court resolve this dilemma?

Courts have responded to this dilemma by drawing a distinction between an expert's hearsay that is based on general knowledge and an expert's hearsay relating to case-specific facts. Experts usually acquire the general knowledge in their field through hearsay, such as when a medical doctor learns how generally to treat a broken wrist through knowledge obtained from textbooks or medical journals. Typically, this general knowledge has not been subject to exclusion on hearsay grounds. Therefore, an expert can allude to this hearsay in her testimony (e.g., "It is generally accepted that the best way to treat a broken wrist is with a cast for six weeks").

Case-specific facts are treated differently, however. A case-specific fact is one that relates to the particular events and participants alleged to have been involved in the case being tried, such as how, when, and/or where a particular plaintiff broke his wrist. When an expert has no personal knowledge of a case-specific fact, then an expert has traditionally been precluded from relating it to the finder of fact. Instead, a party must establish case-specific facts by calling witnesses with personal knowledge of those facts. An expert may then testify about more generalized information to help jurors understand the significance of those case-specific facts.

An expert's attempt to discuss case-specific facts for which he had no personal knowledge was the focus of the Supreme Court in *Smith v. Arizona* (discussed previously in Chapter 8), and the Court reached a specific resolution: "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." *Smith v. Arizona,* 144 S.Ct. 1785, 1798 (2024). Therefore, the proponent of the evidence must either (i) find an appliable hearsay exception or (ii) admit the evidence through a different witness (which would then allow the expert witness to be asked a hypothetical question based on the evidence).

Let us unfold a hypothetical on this tricky issue. Assume in a vehicular manslaughter case, the prosecution offers an expert to testify that, based on the skid marks of the car, the car was travelling at fifty miles per hour. At trial, the expert explains that accident reconstruction experts rely on a mathematical formula to determine speed based on the length of the skid mark. Is this testimony hearsay? No, it is not; it is general knowledge that is not excluded.

Now assume that the expert then testifies that the skid mark in question was 100 feet long and that the expert is aware of this fact because a police officer who measured the skid mark told him the measurement. Is this testimony hearsay? Yes, according to *Smith*, it is. This case-specific fact is offered for its truth because the validity of the expert's opinion on the speed of the car turns on the truth of the statement made by the officer. If the skid mark is not 100 feet long, then the expert's conclusion as to the speed of the vehicle is incorrect. So, the prosecution has two options. First, they can try to find a hearsay exception for the police officer's statement, which would allow the expert to testify to that statement in court. Second, they could bring in the evidence through another means, such as putting the police officer on the stand to testify as to her measurements. After the police officer has testified the expert can be asked a hypothetical

question based on the evidence, such as, "if you assume that the skid mark was 100 feet long, how fast was the car moving?"

Note the Confrontation Clause implications of those two paths. If the police officer testifies as to her measurements, she will not be relying on hearsay and can be cross-examined. If the expert testifies as to the police officer's hearsay statement, the defendant cannot cross-examine the police officer. As this statement is likely testimonial (because it is a police officer relaying information to a prosecution expert for use at trial), we have a violation of the Confrontation Clause if the officer is unavailable, and the defendant did not have a prior opportunity for cross-examination. Therefore, even if the police officer's statement satisfies a hearsay exception, it will be inadmissible.

Accordingly, FRE 703 encompasses many variables when an expert attempts to disclose facts upon which the expert relied. Remember to ask yourself whether the fact is general knowledge or case-specific. Then, if it is case-specific, you must determine whether the prosecution expert had independent knowledge of the fact or if the expert received the fact through an out-of-court statement. If it is an out-of-court statement, you must assess whether it is being offered for its truth, and, if so, you must find an appropriate hearsay exception. Once you have found a hearsay exception, you still must determine whether the hearsay statement is testimonial. If it is, it must meet the mandates of the Confrontation Clause.

Diaz v. United States

The Supreme Court recently illuminated the scope of FRE 704(b) in Diaz v. United States. Justice Thomas's majority opinion and Justice Gorsuch's dissent engaged in a textualist dispute over the meaning of the word "about" in FRE 704(b): does it mean that "an opinion" about a defendant's mental state or condition is prohibited but general references are allowed, as Justice Thomas believes? Or does it mean something more broad – namely that any opinion or general references "concerning, regarding, or in reference to whether the defendant, while committing a charged criminal act, had the requisite mental state to convict" is prohibited, as Justice Gorsuch believes?

I believe that the easiest way to break down the dispute and explain the scope of the holding is through a problem based on the case, which can be assigned on page 523 (before United States v. Locascio):

Problem 10-3A

Delilah Diaz was stopped at a port of entry on the United States-Mexico border, and border patrol officers found more than 54 pounds of methamphetamine hidden in the vehicle. The government was required to prove that Diaz "knowingly" transported drugs, and her defense was that she did not know drugs were hidden in the car. In response, the government called an expert witness who testified that "most" drug couriers know they are transporting drugs. The expert did not, however, offer an opinion on whether the defendant herself knew she was transporting drugs. Diaz objects to the testimony on the ground that the expert's opinion violates

FRE 704(b) in that the expert stated "an opinion about whether the defendant did or did not have a mental state…that constitutes an element of the crime charged." How do you rule?

Problem 10-3A Answer

- Based on: *Diaz v. United States*, 144 S.Ct. 1727 (2024).
- Pedagogical goals: to explore when an expert offers an opinion directly on a defendant's mental state.
- As the expert did not express an opinion about whether the defendant *herself* knowingly transported methamphetamine, his opinion is admissible. The expert's testimony about "most" drug couriers does not necessarily describe Diaz's mental state, and therefore the expert did not express an opinion about whether Diaz *herself* knowingly transported methamphetamine.
- But isn't the expert's testimony the functional equivalent of stating an opinion on the defendant's mental state (e.g., "most people have this knowledge and she's like most people")? No, according to the court, because an opinion on *most* couriers is not an opinion on *all* couriers. The jury was free to determine whether Diaz was part of the group of couriers who knew they were carrying drugs, and so the ultimate issue of whether she possessed the requisite mental state was left to the jury's judgment.
- But didn't the expert offer testimony "about" a mental state in contravention of FRE 704(b)? No, according to the court, as FRE 704(a) expressly allows opinions on an ultimate issue. The exception in FRE 704(b) is narrowly limited to whether the defendant did or did not have a mental state, and the expert did not offer an opinion "about" that precise topic.
- Note: on cross-examination of the expert, he admitted that he was not involved in the defendant's case and that the Government itself was aware of cases involving unknown couriers – thus the jury was aware that unknowing couriers exist and that there was evidence to suggest she could be one of them.
- A grayness does exist in the majority's logic, as pointed out by the dissent: what if the expert testified that "In my experience, 99% of drug couriers know"? Would that opinion cross the line? If so, how close did the expert's use of the term "most" come to that line?

FRE 609(a)(2)

With much thanks to the thoughtful comments of Prof. Gregory Mitchell, I believe that a sentence in my exploration of FRE 609(a)(2) is inaccurate. That line, on page 238, reads, "But do not forget that deceit, untruthfulness, or falsification must be an **element** of the crime in order to qualify under FRE 609(a)(2)."

A better encapsulation of the rule would be: "Under FRE 609(a)(2) an act of deceit, untruthfulness, or falsification must have been used to prove the elements of the crime but need not have been an element of the crime. Admission of the witness's conviction occurs when dishonesty or false statement is integral to the very act constituting the crime. In other words, even if it is not an element, if the factfinder had to find, or the defendant had to admit, an act of

dishonesty or false statement in order for the witness to have been convicted, then the conviction is admissible under FRE 609(a)(2)."

For an illustrative case, *see United States v. Jefferson*, 623 F.3d 227, 234-235 (5th Cir. 2010) (one can be convicted for obstructing justice without proving dishonesty or false statement, but defendant's prior conviction rested on claims that he "knowingly and corruptly" tried to persuade witness to lie, so it fit FRE 609(a)(2) and was automatically admissible).

My apologies for the confusion, and please let me know if you have any questions.

2023 FRE Amendments

The following are three amended rules, with a brief commentary on FRE 702.

Rule 106. Remainder of or Related Statements

If a party introduces all or part of a statement, an adverse party may require the introduction, at that time, of any other part — or any other statement — that in fairness ought to be considered at the same time. The adverse party may do so over a hearsay objection.

Rule 615. Excluding Witnesses from the Courtroom; Preventing an Excluded Witness's Access to Trial Testimony

(a) Excluding Witnesses. At a party's request, the court must order witnesses excluded from the courtroom so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:

(1) a party who is a natural person;

(2) one officer or employee of a party that is not a natural person, if that officer or employee has been designated as the party's representative by its attorney;

(3) any person whose presence a party shows to be essential to presenting the party's claim or defense; or

(4) a person authorized by statute to be present.

(b) Additional Orders to Prevent Disclosing and Accessing Testimony. An order under (a) operates only to exclude witnesses from the courtroom. But the court may also, by order:

(1) prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom; and

(2) prohibit excluded witnesses from accessing trial testimony.

Rule 702. Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

In terms of the amendment to FRE 702, the new rule clarifies that the proponent of expert testimony has the burden of establishing all four criteria by a preponderance of the evidence. The changes to 702(d) require a tighter connection between experts' opinions and the methods they use to prevent experts from exaggerating the conclusions that can be drawn from applying a given method. The new rule emphasizes a judge's role in first determining whether a specific opinion is "more likely than not" supported by an expert's methodology.