Contact Us: forensicCOE@rti.org
RTI International
3040 E. Cornwallis Road PO Box 12194
Research Triangle Park, NC 27709

Topic of Interest: Forensic Testimony, *Smith v. Arizona*

On September 29, 2023, the Supreme Court granted certiorari for the case of *Smith v. Arizona* (docket 22-899).[1] The key question before the Court is "whether the Confrontation Clause of the Sixth Amendment permits the prosecution in a criminal trial to present testimony by a substitute expert conveying the testimonial statements of a nontestifying forensic analyst, on the grounds that (a) the testifying expert offers some independent opinion and the analyst's statements are offered not for their truth but to explain the expert's opinion, and (b) the defendant did not independently seek to subpoena the analyst."[2] Members of the forensic and court communities are awaiting the Supreme Court's response. Depending on its stance, this decision could result in myriad implications pursuant to the admission of forensic evidence compliant with the Confrontation Clause, particularly regarding substitute witnesses.

Legal Definitions

Certiorari: "The primary means to petition the court for review is to ask it to grant a *writ of certiorari.* This is a request that the Supreme Court order a lower court to send up the record of the case for review."[12]

Confrontational Clause: "The Confrontation Clause of the Sixth Amendment [to the United States Constitution] guarantees a criminal defendant the right 'to be confronted with the witnesses against him.'"[13]

Case Synopsis

In this case, the State of Arizona charged the defendant with various felony drug offenses. Substances seized at the time of arrest were submitted to the Arizona Department of Public Safety's (DPS) crime laboratory for forensic analysis.[3] According to the Petition for a Writ of Certiorari, the forensic scientist who conducted the testing concluded that the submitted substances were methamphetamine, marijuana, and cannabis. These observations (e.g., substance weights) and the tests performed (e.g., chemical color tests, microscopic examination, gas chromatography and mass spectrometry with resultant charts) were documented in the forensic scientist's case notes. However, the forensic scientist was no longer employed at DPS at the time of trial, and the State called another DPS forensic scientist to testify in their place. This substitute witness formed an "independent opinion" that the substances were methamphetamine, marijuana, and cannabis by relying on the original analyst's case notes, which were not entered into evidence at trial. Despite being familiar with the procedures regarding drug testing at the DPS crime laboratory, the substitute witness was not directly involved in testing the substances in this particular case. During cross-examination, the substitute witness acknowledged that it would have taken less than 3 hours to retest the evidence. The defendant was found guilty by the jury of "possession of marijuana for sale and possession of methamphetamine, cannabis, and drug paraphernalia."[4]

Related Decisions

The Supreme Court has previously qualified forensic reports as testimonial, asserting that if entered into evidence, the Confrontation Clause is invoked.[5, 6] In both *Melendez-Diaz v. Massachusetts (2009)* and *Bullcoming v. New Mexico (2011)*, the original examiners' reports were admitted into evidence, but the respective analysts were not called to testify. The specific question in the current case more closely relates to *Williams v. Illinois* (2012), in which a forensic specialist testified that the evidentiary DNA profile, generated by an external company, "matched" the DNA profile of the defendant from a DNA database search. Although the generation of the DNA profile itself was foundational to the testifying analyst's

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conclusions, the company's reports were not entered into evidence, and the technicians involved in the process were not called to testify. In a plurality decision, the Supreme Court determined that the defendant's confrontation rights were not violated.[7]

Considerations

The Supreme Court has broached various nuances related to the admission of forensic evidence, substitute testimony, and the fulfillment of the defendant's right to confrontation. The ruling in this case is expected to provide a broader understanding of what is permissible relative to the Confrontation Clause. The Court has acknowledged that "[t]he Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination,"[5] and "notice-and-demand procedures… can reduce burdens on forensic laboratories."[6] Nevertheless, there are numerous situations, including the unavailability of the original analyst or resource considerations regarding obtaining the original analyst, where substitute testimony is more appealing than the alternative solutions.

If the original analyst is unavailable—which could be because of several reasons (e.g., pre-planned time off, family or military leave, deceased)—retesting the evidence, assuming there is sample remaining, is an option to attempt to satisfy the Confrontation Clause. However, it does not guarantee that future scheduling conflicts will be avoided. Retesting considerations include wait time and agency circumstances, such as the availability of analysts in the required discipline, agency backlog, and policies and procedures regarding retesting and expedited testing. Cost is an additional consideration; according to Project FORESIGHT, the median cost to an agency to issue a report varies widely (from $66 to $17,971), depending on the discipline and laboratory.[8]

Another scenario involves the original analyst being tentatively available but no longer employed by the testing agency. This is a realistic possibility given that analyst retention is an acknowledged challenge in forensic communities.[9] Bringing in the analyst to testify would satisfy the Confrontation Clause, but it can be cumbersome or costly, especially if the analyst is outside the court's vicinity. The testing agency may bear the additional responsibility of locating the analyst—who no longer has an obligation to communicate with the agency—and subpoenaing an analyst who may be out of state can be tricky to the issuing party. Resource considerations include compensating the analyst for the time spent traveling, waiting, and testifying, in addition to reimbursing them for lodging, meals, and transportation. Moreover, the implicit job function of testimony associated with the analyst's previous employment is no longer a forefront concern and can result in scheduling issues between the court and the analyst. In particular, this applies to court communities accustomed to subpoenaing analysts for weeks at a time with little insight as to the specific date the analyst can expect to testify.

Other situations that may be easily navigated with respect to the Confrontation Clause may arise. For example, some jurisdictions allow virtual testimony, assuming the decision is consensual, courts are equipped to do so, and the appropriate safeguards are in place.[10] Alternatively, the court may encounter more challenging circumstances, such as a cold case in which the original analyst is deceased and there is no sample remaining to retest.

Regardless of the forthcoming ruling by the Supreme Court, forensic analysts' thorough documentation of their examinations, conclusions, and adherence to their agencies' operating procedures remain key

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attributes to providing reliable testimony. Considering this, some notable questions that forensic analysts may ask themselves include the following:

- How may the ruling be applied to different forensic disciplines?
- If I am called to testify to an independent opinion based on another expert's notes, what language is appropriate to convey the limitations of my testimony and scope of my findings?
- Could another examiner, using my notes, form an independent conclusion?
- Do my agency's policies and procedures necessitate adequate documentation of my analysis?
- Are my recorded notes sufficient to provide reliable testimony if (1) considerable time passes between the analysis and testimony or (2) if I am no longer employed by the testing agency?

The Supreme Court is expected to hear this case in January 2024.[11]

Citations

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