Criminal Procedure

Confronting Confrontation

By Greg May

In *U.S. v. Larson*, 495 F.3d 1094 (9th Cir. 2007), an en banc 9th U.S. Circuit Court of Appeals resolved an apparent three-way intra-circuit split on the standard of review for Confrontation Clause challenges that are based on limitations placed on cross-examination. The 15-judge panel unanimously settled the issue — a unique point of agreement in a decision that split 4-7-4 on the merits.

Making the standard of review dependent on the degree to which cross examination is limited is unnecessary.

Unfortunately, the court's statement of its adopted rule appears to split these Confrontation Clause challenges into two classes, based on the degree to which the cross-examination is limited. It also applies a separate standard of review to each class. The *Larson* court's explanation, however, makes it unclear whether this was the outcome it intended.

'Larson' Decision

The defendants in *Larson* claimed that their Confrontation Clause rights were violated when the court refused to let two prosecution witnesses answer questions about the mandatory minimum sentences they would face if they did not testify for the prosecution. One witness, Joy Lynn Poitra, answered such a question before the court sustained the prosecutor's objection and told the jury that the minimum sentence was a matter for the court to determine. Based on this ruling, defense counsel did not even ask the question of another witness, Rick Lee Lamere.

The original panel affirmed the convictions. The en banc panel found no Confrontation Clause violation regarding Poitra, because she answered the question and her answer was not stricken, thus giving the jury a fair indication of her motive to testify for the prosecution. The court found a Confrontation Clause violation as to Lamere's testimony, because he could not be questioned at all about the mandatory minimum sentence he faced and thus the defendants were unable to demonstrate his motivation to lie. However, the court found the error was harmless and affirmed the convictions.

Standard of Review

Citing three lines of cases applying *de novo*, abuse of discretion, and a "combined" approach to Confrontation Clause appeals challenging based on limits imposed on cross-examination, the court concludes that "the third approach is most appropriate": "We hold that the following approach should be used to review whether a trial court improperly restricted a defendant from cross-examining a prosecution witness: If the defendant raises a Confrontation Clause challenge based on the exclusion of an area of inquiry, we review *de novo*. In reviewing a limitation on the scope of questioning within a given area, we recognize that 'trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.' *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986). A challenge to a trial court's restrictions on the manner or scope of cross-examination on nonconstitutional grounds is thus reviewed for abuse of discretion" (footnote omitted).

The defense bar reacted immediately. Federal Public Defender Steve Kalar suggested, "[I]t can't hurt to complain in the trial transcript that a court is completely barring inquiry into an entire subject-area (rather than limiting cross within it). Salt the record thus, and you might earn yourself a better standard of review on appeal." Posting of Steven Kalar to 9th Circuit Blog (Aug. 2, 2007) http://circuit9.blogspot.com (Aug. 2, 2007, 3:39 p.m.) ("Kalar") (in comments).

This distinction between complete exclusion and mere limitation is almost sure to prove unmanageable. Kalar warns of "pitched battles" over the issue (in main post). University of Michigan Law

School professor Richard Friedman said, "I wonder how tenable that distinction will be; 'area of inquiry' is not a self-defining term." The Confrontation Blog, http://confrontationright.blogspot.com (Aug. 3, 2007, 4:14 p.m.).

This untenable distinction should not have to be drawn at all. Reconciling the *Larson* decision to a single standard of *de novo* review in Confrontation Clause challenges, regardless of the scope of the limitation on cross-examination, clarifies that this distinction is unnecessary.

Confusing Rationale

There are several indicia in *Larson* that the Court of Appeals was advocating a single, *de novo*, standard of review. Both the line of cases whose rule the court purports to adopt and the sister circuit cases that the court says it "brings [the 9th Circuit] in line with" review limits on cross-examination for abuse of discretion only so long as the limitation does not implicate the Confrontation Clause. Each states that whether a limitation on cross-examination results in a Confrontation Clause violation is reviewed *de novo*. (See *Larson* (describing these cases through parenthetical remarks).

The court even cites one of the 9th Circuit cases to support its position that its adopted rule "recognizes that whether there has been a Confrontation Clause violation is ultimately a question of law that must be reviewed *de novo*." This is also consistent with the first line of cases cited by the court in the purported three-way split. Further, this approach is consistent with *Larson*'s distinction between constitutional and nonconstitutional challenges, with the latter reviewed for abuse of discretion.

All these factors suggest the analysis demonstrated in the sister circuit cases. The existence of a Confrontation Clause error is reviewed *de novo*. If there is no constitutional error, or none is claimed, then the evidentiary ruling is reviewed for abuse of discretion.

Unfortunately, enough contradictory indicia in *Larson* cloud this interpretation. The court claims its standard is consistent with *Van Arsdall* because the Supreme Court stated in that case that "insofar as the Confrontation Clause is concerned," a trial court has discretion to limit questioning. Worse, the court explicitly states that its Confrontation Clause review is governed in this case by the abuse-of-discretion standard because defendants "challenge the district court's limitation on the scope of cross-examination within an area of inquiry: the biases and motivations to lie of the Government's cooperating witnesses."

Reconciling Contradictions

Where review is for abuse of discretion, the trial court is deemed to have abused its discretion if its ruling is based on an incorrect legal conclusion. See *Koon v. U.S.*, 518 U.S. 81 (1996). Because *de novo* review generally applies to legal issues (*Harman v. Apfel*, 211 F.3d 1172 (9th Cir. 2000), a discretionary ruling that rests on a legal conclusion is effectively subject to the *de novo* review standard applied to the underlying legal issue.

In this context, restrictions on cross-examination are within a trial court's discretion, but the trial court abuses its discretion when the restriction is based on a mistaken legal conclusion that the restriction does not violate the Confrontation Clause. This is consistent with *Larson*'s statement that the existence of a Confrontation Clause violation is "ultimately a question of law that must be reviewed *de novo*" (citing *U.S. v. Shryock*, 342 F.3d 948 (9th Cir. 2003)).

Van Arsdall appears to be an obstacle to this principle only because the *Larson* court failed to explain it. In *Van Arsdall*, the Supreme Court found a Confrontation Clause violation because the trial court "prohibited *all* inquiry" into the possibility of the witness's bias (emphasis in original). After recognizing the inherent discretion of a trial court to limit cross-examination, the Supreme Court merely found that the trial court's restriction went too far. *Van Arsdall* does not require *de novo* review only when the trial court prohibits all inquiry into the bias of the witness. It merely holds that, when this area of inquiry is foreclosed, the restriction violates the Confrontation Clause. *Van Arsdall* is thus consistent with those cases that hold cross-examination limitations are reviewable for abuse of discretion only insofar as they do not implicate the Confrontation Clause.

At bottom, the problem with *Larson* seems one of labeling. As the Supreme Court once explained in the context of a sentencing departure, which is subject to review for abuse of discretion, "[l]ittle turns, however, on whether we label review of [the sentencing departure] abuse of discretion or *de novo*, for an abuse-of-discretion standard does not mean a mistake of law is beyond appellate correction. A district court by definition abuses its discretion when it makes an error of law. ... The abuse of discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions" (citations omitted).

This is, in essence, exactly what the *Larson* court does. It purports to assign an "abuse of discretion" standard to the constitutional question of whether or not a Confrontation Clause violation resulted from the limits imposed on cross-examination. But it effectively reviews that issue *de novo* and finds that whether the trial court abused its discretion depends on whether a Confrontation Clause violation occurred.

Making the standard of review dependent on the degree to which cross-examination is limited is not just unmanageable but also unnecessary. Every trial-court limitation on cross-examination necessarily rests on the legal conclusion — whether explicitly considered or not — that the restriction does not violate the Confrontation Clause. Burying the necessary *de novo* review of this legal issue in an "abuse of discretion" standard of review usually applicable to evidentiary rulings — especially doing so only for some evidentiary rulings and not for others — only causes confusion. If *Larson* continues to be so understood, it is likely to encourage maneuvering mistakenly seen as necessary to obtain a more favorable standard of review.

This writer looks forward to the 9th Circuit clarifying its rule — the sooner, the better.

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