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# To Serve and Protect? Officers as Expert Witnesses in Federal Drug Prosecutions

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## TO SERVE AND PROTECT? OFFICERS AS EXPERT WITNESSES IN FEDERAL DRUG PROSECUTIONS

*Brian R. Gallini\**

### INTRODUCTION

Members of law enforcement testify as experts in federal drug prosecutions. A lot. By deemphasizing an expert's educational credentials, the Federal Rules of Evidence expressly recognize that "specialized knowledge" may "assist the trier of fact" and, accordingly, a witness may testify as an expert if she has sufficient "knowledge, skill, experience, [or] training."<sup>1</sup> Relying on that standard, federal courts regularly admit members of law enforcement's expert testimony on a variety of topics, including those relevant to federal drug prosecutions.<sup>2</sup> Admitting members of law enforce-

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<sup>1</sup> FED. R. EVID. 702.

<sup>2</sup> See, e.g., *United States v. Barrow*, 400 F.3d 109, 124 (2d Cir. 2005); *United States v. Brown*, No. 99-5395, 2000 WL 1290368, at \*2 (6th Cir. Sept. 6, 2000) (per curiam); *United States v. Lua*, No. 99-10497, 2000 WL 1234618, at \*1 (9th Cir. Aug. 31, 2000); *United States v. Brumley*, 217 F.3d 905, 911 (7th Cir. 2000); *United States v. Harris*, 192 F.3d 580, 588 (6th Cir. 1999); *United States v. Alexander*, No. 99-4072, 1999 WL 694576, at \*1 (4th Cir. Sept. 8, 1999) (per curiam); *United States v. Gibbs*, 190 F.3d 188, 211-14 (3d Cir. 1999); *United States v. Mancillas*, 183 F.3d 682, 704-06 (7th Cir. 1999); *United States v. Borda*, No. 96-4752, 1999 WL 294540, at \*9-10 (4th Cir. May 11, 1999); *United States v. Molina*, 172 F.3d 1048, 1056 (8th Cir. 1999); *United States v. Howard*, 169 F.3d 1127, 1130 (8th Cir. 1999); *United States v. Love*, No. 97-6360, 1999 WL 115523, at \*8-9 (6th Cir. Feb. 8, 1999); *United States v. Doe*, 149 F.3d 634, 636-38 (7th Cir. 1998); *United States v. Spencer*, No. 96-1280 (L), 1997 WL 592849, at \*3 (2d Cir. Sept. 23, 1997); *United States v. Akinrosotu*, No. 96-1097, 1996 WL 414458, at \*1 (2d Cir. July 25, 1996); *United States v. Valle*, 72 F.3d 210, 214-16 (1st Cir. 1995); *United States v. Walls*, 70 F.3d 1323, 1326 (D.C. Cir. 1995); *United States v. Gil*, 58 F.3d 1414, 1422 (9th Cir. 1995); *Headley v. Tilghman*, 53 F.3d 472, 475-76 (2d Cir. 1995); *United States v. Crass*, 50 F.3d 81, 83 (1st Cir. 1995); *United States v. Washington*, 44 F.3d 1271, 1282-83 (5th Cir. 1995); *United States v. Speer*, 30 F.3d 605, 609-10 (5th Cir. 1994); *United States v. Muldrow*, 19 F.3d 1332, 1338 (10th Cir. 1994); *United States v. Tapia-Ortiz*, 23 F.3d 738, 740-42 (2d Cir. 1994); *United States v. Taylor*, 18 F.3d 55, 59 (2d Cir. 1994); *United States v. Quiroz*, 13 F.3d 505, 514 (2d Cir. 1993), *abrogated in part by United States v. Plugh*, 648 F.3d 118 (2d Cir. 2011); *United States v. Straughter*, 950 F.2d 1223, 1232-33 (6th Cir. 1991); *United States v. Campino*, 890 F.2d 588, 592-93 (2d Cir. 1989);

ment's expert testimony under these circumstances have consequences, particularly in federal drug prosecutions. First, in the words of the federal evidentiary rules, juries may hear testimony that is not "the product of reliable principles and methods."<sup>3</sup> And second, when courts routinely admit members of law enforcement's expert testimony, they enable officers to testify without an empirical basis.<sup>4</sup> For example, such officers may fail to testify about both the nature of the particular drug transaction *and* whether defendant possessed the requisite mental state while participating in the transaction.

Courts should consider those problems alongside the prevalence of federal drug cases<sup>5</sup> and the ease with which prosecutors can prove those cases.<sup>6</sup> The core federal drug statute, 21 U.S.C. § 841(a), prohibits an individual from knowingly or intentionally manufacturing, distributing, dispensing, or possessing with the "intent to manufacture, distribute, or dispense, a controlled substance."<sup>7</sup> Importantly, Section 841 does not purport to reach personal use and, instead, is designed to reach drug trafficking.<sup>8</sup> Thus, the typical question in Section 841(a) cases is whether the amount of drugs found on a particular defendant is more consistent with personal use or distribution;<sup>9</sup> indeed, this is *the* issue in the vast majority of cases discussed in this Article. To secure a conviction then, an officer testifying as an expert needs only to state that the amount possessed by a defendant or associated with a drug transaction is more consistent with drug trafficking than it is with personal use.<sup>10</sup>

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United States v. Tutino, 883 F.2d 1125, 1133-34 (2d Cir. 1989); United States v. Garcia, 848 F.2d 1324, 1335 (2d Cir. 1988), *rev'd on other grounds sub nom. Gomez v. United States*, 490 U.S. 858 (1989); United States v. Kusek, 844 F.2d 942, 949 (2d Cir. 1988).

<sup>3</sup> FED. R. EVID. 702.

<sup>4</sup> See, e.g., United States v. Reynoso, 336 F.3d 46, 49 (1st Cir. 2003) (holding that it was not an abuse of discretion to allow a DEA agent to testify that the amount of cocaine found in the defendant's possession was inconsistent with personal use even though the DEA agent "concededly had no personal experience with cocaine users, as distinguished from cocaine distributors").

<sup>5</sup> It is difficult to estimate with precision the percentage of drug cases in which officers testify as experts, but this much can be said: drug prosecutions make up a substantial portion of the federal criminal docket. See Susan N. Herman, *Federal Criminal Litigation in 20/20 Vision*, 13 LEWIS & CLARK L. REV. 461, 464 (2009) (noting that drug cases make up approximately 17 percent of the federal criminal docket).

<sup>6</sup> See generally Ronald F. Wright & Rodney L. Engen, *The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power*, 84 N.C. L. REV. 1935, 1967 (2006) (providing data that suggests "the elements of drug trafficking are especially easy to prove at trial").

<sup>7</sup> 21 U.S.C. § 841(a) (2006).

<sup>8</sup> See *id.*

<sup>9</sup> Speaking generally, prosecuting the mere possession of a controlled substance is typically left in the hands of state prosecutors. *But cf.* 21 U.S.C. § 844(a) (providing a civil penalty for possession of small amounts of certain controlled substances).

<sup>10</sup> See, e.g., United States v. Mancillas, 183 F.3d 682, 693 (7th Cir. 1999).

With that background in mind, this Article considers an illustrative example for each problem. First, the subject of the expert's testimony—e.g., the nature of drug-trafficking operations—must be “reliable” pursuant to the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>11</sup> Yet, federal courts rarely undertake the analysis required to determine whether the expert's testimony has a sound methodological basis.

Federal courts do not seem persuaded that this is a problem. Take the Tenth Circuit's decision in *United States v. Garza*,<sup>12</sup> a prosecution for possession of a firearm in furtherance of a drug-trafficking crime.<sup>13</sup> There, the court upheld the admission of an officer's expert opinion as testimony.<sup>14</sup> In pertinent part, the government and officer-expert engaged in the following colloquy:

Q: Based on your training and experience, do you have an opinion, with all of the marijuana that was found in the bedroom, the way it was packaged, the Ziploc baggies, the scales, and the firearm, whether or not the gun was possessed in connection with a drug trafficking crime?

A: Yes, it was.<sup>15</sup>

Following his conviction after a jury trial, defendant contended on appeal that the officer's opinion was not reliable pursuant to *Daubert*, and as a result, the witness was not properly qualified to testify as an expert.<sup>16</sup> The court disagreed, siding with the district court and stating, “police officers can acquire specialized knowledge of criminal practices and thus the expertise to opine on such matters as the use of firearms in the drug trade.”<sup>17</sup>

Second, the federal judiciary's willingness to retain broad categories of permissible expert testimony raises an equally troubling prospect. An officer, testifying as an expert, relieves the prosecution of its burden to prove that defendant possessed the charged crime's requisite mens rea beyond a reasonable doubt.<sup>18</sup> How so? Federal Rule of Evidence 704(b) prohibits expert witnesses, by either opinion or inference, from stating whether defendant possessed the charged crime's required mental state.<sup>19</sup> Indeed, it specifically provides as follows:

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<sup>11</sup> 509 U.S. 579, 589 (1993); see *infra* notes 51-69 (discussing *Daubert*'s history).

<sup>12</sup> 566 F.3d 1194 (10th Cir. 2009).

<sup>13</sup> *Id.* at 1196.

<sup>14</sup> *Id.* at 1196, 1199.

<sup>15</sup> *Id.* at 1197.

<sup>16</sup> *Id.* at 1199.

<sup>17</sup> *Id.*

<sup>18</sup> *Contra* *United States v. Brown*, No. 99-5395, 2000 WL 1290368, at \*3 (6th Cir. Sept. 6, 2000) (rejecting a similar argument).

<sup>19</sup> *E.g.*, *United States v. Bennett*, 161 F.3d 171, 182-85 (3d Cir. 1998); *United States v. Abou-Kassem*, 78 F.3d 161, 166 (5th Cir. 1996).

No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.<sup>20</sup>

One reason for 704(b)'s prohibition is that, without it, juries could simply follow the expert's commentary about defendant's mens rea despite its independent duty to evaluate mens rea.<sup>21</sup> Language found in Rule 704(b) appears to bar the admission of officers' expert testimony that defendants possessed a certain amount of drugs *with the intent* to distribute them.<sup>22</sup> Yet, the majority of circuits rejects this reasoning and instead concludes that such testimony is premised, for example, on the modus operandi of drug traffickers rather than defendant's own mental state.<sup>23</sup>

Take, for example, the Seventh Circuit's decision in *United States v. Winbush*.<sup>24</sup> There, an FBI agent testified as an expert at trial on drug distribution charges about "the methods and practices of drug traffickers."<sup>25</sup> Following the defendant's conviction after a jury trial, he appealed, contending that the agent's "extreme over-inclusive[] [testimony] was, for all intents and purposes, tantamount to stating an opinion or inference that [defendant] intended to distribute narcotics."<sup>26</sup> The court disagreed, noting that the agent "never mentioned, or even alluded to, [defendant's] actual intent to distribute drugs."<sup>27</sup> Yet, the agent *did* testify that someone with 9.5 grams of crack cocaine would qualify as a drug trafficker; not coincidentally, this amount coincided with the amount found in defendant's possession.<sup>28</sup> The court nevertheless reasoned, "[a]lthough an expert may not testify or opine that the defendant actually possessed the requisite mental state, he may testify in general terms about facts or circumstances from which a jury might

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<sup>20</sup> FED. R. EVID. 704(b).

<sup>21</sup> *United States v. Gonzales*, 307 F.3d 906, 911 (9th Cir. 2002) ("[A]n opinion by a polygraph examiner that a defendant was lying when defendant stated in the course of polygraph testing that he did not have a requisite mens rea is inadmissible under Rule 704(b) because, if the jury believed the expert opinion, it would necessarily find intent."); *United States v. Wood*, 207 F.3d 1222, 1236 (10th Cir. 2000).

<sup>22</sup> THOMAS A. MAUET & WARREN D. WOLFSON, TRIAL EVIDENCE 297 (3d ed. 2005).

<sup>23</sup> *See, e.g., United States v. Younger*, 398 F.3d 1179, 1188-89 (9th Cir. 2005) (affirming trial testimony that the "person" (not necessarily defendant) who possessed the drugs possessed them for purposes of later sales (internal quotation marks omitted)); *United States v. Cotton*, 22 F.3d 182, 185 (8th Cir. 1994) (affirming admission of testimony that the amounts of cocaine seized from defendant was indicative of distribution); *United States v. Williams*, 980 F.2d 1463, 1465 (D.C. Cir. 1992) (affirming the district court's admission of testimony that seized bags of cocaine "were meant to be distributed").

<sup>24</sup> 580 F.3d 503 (7th Cir. 2009).

<sup>25</sup> *Id.* at 507.

<sup>26</sup> *Id.* at 511 (internal quotation marks omitted).

<sup>27</sup> *Id.* at 512.

<sup>28</sup> *Id.* at 506-07.

*infer* that the defendant intended to distribute drugs.”<sup>29</sup> Yet, if Rule 704(b) allowed an expert to conclude that certain drug weights are consistent with trafficking, it would divest the jury’s independent responsibility to make a factual determination about whether defendant possesses the charging statute’s required mens rea.

With these problems and corresponding examples in mind, scholars have skewered courts generally, and federal courts specifically, for improperly loosening the standards governing expert testimony admission.<sup>30</sup> For example, some contend that when courts allow a police officer to testify as an expert about a controlled substance’s identity solely because the officer visually inspected the substance, the courts violate both the rules of evidence and defendant’s Due Process rights.<sup>31</sup> Another scholar suggests that when courts allow officers to explain the significance of drug profile characteristics, they bolster circumstantially substantive proof of guilt at trial and, in doing so, violate character evidence rules.<sup>32</sup> Still another scholar notes that the allowance of officers to testify as “experts” was a “dramatic unintended consequence[]” of Rule 702.<sup>33</sup> State-level arguments follow similar suit; one scholar analyzing the Texas Rules of Evidence, for example, contends that officers’ expert testimony on gang membership cannot even survive basic relevancy review.<sup>34</sup>

Yet, no article has expressly suggested that district courts are pervasively failing to undertake Federal Rule of Evidence 702’s required analysis

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<sup>29</sup> *Id.* at 512 (emphasis added).

<sup>30</sup> See, e.g., Gordon J. Beggs, *Novel Expert Evidence in Federal Civil Rights Litigation*, 45 AM. U. L. REV. 1, 27 n.178 (1995) (citing cases acknowledging that the passage of Rule 702 was designed to establish a lower admissibility standard for expert testimony); Edward J. Imwinkelried, *An Hegelian Approach to Privileges Under Federal Rule of Evidence 501: The Restrictive Thesis, the Expansive Antithesis, and the Contextual Synthesis*, 73 NEB. L. REV. 511, 539 (1994) (arguing that the federal rules “lower[] barriers to the admission of relevant expert testimony”); Ross Andrew Oliver, Note, *Testimonial Hearsay as the Basis for Expert Opinion: The Intersection of the Confrontation Clause and Federal Rule of Evidence 703 After Crawford v. Washington*, 55 HASTINGS L.J. 1539, 1549 (2004) (asserting that, compared to common law tradition, the federal rules lowered the threshold for admissibility of expert testimony).

<sup>31</sup> Michael D. Blanchard & Gabriel J. Chin, *Identifying the Enemy in the War on Drugs: A Critique of the Developing Rule Permitting Visual Identification of Indescript White Powder in Narcotics Prosecutions*, 47 AM. U. L. REV. 557, 560 (1998); see also Jack B. Weinstein, *Science, and the Challenges of Expert Testimony in the Courtroom*, 77 OR. L. REV. 1005, 1008 (1998) (“Much of the so-called expert testimony, such as that of police officers who opine that criminals keep revolvers in glove compartments, or that the mafia is a gang, seems useless. This information really does not help the jury, but rather amounts to preliminary summation.”).

<sup>32</sup> Mark J. Kadish, *The Drug Courier Profile: In Planes, Trains, and Automobiles; and Now in the Jury Box*, 46 AM. U. L. REV. 747, 751 (1997).

<sup>33</sup> Michael Teter, *Acts of Emotion: Analyzing Congressional Involvement in the Federal Rules of Evidence*, 58 CATH. U. L. REV. 153, 191 (2008).

<sup>34</sup> Plácido G. Gómez, *It Is Not So Simply Because an Expert Says It Is So: The Reliability of Gang Expert Testimony Regarding Membership in Criminal Street Gangs: Pushing the Limits of Texas Rule of Evidence 702*, 34 ST. MARY’S L.J. 581, 598-99 (2003).

before allowing law enforcement members to testify as experts in federal drug prosecutions. Equally new is this Article's observation that some of that resulting expert testimony may unduly extend Rule 704(b) and threaten to violate the Due Process Clause of the Fourteenth Amendment.<sup>35</sup> To remedy these rule-based and constitutional problems,<sup>36</sup> this Article proposes that courts disallow officers to testify as both experts and lay witnesses in federal drug prosecutions.<sup>37</sup> Therefore, courts should limit officers' expert

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<sup>35</sup> Scholars have unquestionably recognized *other* problems with law enforcement expert testimony. See, e.g., Joëlle Anne Moreno, *What Happens When Dirty Harry Becomes an (Expert) Witness for the Prosecution?*, 79 TUL. L. REV. 1, 18 (2004) (arguing that district courts abjure their role as gatekeepers in the context of drug jargon expert testimony); Wes R. Porter, *Repeating, Yet Evading Review: Admitting Reliable Expert Testimony in Criminal Cases Still Depends Upon Who is Asking*, 36 RUTGERS L. REC. 48, 63 (2009) ("Unreliable and unhelpful criminal profiling can be difficult to distinguish from law enforcement expert testimony about modes operandi, particularly in gang and drug offenses." (footnote omitted)); Mark Hansen, *Dr. Cop on the Stand: Judges Accept Police Officers as Experts Too Quickly, Critics Say*, 88 A.B.A. J., May 2002, at 31, 34 (compiling comments from academics and reporting that "trial courts hardly ever hold police officers to the same admissibility standards that apply to other types of expert testimony, some law scholars charge"). At least one court has likewise observed that expert testimony about "[d]rug courier profiles have long been recognized as inherently prejudicial 'because of the potential [it has] for including innocent citizens as profiled drug couriers.'" *United States v. Williams*, 957 F.2d 1238, 1242 (5th Cir. 1992) (quoting *United States v. Hernandez-Cuartas*, 717 F.2d 552, 555 (11th Cir. 1983)).

<sup>36</sup> Importantly, the problems identified in this Article regarding expert law enforcement testimony in federal courts apply with equal force in the vast majority of states. See generally Edward J. Imwinkeled, *"This is Like Déjà Vu All Over Again": The Third, Constitutional, Attack on the Admissibility of Police Laboratory Reports in Criminal Cases*, 38 N.M. L. REV. 303, 304 (2008) (noting that forty-one states have "adopt[ed] evidence codes patterned more or less directly after the Federal Rules"). Consider, for example, the vast number of state appellate cases upholding the admissions of expert officer testimonies that drugs found in defendants' possession or held by a hypothetical subject under similar circumstances, were intended for such distribution. See, e.g., *State v. Fornof*, 179 P.3d 954, 959-60 (Ariz. Ct. App. 2008) (holding that trial court did not err in admitting expert testimony by a detective that drugs in defendant's possession were for sale, rather than personal use); *Marts v. State*, 968 S.W.2d 41, 47-48 (Ark. 1998) (affirming the admission of a detective's testimony that the amount and quality of methamphetamine would indicate an individual was involved in trafficking); *People v. Parra*, 82 Cal. Rptr. 2d 541, 544 (Cal. Ct. App. 1999) ("It is well settled that '... experienced officers may give their opinion that the narcotics are held for purposes of sale based upon such matters as quantity, packaging and normal use of an individual . . .'" (quoting *People v. Newman*, 484 P.2d 1356, 1359 (1971))); *Brooks v. State*, 700 So. 2d 473, 474 (Fla. Dist. Ct. App. 1997) ("It is proper for an appropriately trained and experienced law enforcement officer to offer expert opinion concerning packaging drugs for sale versus personal use."); *People v. Ray*, 479 N.W.2d 1, 2 (Mich. Ct. App. 1991) (per curiam) (holding that an officer was properly qualified as an expert on the basis of his training and experience to offer expert testimony that evidence indicated that defendant intended to sell crack cocaine); *Reece v. State*, 878 S.W.2d 320, 325 (Tex. Ct. App. 1994) ("Police officers may testify, based upon their training and experience, that a defendant's actions are consistent with someone selling cocaine. An opinion is not inadmissible merely because it embraces an ultimate issue." (citation omitted)).

<sup>37</sup> At first glance, this Article's proposal—if adopted—would simply enable officers to testify on ultimate issues of defendants' mental states as lay witnesses. Yet, Federal Rule 602 prevents witnesses from testifying about "a matter unless evidence is introduced sufficient to support a finding that the

testimony in federal drug prosecutions to law enforcement members who did not also participate in the underlying criminal investigation. And, moreover, those witnesses should be sequestered from other witnesses in the cases prior to their testimony. Regardless of whether the federal judiciary adopts this proposal, however, this Article alternatively contends that, prior to qualifying any member of law enforcement as an expert, district courts must require an explanation about: (1) how the member's experience led to the conclusion reached; (2) how that experience is an appropriate basis for the offered opinion; and (3) how the experience reliably applies to the facts.

Part I explores the pertinent federal rule governing experts' qualifications. Specifically, Part I examines Federal Rule of Evidence 702 and thereafter contends that federal courts routinely shirk their obligation to perform the Rule's required reliability analysis. Accordingly, Part I concludes by proposing that district courts should stop admitting the expert opinions of law enforcement's investigating officers or agents as testimony in federal drug prosecutions. District courts should, however, continue to receive lay testimony from those agents about the facts underlying their investigations. Part I also contemplates allowing expert law enforcement testimony, but only under certain limited circumstances.

Part II then considers Rule 704(b), its background, and its corresponding judicial interpretations. It concludes by suggesting that certain law enforcement expert testimony impermissibly—albeit often inferentially—states an opinion about defendant's mental state.

#### I. RULE 702 AND FEDERAL COURTS' LAX ENFORCEMENT OF THE RELIABILITY ANALYSIS

As noted, federal statute 21 U.S.C. § 841(a) prohibits an individual from knowingly or intentionally manufacturing, distributing, dispensing, or possessing with the "intent to manufacture, distribute, or dispense, a controlled substance."<sup>38</sup> Punishment for violating Section 841(a) is severe. For example, possession of five or more grams of methamphetamine carries with it a mandatory minimum sentence of five years in prison.<sup>39</sup> As Section

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witness has personal knowledge of the matter." FED. R. EVID. 602. And, even if Rule 602 did not operate to disallow such lay testimony, then Rule 701 likely would. FED. R. EVID. 701. The Rule states:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

*Id.*

<sup>38</sup> 21 U.S.C. § 841(a) (2006).

<sup>39</sup> *Id.* § 841(b)(1)(B)(viii). That penalty is, of course, merely illustrative of the sizeable mandatory minimum statutory penalties resulting from federal drug code violations. *Cf. id.* § 848(e)(1)(A) (provid-

841(a) indicates, the government must minimally prove a “knowing” or “intentional” violation.<sup>40</sup> In order to prove defendant’s mens rea, the government often proffers a member of law enforcement to testify as an expert. Its doing so raises numerous questions. The first of which is whether the federal rules properly contemplate qualifying a member of law enforcement as an expert in the narrow circumstance of federal drug prosecutions.

Accordingly, in Part II, Section A first explains Rule 702, which provides standards that address when witnesses qualify as experts and the basis for which courts should admit their testimony. Section B then evaluates a sampling of federal court decisions and the categories of testimony that those courts widely accept in allowing expert agent testimony. And, finally, Section C argues that district courts routinely admit potentially unreliable expert testimony. They do this by failing to undertake the analysis that Rule 702 and Supreme Court case law require before allowing expert law enforcement testimony in federal drug prosecutions.

#### A. *Rule 702 and Its History*

As originally enacted in 1975, Federal Rule of Evidence 702 provided as follows:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.<sup>41</sup>

Prior to the enactment of Rule 702, several jurisdictions relied on the common law rule that courts should permit expert testimony if the testimony addressed an issue “not within the common knowledge of the average layman.”<sup>42</sup> Better known as the “need” standard, it bestowed substantial discretion upon trial courts,<sup>43</sup> and those courts often exercised that discre-

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ing the death penalty for anyone who intentionally kills another person while “engaging in or working in furtherance of a continuing criminal enterprise”).

<sup>40</sup> *Id.* § 841(a).

<sup>41</sup> FED. R. EVID. 702 (1975) (repealed 2000).

<sup>42</sup> *Bridger v. Union Ry.*, 355 F.2d 382, 387 (6th Cir. 1966); *accord Steinberg v. Indem. Ins. Co. of N. Am.*, 364 F.2d 266, 274 (5th Cir. 1966) (“If the question is one which the layman is competent to determine for himself, the opinion testimony is excluded; if he reasonably cannot form his own conclusion without the assistance of the expert, the testimony is admissible.”).

<sup>43</sup> *Engle v. Stull*, 377 F.2d 930, 935 (D.C. Cir. 1967); *Schillie v. Atchison, Topeka & Santa Fe Ry.*, 222 F.2d 810, 814 (8th Cir. 1955).

tion to exclude expert testimony on most issues unless the testimony was essential to resolve a disputed issue.<sup>44</sup>

Yet, Rule 702 operated in part to overrule the “need” standard and expand the categories of admissibility of expert testimony.<sup>45</sup> Indeed, the language, “assist the trier of fact,” suggests that Congress rejected the “need” rule in favor of a rule predicated on gauging the helpfulness of the proposed expert’s testimony to the fact-finder.<sup>46</sup> Thus, as originally drafted in 1975, it seems that courts believed that expert testimony was properly admissible as long as it would help the triers-of-fact understand an issue—even one within the common understandings of ordinary jurors.<sup>47</sup>

It is easy to see how courts arrived at that open-ended interpretation. To begin with, the text of Rule 702 allows for expert testimony in the form of “scientific, technical, or *other specialized knowledge*.”<sup>48</sup> Focusing on that language, the advisory committee notes state “[t]he rule is broadly phrased. The fields of knowledge which may be drawn upon are not limited merely to the ‘scientific’ and ‘technical’ but extend to all ‘specialized’ knowledge.”<sup>49</sup> That language echoes the statement of Reporter of the Rules Advisory Committee Edward W. Cleary who said, prior to the Rule’s enactment, that “[t]he category of expert includes not only the true specialist but also others who can contribute in the area, sometimes called ‘skilled witnesses.’”<sup>50</sup>

In 1993, however, the Supreme Court’s decision in *Daubert* altered the standards governing the admissibility of experts’ scientific testimony.<sup>51</sup> In

<sup>44</sup> M. C. Dransfield, Annotation, *Safety of Condition, Place, or Appliance as Proper Subject of Expert or Opinion Evidence in Tort Actions*, 146 A.L.R. 5, 8 (1943) (“[T]he opinion of witnesses possessing peculiar skill or knowledge may be received whenever the facts are such that inexperienced persons are likely to prove incapable of forming a correct judgment without such assistance, but when the necessity of the case ceases the operation of the exception also ceases.”).

<sup>45</sup> See FED. R. EVID. 702 advisory committee’s note (“Whether the situation is a proper one for the use of expert testimony is to be determined on the basis of assisting the trier. . . . When opinions are excluded, it is because they are unhelpful and therefore superfluous and a waste of time.”).

<sup>46</sup> See J. E. Macy, Annotation, *Admissibility of Opinion Evidence as to the Cause of an Accident or Occurrence*, 38 A.L.R.2d 13, 21 (1954) (discussing the majority rule that expert testimony is inappropriate where the jury can understand the facts and contrasting it against a proposed rule that would reverse restrictions on the use of opinion evidence).

<sup>47</sup> See, e.g., *Morvant v. Constr. Aggregates Corp.*, 570 F.2d 626, 630-34 (6th Cir. 1978); *United States v. Jackson*, 425 F.2d 574, 576-77 (D.C. Cir. 1970).

<sup>48</sup> FED. R. EVID. 702 (emphasis added).

<sup>49</sup> FED. R. EVID. 702 advisory committee’s note.

<sup>50</sup> *Rules of Evidence: Hearings Before the Special Subcomm. on Reform of Federal Criminal Laws of the H. Comm. on the Judiciary*, 93d Cong. 96 (1973) (statement of Edward W. Cleary); *accord Rules of Evidence (Supplement): Hearing Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 93d Cong. 55 (1973) (statement of Sen. John L. McClellan) (observing “in the main, [the rules concerning opinion evidence] promise[d] to increase the knowledge that will be available to the triers of fact”).

<sup>51</sup> *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993).

doing so, it advised federal courts to consider several non-exhaustive analytical factors in applying Rule 702.<sup>52</sup> Then, in 1999, the Supreme Court held in *Kumho Tire Co. v. Carmichael*<sup>53</sup> that the trial judge's role as "gatekeeper" applies not only to "scientific" testimony, but also to *all* expert testimony—including that premised on "'technical' and 'other specialized' knowledge."<sup>54</sup>

In 2000, the drafters amended Rule 702 in response to *Daubert* and *Kumho Tire*. In its amended form, the Rule provides as follows:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.<sup>55</sup>

The advisory notes to amended Rule 702 seem to confirm the drafters' intent to incorporate the major premises of *Daubert* and *Kumho Tire*.<sup>56</sup> Particularly relevant to non-scientific expert testimony, the committee note confirms that "the amendment does not distinguish between scientific and other forms of expert testimony."<sup>57</sup> Significantly, however, the amendment "rejects" the notion that a non-scientist's expert opinion should be treated "more permissively."<sup>58</sup> Instead, "[a]n opinion from an expert who is not a scientist should receive the same degree of scrutiny for reliability as an opinion from an expert who purports to be a scientist."<sup>59</sup>

The follow-up question seems obvious: for non-scientific expert testimony, *how* should the trial court scrutinize the proposed testimony? On this point, the committee note suggests generally that "[t]he expert's testimony must be grounded in an accepted body of learning or experience in the expert's field, and the expert must explain how the conclusion is so grounded."<sup>60</sup> Moreover, the amendment demands that the testimony "be the

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<sup>52</sup> *Id.* at 593. Those factors included the following: (1) "whether [the proposed scientific knowledge] can be (and has been) tested"; (2) "whether the theory or technique has been subjected to peer review"; (3) "the known or potential rate of error"; and (4) whether the science has achieved "general acceptance" in the relevant scientific community. *Id.* at 593-94 (fourth internal quotation marks omitted).

<sup>53</sup> 526 U.S. 137 (1999).

<sup>54</sup> *Id.* at 141.

<sup>55</sup> FED. R. EVID. 702.

<sup>56</sup> See FED. R. EVID. 702 advisory committee's note—2000 Amendment (approving of the *Daubert* factors and noting, "[c]onsistently with *Kumho*, the Rule as amended provides that all types of expert testimony present questions of admissibility for the trial court . . .").

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* (citing *Watkins v. Telsmith, Inc.*, 121 F.3d 984, 991 (5th Cir. 1997)).

<sup>60</sup> *Id.*

product of reliable principles and methods that are reliably applied to the facts of the case.”<sup>61</sup> When it comes specifically to law enforcement testimony, the committee note offers this example:

[W]hen a law enforcement agent testifies regarding the use of code words in a drug transaction, the principle used by the agent is that participants in such transactions regularly use code words to conceal the nature of their activities. The method used by the agent is the application of extensive experience to analyze the meaning of the conversations. So long as the principles and methods are reliable and applied reliably *to the facts of the case*, this type of testimony should be admitted.<sup>62</sup>

After having dedicated several pages to explaining the finer points of expert testimony, the committee note ends awkwardly by suggesting that “[t]he use of the term ‘expert’ in the Rule does not, however, mean that a jury should actually be informed that a qualified witness is testifying as an ‘expert.’”<sup>63</sup> Moreover, the note concludes, “there is much to be said for a practice that prohibits the use of the term ‘expert’ by both the parties and the court at trial.”<sup>64</sup>

By way of summary, several points seem reasonably clear. First, the current version of Rule 702 assigns the role of “gatekeeper” to trial judges, and, keeping in mind the *Daubert* factors,<sup>65</sup> it tasks those judges with determining the overall reliability of expert testimony.<sup>66</sup> Second, expert testimony extends to more than scientific expert testimony.<sup>67</sup> Third, when it comes to non-scientific expert testimony, it is permissible for the expert to base her opinion solely on experience.<sup>68</sup> Finally, law enforcement agents may permissibly testify as experts in drug prosecutions—particularly about drug code.<sup>69</sup>

The question then becomes how far that collective rationale extends. Stated differently, other than drug-transaction code words, what *other* law enforcement drug-related testimony could be elevated to expert status?

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<sup>61</sup> *Id.*

<sup>62</sup> FED. R. EVID. 702 advisory committee’s note—2000 Amendment (emphasis added).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* (explaining that the *Daubert* factors are “neither exclusive nor dispositive”).

<sup>66</sup> *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149 (1999) (noting that “the trial judge must determine whether the testimony has ‘a reliable basis in the knowledge and experience of [the relevant] discipline’” (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592 (1993))).

<sup>67</sup> *Id.*

<sup>68</sup> FED. R. EVID. 702 advisory committee’s note—2000 Amendment (“Nothing in this amendment is intended to suggest that experience alone—or experience in conjunction with other knowledge, skill, training or education—may not provide a sufficient foundation for expert testimony.”).

<sup>69</sup> *E.g.*, *United States v. Harris*, 192 F.3d 580, 589 (6th Cir. 1999) (“Courts have overwhelmingly found police officers’ expert testimony admissible where it will aid the jury’s understanding of an area, such as drug dealing, not within the experience of the average juror.” (quoting *United States v. Thomas*, 74 F.3d 676, 682 (6th Cir. 1996)) (internal quotation marks omitted)).

B. *Rule 702 in Action: On What Topics Do Officers Qualify as Experts?*

Federal courts interpreting amended federal Rule 702 routinely admit expert agents' testimony—occasionally even when the testifying expert officer is the same person who investigated the offense in question. This Section first explores that troubling scenario. The Article then considers a handful of the most common topics on which officers offer expert testimony, including expert testimony about amounts of drugs;<sup>70</sup> *modus operandi*, including how defendants' activities are consistent with persons avoiding surveillance;<sup>71</sup> guns, equipment, and paraphernalia associated with the narcotics trade;<sup>72</sup> the meaning of codes, conversations, and language;<sup>73</sup> and generalized practices related to narcotics transactions, including courier profiles.<sup>74</sup> In each instance, the district court's role as gatekeeper requires it to ensure that the proposed testimony is "reliable" prior to qualifying an expert. Although the "trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable,"<sup>75</sup> the text of Rule 702 minimally requires the judge to ensure that "(1) the testimony is based upon sufficient facts or data, (2) the

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<sup>70</sup> See, e.g., *United States v. Vann*, 336 F. App'x 944, 947 (11th Cir. 2009); *United States v. Armstrong*, 183 F. App'x 711, 715 (10th Cir. 2006); *United States v. Reynoso*, 336 F.3d 46, 49 (1st Cir. 2003); *United States v. Solorio-Tafolla*, 324 F.3d 964, 965 (8th Cir. 2003); see also *United States v. Rich*, 326 F. Supp. 2d 670, 678 (E.D. Pa. 2004) (allowing for expert testimony on the packaging and distribution of crack and cocaine).

<sup>71</sup> See, e.g., *United States v. Parra*, 402 F.3d 752, 759 (7th Cir. 2005); *United States v. Sarabia Martinez*, 276 F.3d 447, 452 (8th Cir. 2002); *United States v. Valencia Amezcua*, 278 F.3d 901, 908-09 (9th Cir. 2002).

<sup>72</sup> See, e.g., *United States v. Hicks*, 575 F.3d 130, 144 (1st Cir. 2009); *United States v. Lopez*, 547 F.3d 364, 373 (2d Cir. 2008); *United States v. Jeanetta*, 533 F.3d 651, 657 (8th Cir. 2008); *United States v. Pinillos-Prieto*, 419 F.3d 61, 71 (1st Cir. 2005).

<sup>73</sup> See, e.g., *United States v. Reed*, 575 F.3d 900, 923 (9th Cir. 2009); *United States v. York*, 572 F.3d 415, 421-22 (7th Cir. 2009); *United States v. Emmanuel*, 565 F.3d 1324, 1335-36 (11th Cir. 2009); *United States v. Delatorre*, 309 F. App'x 366, 373 (11th Cir. 2009); *United States v. Farmer*, 543 F.3d 363, 370 (7th Cir. 2008); *United States v. Mejia*, 448 F.3d 436, 448 (D.C. Cir. 2006); *United States v. Garcia*, 447 F.3d 1327, 1335 (11th Cir. 2006); *United States v. Beltran-Arce*, 415 F.3d 949, 951-52 (8th Cir. 2005); *United States v. Gray*, 410 F.3d 338, 347 (7th Cir. 2005); *United States v. Ceballos*, 302 F.3d 679, 687 (7th Cir. 2002).

<sup>74</sup> See, e.g., *United States v. Moore*, 521 F.3d 681, 685 (7th Cir. 2008); *United States v. Sanchez-Hernandez*, 507 F.3d 826, 831 (5th Cir. 2007); *United States v. Blount*, 502 F.3d 674, 680 (7th Cir. 2007); *United States v. Martinez*, 476 F.3d 961, 967 (D.C. Cir. 2007); *United States v. Barrow*, 400 F.3d 109, 124 (2d Cir. 2005); *United States v. Davis*, 397 F.3d 173, 179 (3d Cir. 2005); *United States v. Miller*, 395 F.3d 452, 454 (D.C. Cir.), *vacated*, 545 U.S. 1101 (2005); *United States v. Garcia-Morales*, 382 F.3d 12, 19 (1st Cir. 2004); *United States v. Wilson*, 355 F.3d 358, 362 (5th Cir. 2003); *United States v. Lopez-Lopez*, 282 F.3d 1, 14-15 (1st Cir. 2002); *United States v. Cruz-Velasco*, 224 F.3d 654, 660 (7th Cir. 2000); *United States v. Molina*, 172 F.3d 1048, 1056 (8th Cir. 1999); *United States v. Carrillo-Morones*, 564 F. Supp. 2d 707, 711 (W.D. Tex. 2008); *United States v. Yevakpor*, 501 F. Supp. 2d 330, 332-33 (N.D.N.Y. 2006).

<sup>75</sup> *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999).

testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.”<sup>76</sup> But, as the discussion below demonstrates, circuit courts readily affirm district courts’ qualification of law enforcement experts that do not apply the foregoing factors.

### 1. Agents as Experts and Lay Witnesses in Federal Court

A special threshold problem arises when the prosecution seeks to present a case agent or other member of law enforcement as both an expert *and* a fact witness.<sup>77</sup> Indeed, serving dual roles as both a case agent and an expert witness may improperly allow the agent to testify as an expert about the general meaning of conversations and other *facts* of the case. Consider, for instance, the case agent who testifies as an expert about the significance of coded communications in a drug transaction. He then goes beyond those words in order to summarize his belief about defendant’s conduct based on his own knowledge obtained from investigating the case.

That hypothetical came to life in *United States v. Freeman*.<sup>78</sup> There, defendant appealed his conviction for conspiracy to manufacture and distribute cocaine to the Ninth Circuit.<sup>79</sup> Defendant argued that the district court improperly allowed a detective for the Los Angeles Police Department to testify as both an expert and a fact witness.<sup>80</sup> As an expert, the detective testified about the meaning of certain jargon related to drug trafficking, such as the meaning of words like “iggidy,” “ticket,” and “all gravy.”<sup>81</sup> Yet, the detective also “offered interpretations of ambiguous conversations that did not consist of coded terms at all.”<sup>82</sup> Although the court acknowledged that the detective could permissibly proffer lay testimony,<sup>83</sup> “the line between [the detective’s] lay and expert testimony was never articulated for the jury,” which “created a risk that there was an imprimatur of scientific or technical validity to the entirety of his testimony.”<sup>84</sup> That concern, in conjunction with the court’s identification of several examples where the detec-

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<sup>76</sup> FED. R. EVID. 702.

<sup>77</sup> *E.g.*, *United States v. Anchrum*, 590 F.3d 795, 803 (9th Cir. 2009).

<sup>78</sup> 498 F.3d 893 (9th Cir. 2007).

<sup>79</sup> *Id.* at 897.

<sup>80</sup> *Id.* at 900.

<sup>81</sup> *Id.* at 901 (internal quotation marks omitted).

<sup>82</sup> *Id.* at 902.

<sup>83</sup> *Id.*

<sup>84</sup> *Freeman*, 498 F.3d at 903.

tive's testimony conveyed or relied on hearsay evidence, led the court to conclude that portions of the detective's testimony were inadmissible.<sup>85</sup>

The Second Circuit nicely summarized additional concerns in its 2002 opinion in *United States v. Dukagjini*.<sup>86</sup> There, two defendants appealed their convictions for conspiracy to distribute heroin.<sup>87</sup> They argued that the district court improperly admitted expert testimony from a DEA case agent who interpreted the meaning of wiretapped telephone conversations.<sup>88</sup> The agent who, to be clear, investigated defendants, interpreted specific drug jargon—e.g., “B-licks” meant heroin—and several statements made between defendants and an additional confederate, none of whom testified.<sup>89</sup> The defendants specifically argued that the agent's “dual roles as case agent and expert witness allowed him to serve as a summary witness, improperly testifying as an expert about the general meaning of conversations and the facts of the case.”<sup>90</sup>

At the outset of analyzing defendants' contentions, the court recited several concerns with the DEA agent's testimony. First, “when a fact witness or a case agent also functions as an expert for the government, the government confers upon him ‘[t]he aura of special reliability and trustworthiness surrounding expert testimony, which ought to caution its use.’”<sup>91</sup> Second, the court observed, “when the prosecution uses a case agent as an expert, there is an increased danger that the expert testimony will stray from applying reliable methodology and convey to the jury the witness's ‘sweeping conclusions’ about appellants' activities, deviating from the strictures of Rules 403 and 702.”<sup>92</sup> The court noted that a final risk of the case agent's expert testimony was that “[s]ome jurors will find it difficult to discern whether the witness is relying properly on his general experience and reliable methodology, or improperly on what he has learned of the case.”<sup>93</sup>

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<sup>85</sup> *Id.* at 904-05. The *Freeman* court, however, ultimately concluded that any error in admitting the problematic portions of the detective's testimony was harmless given that “[t]he overwhelming portion of [the detective's] testimony was . . . properly admitted.” *Id.* at 906.

<sup>86</sup> 326 F.3d 45 (2d Cir. 2003).

<sup>87</sup> *Id.* at 48-49.

<sup>88</sup> *Id.* at 49-50.

<sup>89</sup> *Id.* at 50-51 (internal quotation marks omitted).

<sup>90</sup> *Id.* at 53.

<sup>91</sup> *Id.* (alteration in original) (quoting *United States v. Young*, 745 F.2d 733, 766 (2d Cir. 1984) (Newman, J., concurring)).

<sup>92</sup> *Dukagjini*, 326 F.3d at 54 (quoting *United States v. Simmons*, 923 F.2d 934, 946 n.5 (2d Cir. 1991)). The court stated:

As the testimony of the case agent moves from interpreting individual code words to providing an overall conclusion of criminal conduct, the process tends to more closely resemble the grand jury practice, improper at trial, of a single agent simply summarizing an investigation by others that is not part of the record.

*Id.*

<sup>93</sup> *Id.*

Applying all of its concerns to the facts, the court held that the district court improperly admitted portions of the agent's testimony—most notably testimony about general conversations rather than interpreting specific drug jargon.<sup>94</sup> Moreover, reasoned the court, the agent interpreted ambiguous slang terms that may or may not have been drug code either in the drug world or in this particular conspiracy.<sup>95</sup>

Considering the Second Circuit's concerns and the *Freeman* example from a summary standpoint, it seems that district courts should not admit expert testimony from law enforcement members who also investigated defendants on trial. Minimally, though, district courts should be careful to separate out a case agent's testimony concerning code terms, which are properly within the province of expert testimony (so say the courts), and ambiguous slang terms upon which the agent may offer only lay testimony.<sup>96</sup> Only by doing so can district courts be "vigilant gatekeepers" by ensuring that mixed expert/fact law enforcement testimony is reliable.<sup>97</sup>

## 2. Amount of Drugs

More than a handful of circuits routinely allow an expert agent to testify that the amount of drugs in defendant's possession is consistent with distribution rather than personal use.<sup>98</sup> In *United States v. Reynoso*,<sup>99</sup> for example, the court charged defendant with conspiracy to distribute cocaine after DEA agents seized 110 grams of the drug from his car.<sup>100</sup> To establish the fact of distribution, the district court admitted a DEA agent's expert testimony.<sup>101</sup> The agent stated that the cocaine seized from defendant's car was "too large to have been exclusively for his personal use."<sup>102</sup> Although the agent "had no personal experience with cocaine users, as distinguished from cocaine distributors," the First Circuit affirmed.<sup>103</sup> Without citing ei-

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<sup>94</sup> *Id.* at 55.

<sup>95</sup> *Id.* ("[T]here is a high risk that when a case agent/expert strays from the scope of his expertise, he may impermissibly rely upon and convey hearsay evidence."). Because defendants failed to preserve their objection, in particular to the Confrontation Clause violation, the court ultimately held that the erroneous admission of the agent's testimony was a harmless error. *Id.* at 59-60, 62.

<sup>96</sup> See *United States v. Reed*, 575 F.3d 900, 922 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 1728 (2010).

<sup>97</sup> *Dukagjini*, 326 F.3d at 55-56.

<sup>98</sup> See, e.g., *United States v. Gonzalez*, 528 F.3d 1207, 1213-14 (9th Cir. 2008); *United States v. Burkley*, 513 F.3d 1183, 1189 (10th Cir. 2008); *United States v. Reynoso*, 336 F.3d 46, 49 (1st Cir. 2003); *United States v. Solorio-Tafolla*, 324 F.3d 964, 965-66 (8th Cir. 2003); *In re Sealed Case*, 99 F.3d 1175, 1178 (D.C. Cir. 1996); *United States v. Navarro*, 90 F.3d 1245, 1260 (7th Cir. 1996).

<sup>99</sup> 336 F.3d 46 (1st Cir. 2003).

<sup>100</sup> *Id.* at 49.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

ther *Daubert* or *Kumho Tire*, the court summarily concluded that the agent “was competent to testify to the relative raw-weight distinctions in the drug quantities typically possessed by users as distinguished from dealers.”<sup>104</sup> Problematically, however, the First Circuit’s brief reasoning says nothing about the empirical basis for the agent’s testimony.

Consider also *United States v. Solorio-Tafolla*,<sup>105</sup> an Eighth Circuit decision. That case nicely illustrates the relative absence of analysis supporting appellate court holdings on the issue.<sup>106</sup> There, defendant appealed his conviction for conspiracy to distribute and possession with the intent to distribute methamphetamine.<sup>107</sup> In doing so, he argued that the district court erroneously admitted expert law enforcement testimony (without a *Daubert* hearing) about, among other topics, the difference between “drug quantities obtained for personal use, as opposed to drug trafficking.”<sup>108</sup> In rejecting defendant’s contention that such testimony was unreliable, the court held that the district court properly received the testimony.<sup>109</sup> Relying heavily on the officer’s twenty-eight years of experience, the court reasoned that Rule 702 “permits a district court to allow the testimony of a witness whose knowledge, skill, training, experience or education will assist a trier of fact in understanding an area involving specialized subject matter.”<sup>110</sup> As true as that quote may be, it does not explain the methodology underlying the officer’s testimony.

### 3. Modus Operandi and Avoiding Surveillance

Courts also often admit law enforcement expert testimony on the question of whether defendant’s activities are consistent with the modus operandi of participants in drug transactions. For instance, in an Eighth Circuit case focused on the propriety of expert testimony about counter-surveillance, law enforcement seized walkie-talkies from defendant’s residence.<sup>111</sup> At trial, a member of the Minnesota Bureau of Criminal Apprehension testified as an expert over objection that drug dealers use walkie-talkies to conduct counter-surveillance.<sup>112</sup> Following defendant’s conviction for conspiring to distribute in excess of 500 grams of methamphetamine, he appealed, contending that the district court erroneously allowed the agent to

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<sup>104</sup> *Id.*

<sup>105</sup> 324 F.3d 964 (8th Cir. 2003).

<sup>106</sup> *Id.* at 965-66.

<sup>107</sup> *Id.* at 965.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 966.

<sup>110</sup> *Id.* (quoting *United States v. Molina*, 172 F.3d 1048, 1056 (8th Cir. 1999)) (internal quotation marks omitted).

<sup>111</sup> *United States v. Sarabia-Martinez*, 276 F.3d 447, 452 (8th Cir. 2002).

<sup>112</sup> *Id.*

testify as an expert.<sup>113</sup> Without either addressing Rule 702's factors or discussing *Daubert* or *Kumho Tire*, the court summarily affirmed.<sup>114</sup> It concluded that "[t]he district court clearly had discretion to allow [the agent's] testimony concerning matters likely to be unfamiliar to jurors."<sup>115</sup> Thus, as in prior cases, the court did not require the officer to explain the methodological basis for the connection between walkie-talkies and his experience investigating drug-trafficking cases.

The Seventh Circuit has gone further to liberally allow the police officers' and federal agents' testimony about counter-surveillance use in drug transactions without requiring supporting facts, data, or methodology.<sup>116</sup> In *United States v. Parra*,<sup>117</sup> a jury found defendant guilty of conspiracy to distribute and possess with intent to distribute in excess of 500 grams of cocaine and for possessing with the intent to distribute in excess of 500 grams of cocaine.<sup>118</sup> On appeal, defendant challenged, *inter alia*, the admission of an agent's expert testimony regarding drug-trafficking counter-surveillance techniques.<sup>119</sup> In particular, defendant contested the agent's testimony that the manner in which his co-defendant was parked during a particular drug transaction was indicative of counter-surveillance.<sup>120</sup>

Citing a number of cases decided prior to Rule 702's amendment, the court rejected defendant's claim and held that the agent's experience qualified him as an expert on drug-trafficking counter-surveillance.<sup>121</sup> Although this was the agent's first in-court expert testimony, the court nonetheless noted that the agent received training from agent school, including training in counter-surveillance techniques.<sup>122</sup> The court also noted that he gained

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<sup>113</sup> *Id.* at 450, 452.

<sup>114</sup> *Id.* at 452-53.

<sup>115</sup> *Id.*

<sup>116</sup> *See, e.g.*, *United States v. Romero*, 189 F.3d 576, 584-85 (7th Cir. 1999) (noting the propriety of expert officer testimony on "various countersurveillance techniques used by drug dealers to avoid detection"); *United States v. Sanchez-Galvez*, 33 F.3d 829, 832 (7th Cir. 1994) ("[B]ecause the clandestine nature of narcotics trafficking is likely to be outside the knowledge of the average layman, law enforcement officers may testify as experts in order to assist the jury in understanding these transactions."); *United States v. Brown*, 7 F.3d 648, 652 (7th Cir. 1993) ("Because courts have recognized that the average juror is unlikely to be knowledgeable about drug trafficking, they consistently have allowed expert testimony concerning the 'tools of the trade' and the methods of operation of those who distribute various types of illegal narcotics."); *United States v. de Soto*, 885 F.2d 354, 360 (7th Cir. 1989) ("[T]estimony by law enforcement officers regarding drug countersurveillance may be admitted as expert testimony."). Although the Seventh Circuit decided each of these cases prior to Rule 702's amendment, the court continues to rely on them. *See United States v. Parra*, 402 F.3d 752, 759 (7th Cir. 2005) (citing this block of cases).

<sup>117</sup> 402 F.3d 752 (7th Cir. 2005).

<sup>118</sup> *Id.* at 755, 757.

<sup>119</sup> *Id.* at 758.

<sup>120</sup> *Id.* at 757, 759.

<sup>121</sup> *Id.* at 759 (citing pre-amendment cases discussed *supra* note 116).

<sup>122</sup> *Id.* at 758.

extensive experience as a DEA special agent through his involvement in multiple undercover purchases of controlled substances.<sup>123</sup> Accordingly, the court concluded that the agent's testimony regarding the co-defendant's activities during the drug sale "was valuable notwithstanding the fact that the jury had access to the surveillance tapes."<sup>124</sup>

Finally, as noted, courts also allow more generic officer expert testimony about the modus operandi of participants in drug transactions. In *United States v. Lopez-Lopez*,<sup>125</sup> for example, the First Circuit considered whether the district court properly allowed a U.S. Customs Service agent to testify as an expert about how traffickers imported drugs.<sup>126</sup> The agent, who was not involved in investigating the case, "testified about how drug importation schemes use GPS to facilitate air drops and boat-to-boat transfers, and about how cellular telephones are used to enable boat-to-ground communication."<sup>127</sup> Although the appellants asserted that the district court failed to properly apply *Daubert*, the First Circuit disagreed, noting that "[t]he [district] court found that [the expert's] testimony was based on his experience with how GPS and cellular telephones are used in drug operations."<sup>128</sup>

The *Parra* and *Lopez-Lopez* courts' reliance on experience, however, highlights only one facet of the district court's gate-keeping function. Determining the overall validity of expert testimony likewise necessitates inquiry into (1) how that experience translates into reliable testimony, and (2) how the witness applies the principles and methods to the facts of the case. Minimally, though, a mere reliance on a witness's experience does not comport with the Advisory Committee's suggestion that an opinion from a non-scientist expert "should receive the same degree of scrutiny for reliability as an opinion from an expert who purports to be a scientist."<sup>129</sup>

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<sup>123</sup> *Parra*, 402 F.3d at 758.

<sup>124</sup> *Id.* at 759. Importantly, federal courts' admission of expert officer testimony on the issue of counter-surveillance is hardly new and seems merely to continue pre-702 amendment practice. *See, e.g.*, *United States v. Sanchez-Galvez*, 33 F.3d 829, 832 (7th Cir. 1994); *United States v. Pearce*, 912 F.2d 159, 163 (6th Cir. 1990); *United States v. Maher*, 645 F.2d 780, 783 (9th Cir. 1981).

<sup>125</sup> 282 F.3d 1 (1st Cir. 2002).

<sup>126</sup> *Id.* at 13.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 14. Like other areas, the allowance of officer/agent expert testimony on drug-trafficker modus operandi appears consistent with the practice prior to Rule 702's amendment. *See, e.g.*, *United States v. White*, 116 F.3d 903, 922 (D.C. Cir. 1997); *United States v. Webb*, 115 F.3d 711, 713-14 (9th Cir. 1997); *United States v. Alonso*, 48 F.3d 1536, 1540 (9th Cir. 1995); *United States v. Gastiaburo*, 16 F.3d 582, 588-89 (4th Cir. 1994).

<sup>129</sup> FED. R. EVID. 702 advisory committee's note—2000 Amendment.

#### 4. Guns, Equipment, and Paraphernalia

Expert testimony about the role of guns and other equipment in drug transactions is also common. Consider *United States v. Hicks*,<sup>130</sup> wherein the district court admitted expert testimony from a Massachusetts State Police Officer about the role of weapons in crack cocaine transactions in Brockton, MA.<sup>131</sup> At the district court level, the officer testified that weapons were prevalent among drug dealers in Brockton.<sup>132</sup> The officer also stated that it was “common practice” for dealers to hide or pass off weapons to other dealers and to those who sell drugs for them.<sup>133</sup> Defendant contended on appeal that the officer improperly invaded the fact-finding function of the jury.<sup>134</sup> In affirming the district court’s decision, the First Circuit briefly reasoned that the officer had extensive experience investigating narcotics dealers in Brockton, and “[t]he average juror might not understand the fluid exchange of weapons among drug dealers in Brockton.”<sup>135</sup>

The First Circuit’s holding is hardly anomalous. In *United States v. Lopez*,<sup>136</sup> the Second Circuit considered whether the district court correctly allowed a New York Police Detective to testify as an expert that drug paraphernalia seized from defendant’s car constituted evidence of distribution.<sup>137</sup> Following his convictions for possession of cocaine with intent to distribute and possession of two firearms in furtherance of a drug-trafficking crime, defendant appealed.<sup>138</sup> He asserted, *inter alia*, that the detective did not base his testimony on “any reliable methodology or data.”<sup>139</sup> Noting that the argument was “without merit,” the Second Circuit affirmed.<sup>140</sup> It reasoned in part that “[a] detective with nearly two decades’ experience investigating drug crimes is well qualified to give such expert opinion.”<sup>141</sup>

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<sup>130</sup> 575 F.3d 130 (1st Cir. 2009).

<sup>131</sup> *Id.* at 136.

<sup>132</sup> *Id.* at 144.

<sup>133</sup> *Id.* (internal quotation marks omitted).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> 547 F.3d 364 (2d Cir. 2008).

<sup>137</sup> *Id.* at 372. Over defendant’s objection, the district court specifically allowed the detective to testify as an “expert in the practices of drug users and dealers” in part because “his specialized knowledge would assist me [in this bench trial] to understand the evidence or determine a fact in issue.” *Id.* at 373 (second internal quotation marks omitted). The detective then testified about items found in defendant’s bag and “concluded that the items were more consistent with drug distribution than personal use.” *Id.*

<sup>138</sup> *Id.* at 366.

<sup>139</sup> *Id.* at 373.

<sup>140</sup> *Lopez*, 547 F.3d at 366, 373.

<sup>141</sup> *Id.* at 373.

Lastly, by way of example, the Eighth Circuit also approved expert testimony about drug paraphernalia seized from defendant's residence.<sup>142</sup> In *United States v. Jeanetta*,<sup>143</sup> defendant appealed his drug convictions by arguing, in part, that the district court abused its discretion.<sup>144</sup> The district court had admitted a police officer's expert testimony about the significance of Ziploc bags, radios, scanners, cameras, monitors, night vision goggles, and \$2,000 cash—all seized from defendant's home.<sup>145</sup> The officer in *Jeanetta* first testified that drug dealers commonly use Ziploc bags to repack-age drugs and that the bags are popular because they can be resealed and their contents are visible.<sup>146</sup> Second, as to radios, scanners, cameras, monitors, and night vision goggles, the officer testified that drug dealers commonly use those tools to monitor law enforcement activities.<sup>147</sup> Finally, the officer testified that drug dealers commonly keep large quantities of cash on hand for drug transactions.<sup>148</sup>

The Eighth Circuit upheld the district court's admission of the officer's expert testimony.<sup>149</sup> Without conducting the analysis required by *Daubert* and *Kumho Tire*, it briefly reasoned that "[t]he significance of seemingly innocuous household items . . . sophisticated surveillance equipment," and the presence of \$2000 "was highly relevant to Jeanetta's claim he was merely a drug user and not a trafficker."<sup>150</sup> Accordingly, "[b]ecause the importance of the items would not necessarily be apparent to a lay observer, the expert testimony was necessary to explain the significance of the items as they related to the world of drug dealing."<sup>151</sup>

*Hicks*, *Lopez*, and *Jeanetta* collectively illustrate that the utility of expert testimony to the jury is a matter entirely separate from the *Daubert* Court's concern about the testimony's reliability<sup>152</sup>—a concern shared by

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<sup>142</sup> *United States v. Jeanetta*, 533 F.3d 651, 657-58 (8th Cir. 2008).

<sup>143</sup> 533 F.3d 651 (8th Cir. 2008).

<sup>144</sup> *Id.* at 657.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Jeanetta*, 533 F.3d at 658.

<sup>150</sup> *Id.* at 657.

<sup>151</sup> *Id.* at 657-58. Again, allowing expert testimony on equipment or paraphernalia's role in drug transactions appears merely to continue district courts' practice prior to Rule 702's 2000 amendment. *See, e.g.*, *United States v. Thomas*, 74 F.3d 676, 682 (6th Cir. 1996); *United States v. Kearns*, 61 F.3d 1422, 1427 (9th Cir. 1995); *United States v. Gastiaburo*, 16 F.3d 582, 588-89 (4th Cir. 1994); *United States v. Simmons*, 923 F.2d 934, 946 (2d Cir. 1991).

<sup>152</sup> *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993) ("[U]nder the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.").

Rule 702.<sup>153</sup> Stated differently, although an appellate court declared that a district court's admission of expert testimony assisted the jury, such statement says nothing about whether that testimony was reliable within the meaning of Rule 702. And, more importantly, applying Rule 702 in this cursory manner hardly ensured that the district court undertook the analysis required by *Daubert* prior to admitting the objectionable testimony.

##### 5. The Meaning of Codes, Conversations, and Language

Seemingly by far the most commonly admitted form of expert officer testimony is that which is related to the meaning of drug codes, conversations, and language.<sup>154</sup> In one of many representative examples, in *United States v. Emmanuel*,<sup>155</sup> the Eleventh Circuit affirmed the district court's admission of expert testimony from a sergeant in the Drug Enforcement United of the Royal Bahamas Police Force.<sup>156</sup> The sergeant interpreted general jargon used by drug transaction participants.<sup>157</sup> For instance, the officer testified that "'car' mean[t] boat," that "'the road could get bad' mean[t that] the weather could get bad," and that "'pothole' mean[t that] there [was] a delay with a shipment."<sup>158</sup>

The sergeant also offered definitions of drug-specific jargon, explaining that "'two dollars' mean[t] \$2,000," that "'D Boys' mean[t] agents from the Drug Enforcement Administration," and that "for them to find the girls with this guy, they got to pick him out of the water, and, you know, and cut," meant individuals had "to take the boat out of the water and cut it up to find the cocaine."<sup>159</sup> After indicating, "[t]he operations of narcotics dealers, including drug codes and jargon, are proper subjects of expert testimony," the appellate court summarily stated without further explanation, "[t]his testimony was properly admitted."<sup>160</sup> Accordingly, the court made no

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<sup>153</sup> FED. R. EVID. 702 advisory committee's note—2000 Amendment ("Consistently with *Kumho*, the Rule as amended provides that all types of expert testimony present questions of admissibility for the trial court in deciding whether the evidence is reliable and helpful.")

<sup>154</sup> See *United States v. Theodoropoulos*, 866 F.2d 587, 591 (3d Cir. 1989) (calling law enforcement expert testimony on drug jargon "the paradigm situation for expert testimony under Rule 702"), *overruled on other grounds* by *United States v. Price*, 76 F.3d 526 (3d Cir. 1996). The frequent use of expert testimony on the issue of drug jargon is hardly surprising given that the Advisory Committee Notes to Rule 702 expressly authorize the use of testimony by law enforcement officers concerning the meaning of words by drug traffickers. FED. R. EVID. 702 advisory committee's note—2000 Amendment.

<sup>155</sup> 565 F.3d 1324 (11th Cir. 2009).

<sup>156</sup> *Id.* at 1327, 1335.

<sup>157</sup> *Id.* at 1335.

<sup>158</sup> *Id.* at 1336.

<sup>159</sup> *Id.* (third internal quotation marks omitted).

<sup>160</sup> *Id.* at 1335-36.

effort to examine the facts or data, if any, that enabled the sergeant to discern that seemingly innocuous phrases were actually drug code.

A similar dearth of analysis pervaded the D.C. Circuit's opinion in *United States v. Mejia*.<sup>161</sup> In *Mejia*, two defendants were convicted of conspiring to distribute five or more kilograms of cocaine with the knowledge and intent that such cocaine would be unlawfully imported into the United States.<sup>162</sup> On appeal, defendants challenged the district court opinion for admitting a Costa Rican inspector's expert testimony because he led the investigation in Costa Rica.<sup>163</sup> The court concluded that the district court properly considered the inspector an expert given that he learned the "lexicon" used by drug traffickers through his many years of listening to their conversations.<sup>164</sup> The court reasoned that the advisory committee notes to Rule 702 specifically contemplate allowing this type of testimony.<sup>165</sup>

A final example comes from the Ninth Circuit's decision in *United States v. Reed*.<sup>166</sup> In *Reed*, multiple defendants were convicted by a jury of conspiracy crimes related to the manufacture and distribution of phenylcyclohexylpiperidine ("PCP").<sup>167</sup> On appeal, one defendant challenged the admission of expert testimony regarding "drug jargon."<sup>168</sup> This expert, labeled only by the court as a "Detective," testified for instance that "'grignard,' 'yardstick,' and 'yards' . . . refer[red] to the reagent used in the PCP manufacturing process."<sup>169</sup> The court summarily affirmed the district court's decision.<sup>170</sup> Without examining the detective's methodology, it reasoned that (1) the detective's testimony "was based on his experience investigating PCP traffickers and on his specific experience investigating the present case"; and (2) it "was not inherently unreliable and it was helpful in defining ambiguous terms used in the wiretap recordings."<sup>171</sup> According to the court, those terms "were outside the knowledge of the lay juror."<sup>172</sup>

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<sup>161</sup> 448 F.3d 436 (D.C. Cir. 2006).

<sup>162</sup> *Id.* at 439.

<sup>163</sup> *Id.* at 448.

<sup>164</sup> *Id.* (internal quotation marks omitted).

<sup>165</sup> *Id.* ("The method used by the agent is the application of extensive experience to analyze the meaning of the conversations." (emphasis omitted) (quoting FED. R. EVID. 702 advisory committee's note—2000 Amendment) (internal quotation marks omitted)).

<sup>166</sup> 575 F.3d 900 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 1728 (2010).

<sup>167</sup> *Id.* at 904.

<sup>168</sup> *Id.* at 922-23.

<sup>169</sup> *Id.* at 923.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Reed*, 575 F.3d at 923. Similar to other categories in this Article, courts continue to admit expert testimony on the interpretation and meaning of codes, conversations, and language in drug transactions, similar to the practices of federal courts prior to Rule 702's 2000 amendment. *See, e.g.*, *United States v. Griffith*, 118 F.3d 318, 321-22 (5th Cir. 1997) (affirming the use of law enforcement agents as experts on drug trade jargon); *United States v. Delpit*, 94 F.3d 1134, 1145 (8th Cir. 1996) (same); *United States v. Walls*, 70 F.3d 1323, 1326-27 (D.C. Cir. 1995) (same).

## 6. Generalized Practices Related to Narcotics Transactions

Finally, district courts often admit expert testimony on the generalized practices of drug traffickers.<sup>173</sup> For example, the Seventh Circuit in *United States v. Moore*,<sup>174</sup> affirmed the admission of expert testimony. At the district court level, a state police officer testified about a drug transaction involving 3.6 kilograms of heroin.<sup>175</sup> Officers apprehended defendant after he picked up a confederate at a bus station and discovered contraband in the confederate's luggage.<sup>176</sup> At trial, defendant argued that he did not know that the confederate's luggage contained contraband.<sup>177</sup> To implicitly refute that assertion, the government asked the officer, over objection, whether innocent persons participate in drug transactions.<sup>178</sup> The officer responded, "only 'people that are involved in the drug deal' will be present—and by 'involved' [the officer] meant people who 'have knowledge as to what's taking place, the illegal activity.'"<sup>179</sup> A jury convicted defendant of conspiring to possess heroin with the intent to distribute, and he was sentenced to 121 months imprisonment.<sup>180</sup>

On appeal, defendant asserted that the district court erroneously allowed the officer to testify as an expert.<sup>181</sup> The court acknowledged that the district court failed to address the inquiries required by Rule 702.<sup>182</sup> It specifically noted that the record lacked any evidence demonstrating that the officer's testimony rested on "facts or data."<sup>183</sup> Yet, the court declined to reverse.<sup>184</sup> Instead, it affirmed defendant's conviction because the parties failed to direct the district court's attention to the proper Rule 702 analysis.<sup>185</sup>

Although courts routinely admit expert testimony about generalized practices related to narcotics transactions, things get tricky when it comes to

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<sup>173</sup> *E.g.*, *United States v. Mendoza*, 236 F. App'x 371, 381 (10th Cir. 2007); *United States v. Miller*, 395 F.3d 452, 454 (D.C. Cir.), *vacated on other grounds*, 545 U.S. 1101 (2005).

<sup>174</sup> 521 F.3d 681 (7th Cir. 2008).

<sup>175</sup> *Id.* at 682-83.

<sup>176</sup> *Id.* at 682.

<sup>177</sup> *Id.* at 683.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Moore*, 521 F.3d at 683.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

The district judge did not address any of the Rule's three questions: (1) whether [the officer's] view "is based upon sufficient facts or data"; (2) whether it is "the product of reliable principles and methods"; and (3) whether the "witness has applied the principles and methods reliably to the facts of the case."

*Id.* (quoting FED. R. EVID. 702).

<sup>183</sup> *Id.* at 684 (internal quotation marks omitted).

<sup>184</sup> *Id.* at 685.

<sup>185</sup> *Moore*, 521 F.3d at 685.

testimony about drug courier profiles. Indeed, the majority of circuits decline to admit expert testimony on drug profiles as substantive evidence, having “long . . . recognized [those profiles] as inherently prejudicial ‘because of the potential they have for including innocent citizens as profiled drug couriers.’”<sup>186</sup> Importantly, however, courts struggle to draw a clear line between permissible expert testimony about generalized practices related to drug transactions and impermissible expert testimony on drug courier profiles.<sup>187</sup>

For instance, in *United States v. Sanchez-Hernandez*,<sup>188</sup> the Fifth Circuit considered whether the district court properly admitted expert testimony.<sup>189</sup> There, the expert testified that defendant’s conduct indicated drug smuggling based on comparisons to a drug-smuggling profile.<sup>190</sup> In *Sanchez-Hernandez*, defendant was charged, in part, with importing marijuana into the United States from Mexico.<sup>191</sup> As part of its case-in-chief, the government proffered—and the district court admitted—expert testimony from the border patrol agents who arrested defendant.<sup>192</sup> Collectively, their testimony included the following: (1) a lead person entered the water and served as a scout for others, which was consistent with a “drug crossing” rather than an “alien crossing”; (2) the persons seeking to cross the water were wearing camouflage, which was consistent with drug smuggling; (3) the persons crossing were carrying a green duffle bag, which was a type commonly used for drug smuggling; (4) the persons crossing the river were doing so at a point frequently used by drug smugglers; and (5) the manner

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<sup>186</sup> *United States v. Williams*, 957 F.2d 1238, 1242 (5th Cir. 1992) (quoting *United States v. Hernandez-Cuartas*, 717 F.2d 552, 555 (11th Cir. 1983)); *see also, e.g.*, *United States v. Jones*, 913 F.2d 174, 177 (4th Cir. 1990) (holding that drug profile testimony is impermissibly prejudicial against defendant); *United States v. Doe*, 903 F.2d 16, 19-21 (D.C. Cir. 1990) (explaining the need to balance the value of testimony on drug trafficking practices and drug courier profiles against its potential to be prejudicial); *United States v. Beltran-Rios*, 878 F.2d 1208, 1210-13 (9th Cir. 1989) (permitting drug profiler testimony only in limited circumstances due to its prejudicial effect); *United States v. Hernandez-Cuartas*, 717 F.2d 552, 555 (11th Cir. 1983) (condemning the use of drug profiles used as evidence of guilt).

<sup>187</sup> *See United States v. Long*, 328 F.3d 655, 666 (D.C. Cir. 2003) (“‘Courts have condemned the use of profiles as substantive evidence of guilt,’ while acknowledging that there is a ‘fine line between potentially improper profile evidence and accepted specialized testimony.’” (quoting *United States v. McDonald*, 933 F.2d 1519, 1521 (10th Cir. 1991), and *United States v. Becker*, 230 F.3d 1224, 1231 (10th Cir. 2000)) (citation omitted)); *see also, e.g.*, *United States v. Mendoza-Mendoza*, 267 F. App’x 365, 366 (5th Cir. 2008) (per curiam) (discussing whether expert law enforcement testimony was purely background material or drug profile testimony as substantive evidence of defendant’s guilt); *United States v. Cadavid*, No. 93-50278, 1994 WL 390009, at \*4 (9th Cir. July 25, 1994) (same); *Jones*, 913 F.2d at 177 (same).

<sup>188</sup> 507 F.3d 826 (5th Cir. 2007).

<sup>189</sup> *Id.* at 830-31.

<sup>190</sup> *Id.* at 832-33.

<sup>191</sup> *Id.* at 827.

<sup>192</sup> *Id.* at 827-28.

in which defendant was carrying the green bag was consistent with the way drugs are carried.<sup>193</sup>

Defendant contended that the district court abused its discretion by admitting the agents' testimony as substantive evidence.<sup>194</sup> He reasoned that the government premised it on impermissible comparisons to a drug-smuggling profile.<sup>195</sup> The Fifth Circuit disagreed, holding that, "[a]lthough the agents' testimony came close to crossing the line," it was nonetheless permissible because it explained to the jury the difference between an alien and a drug crossing.<sup>196</sup> The testimony collectively was "based on their knowledge and experience [and] could assist the trier of fact to understand the evidence."<sup>197</sup>

That same Circuit's decision in *United States v. Gutierrez-Farias*,<sup>198</sup> however, illustrates how fine the line is between permissible *modus operandi* testimony and impermissible drug courier profile testimony.<sup>199</sup> There, the district court allowed a DEA agent to testify as an expert at defendant's trial for conspiring to distribute 100 kilograms of marijuana.<sup>200</sup> The agent testified about the business of transporting drugs through South Texas.<sup>201</sup> The agent, who had no personal involvement in the case, essentially testified as follows:

(1) drug owners have managers and other people who work for them; (2) people higher up in the organization hire other people to transport the drugs; and (3) the people doing the hiring "look for people, individuals, approach individuals that have knowledge, that they're involved in this kind of business, and they charge a price."<sup>202</sup>

After questioning "whether [the agent's] testimony regarding what a person in [defendant's] position would have known about the drugs he was

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<sup>193</sup> *Id.* at 828.

<sup>194</sup> *Sanchez-Hernandez*, 507 F.3d at 830-31.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 832-33.

<sup>197</sup> *Id.* at 833.

<sup>198</sup> 294 F.3d 657 (5th Cir. 2002).

<sup>199</sup> Courts decline to admit expert testimony about drug couriers' profiles as substantive evidence in part because such testimony may tacitly comment on whether defendant has the requisite mental state for the crime charged. *See* *United States v. Lui*, 941 F.2d 844, 847 (9th Cir. 1991) ("As in *Quigley*, here [the DEA agent] tied [defendant's] actions to a drug courier profile for the purpose of proving [defendant's] guilt."); *United States v. Quigley*, 890 F.2d 1019, 1023-24 (8th Cir. 1989) ("This point by point examination of profile characteristics with specific reference to [defendant] constitutes use of the profile not as background to explain or justify an investigative stop, but as substantive evidence that [defendant] fits the profile and, therefore, must have intended to distribute the cocaine in his possession."). Notably, at least one circuit has shown a past willingness to admit expert testimony on drug courier's profiles as substantive evidence of guilt. *See* *United States v. Teslim*, 869 F.2d 316, 324 (7th Cir. 1989).

<sup>200</sup> *Gutierrez-Farias*, 294 F.3d at 659, 661.

<sup>201</sup> *Id.* at 661.

<sup>202</sup> *Id.* at 662.

transporting can fairly be considered ‘expert,’” the court held that the district court erred in admitting the testimony.<sup>203</sup> In doing so, the court reasoned that the agent’s testimony improperly suggested that “because most drivers know there are drugs in their vehicles, [defendant] must have known too.”<sup>204</sup>

The juxtaposition of *Sanchez-Hernandez* and *Gutierrez-Farias* nicely illustrates that courts have difficulties parsing out the propriety of law enforcement expert testimony, particularly in the drug courier context. Yet, more importantly, they both illustrate the analytical sidestepping undertaken by appellate courts. Whether the expert testimony in both cases does or does not mirror a drug courier profile seems as though it is a matter entirely collateral to the central question of how officers *know*, for example, that carrying a bag in a certain manner is consistent with participation in drug trafficking.<sup>205</sup> Do facts support that principle? Do courts premise their decision on a reliable methodology? If so, how do they maintain and control that methodology? Finally, does the law enforcement community generally accept their methodology? These and similar questions must be answered in order to complete the reliability analysis that the Supreme Court and Rule 702 require.

### C. *The Federal Judiciary Is Largely Ignoring the Requirements of Rule 702*

The text of Rule 702 (and state equivalents) minimally requires that expert evidence proponents must convince the courts that the evidence “will assist the trier of fact to understand the evidence or to determine a fact in issue.”<sup>206</sup> When the expert is a member of law enforcement (or otherwise seeks to qualify as an expert by way of knowledge or experience), the Rule also directs consideration of whether “(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.”<sup>207</sup>

Importantly, the advisory committee note observes that the following *Daubert* factors are likewise relevant to non-scientific expert testimony: (1) “whether the expert’s technique or theory can be or has been [objectively] tested”; (2) “whether the technique or theory has been subject to peer

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<sup>203</sup> *Id.* at 663.

<sup>204</sup> *Id.* Although placed under the Rule 702 category, the Fifth Circuit’s opinion in *Gutierrez-Farias* could properly also be characterized as holding that the expert’s testimony violated Rule 704(b). *See id.* (concluding that the expert’s statements were the “functional equivalent” of a comment on defendant’s mental state).

<sup>205</sup> *United States v. Sanchez-Hernandez*, 507 F.3d 826, 828 (5th Cir. 2007).

<sup>206</sup> FED. R. EVID. 702.

<sup>207</sup> *Id.*

review and publication”; (3) the “rate of error of the technique or theory”; (4) “the existence and maintenance of standards and controls”; and (5) whether the scientific community has generally accepted the technique or theory.<sup>208</sup> Now, admittedly, the factors are neither exclusive,<sup>209</sup> nor can they apply to *every* part of an expert’s testimony.<sup>210</sup> But, the advisory committee notes to the 2000 amendment are clear: “[t]he standards set forth in the amendment are broad enough to require consideration of any or all of the specific Daubert factors where appropriate.”<sup>211</sup>

What then should practitioners do with the appellate decisions discussed in Section B that uphold the admission of law enforcement expert testimony but do not include, highlight, or otherwise rely on *any* of the foregoing eight total factors? Indeed, as revealed in the First,<sup>212</sup> Eighth,<sup>213</sup> and Eleventh Circuit cases discussed above,<sup>214</sup> appellate courts are seemingly unwilling to scrutinize district courts’ decisions to qualify law enforcement members as experts. Of course, some of that undoubtedly stems from the deferential abuse of discretion standard governing appellate evidentiary claims.<sup>215</sup> Yet, the question is: *Does* a district court abuse its discretion pursuant to Rule 702 when it comes to law enforcement expert testimony?<sup>216</sup>

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<sup>208</sup> *Id.* advisory committee’s note—2000 Amendment.

<sup>209</sup> See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 593 (1993).

<sup>210</sup> See, e.g., *Kannankeril v. Terminix Int’l, Inc.*, 128 F.3d 802, 809 (3d Cir. 1997); *Tyus v. Urban Search Mgmt.*, 102 F.3d 256, 263 (7th Cir. 1996).

<sup>211</sup> FED. R. EVID. 702 advisory committee’s note—2000 Amendment (emphasis added).

<sup>212</sup> See *United States v. Reynoso*, 336 F.3d 46, 49 (1st Cir. 2003).

<sup>213</sup> See *United States v. Jeanetta*, 533 F.3d 651, 658 (8th Cir. 2008); *United States v. Sarabia Martinez*, 276 F.3d 447, 452 (8th Cir. 2002).

<sup>214</sup> See *United States v. Emmanuel*, 565 F.3d 1324, 1336 (11th Cir. 2009).

<sup>215</sup> See, e.g., *United States v. Stokes*, 388 F.3d 21, 26 (1st Cir. 2004) (holding that the trial court did not abuse its discretion by excluding expert testimony), *vacated*, 544 U.S. 917 (2005); *United States v. Robertson*, 387 F.3d 702, 704 (8th Cir. 2004) (holding that the trial court did not abuse its discretion by admitting two police detectives as expert witnesses on drug trafficking); *United States v. Adams*, 271 F.3d 1236, 1246 (10th Cir. 2001) (holding that the trial court did not abuse its discretion by excluding expert testimony). According to Black’s Law Dictionary, an “abuse of discretion” occurs when the “appellate court is of the opinion that” the trial judge has made a “clearly erroneous conclusion and judgment—one is that [sic] clearly against logic and effect of such facts as are presented in support of the application or against the reasonable and probable deductions to be drawn from the facts disclosed upon the hearing.” BLACK’S LAW DICTIONARY 10 (6th ed. 1990). Based on that standard, some commentators believe that, in order for a trial court to abuse its discretion, the decision “must be eye-popping, neck-snapping, jaw-dropping egregious error.” Mark P. Painter & Paula L. Welker, *Abuse of Discretion: What Should It Mean Under Ohio Law?*, 29 OHIO N.U. L. REV. 209, 219 (2002) (quoting Roger Badeker, *Wide as a Church Door, Deep as a Well: A Survey of Judicial Discretion*, 61 J. KAN. B. ASS’N, Mar.-Apr. 1992, at 33, 33) (internal quotation marks omitted).

<sup>216</sup> Even if a district court abuses its discretion, the harmless error standard presents yet another (and arguably more substantial) hurdle over which the criminal defendant must jump. See FED. R. CRIM. P. 52(a) (“Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.”); see also *Hamling v. United States*, 418 U.S. 87, 135 (1974) (noting that an appellate

The absence of meaningful appellate analysis aside, the almost total willingness of district courts to admit—and appellate courts to affirm—expert agent testimony is disconcerting for another reason: the categories of permissible law enforcement expert testimony keep expanding.<sup>217</sup> As the discussion above demonstrated, district courts allow expert testimony on a wide variety of topics in drug prosecutions like (1) the amount of drugs in defendant’s possession; (2) the modus operandi of drug traffickers; (3) paraphernalia and equipment associated with the drug trade; (4) translations of drug jargon; and (5) periodic testimony on drug courier profiles.<sup>218</sup>

That diverse array of topics upon which law enforcement may evidently testify as experts hardly seems to comport with the Supreme Court’s vision of the district court as the “gatekeep[er].”<sup>219</sup> Indeed, in *Daubert*, the Court emphasized that to fulfill that role, district courts must ensure that the proposed expert testimony is both relevant and reliable.<sup>220</sup> Although *Daubert* was limited to scientific expert testimony,<sup>221</sup> *Kumho Tire* clarified the importance of assuring that even non-scientific evidence is reliable.<sup>222</sup> Moreover, *Kumho Tire* expressly observed that “some of *Daubert*’s questions can help to evaluate the reliability even of experience-based testimony.”<sup>223</sup> Taken together, the message is clear: the Supreme Court—post-*Daubert*—meant for courts to apply more judicial scrutiny of proposed expert evidence rather than less.<sup>224</sup>

Admittedly, though, the committee notes accompanying the amended Rule 702 expressly contemplate “law enforcement agent [testimony] regarding the use of code words in a drug transaction.”<sup>225</sup> Indeed, said the committee, “[s]o long as the principles and methods are reliable and applied reliably to the facts of the case, this type of testimony should be admitted.”<sup>226</sup> Yet it is far less clear that the drafters meant for that language to

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court may hesitate to step in because, even if there exists an erroneous inclusion of expert testimony, such error may be harmless to defendant).

<sup>217</sup> See Walter G. Amstutz & Bobby Marzine Harges, *Evolution of Controversy: The Daubert Dilemma: The Application of Daubert v. Merrell Dow Pharmaceuticals Inc. to Expert Testimony of Law Enforcement Officers in Narcotics-related Cases*, 23 U. HAW. L. REV. 67, 100 (2000) (noting the “diversity of topics that law enforcement officers have testified about in narcotics-related cases”).

<sup>218</sup> See discussion *supra* Part I.B.2-6.

<sup>219</sup> *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993).

<sup>220</sup> *Id.* at 589.

<sup>221</sup> *Id.* at 597.

<sup>222</sup> *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149 (1999).

<sup>223</sup> *Id.* at 151.

<sup>224</sup> See Erica Beecher-Monas, *Blinded by Science: How Judges Avoid the Science in Scientific Evidence*, 71 TEMP. L. REV. 55, 102 (1998) (noting “the heightened scrutiny required under *Daubert*”); D. Michael Risinger & Jeffrey L. Loop, *Three Card Monte, Monty Hall, Modus Operandi and “Offender Profiling”: Some Lessons of Modern Cognitive Science for the Law of Evidence*, 24 CARDOZO L. REV. 193, 223 n.194 (2002) (referring to *Daubert* and noting its “general heightening of scrutiny”).

<sup>225</sup> FED. R. EVID. 702 advisory committee’s note—2000 amendment (emphasis added).

<sup>226</sup> *Id.*

allow law enforcement experts to *translate* code words. More startlingly, it is not clear that the drafters meant to allow officers—rather than a laboratory technician—to testify that the substance defendant allegedly possessed or distributed was, in fact, a *controlled* substance.<sup>227</sup>

Regardless, the question seems to become how best to assess the reliability of the law enforcement expert witnesses' methodology.<sup>228</sup> In an opinion issued by the Ninth Circuit shortly after Rule 702's amendment, the court in *United States v. Hermanek*<sup>229</sup> held that the district court erred in admitting expert drug-jargon testimony.<sup>230</sup> In doing so, the court reasoned that the district court impermissibly admitted the officer's testimony without requiring the government to explain the method that the officer used to interpret particular words that referred to cocaine.<sup>231</sup>

But, *Hermanek* still begs the question: How *could* an officer employ a reliable "method" of translating drug jargon? In *United States v. Wilson*,<sup>232</sup> a Fourth Circuit decision, a narcotics officer testified as an expert on drug-related code language and, in doing so, stated the following to explain his methodology:

It all depends on the situation. I mean, there's, obviously, there's a lot of words to mean one thing. So like I say, you take it into the context of what you're talking about. That's how you determine. . . . It all depends on the context of the call. You know, drug dealers use coded language. And the reason that they do that is because they don't want police involvement or police to know what they're talking about. . . . I take the person who's talking, the conversation. I take what has this person, what's the routine pattern of this person before and the pattern after. And that's how I make my determination. . . . [W]hen you hear [a] word time and time again . . . then there's a pattern that develops. And when that pattern develops, that ultimately shows you what they're talking about.<sup>233</sup>

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<sup>227</sup> *E.g.*, *United States v. Sanapaw*, 366 F.3d 492, 496 (7th Cir. 2004) (accepting testimony from "three law enforcement officers with prior experience in drug detection [who] testified that the substance appeared to be marijuana").

<sup>228</sup> See Jennifer L. Groscup et al., *The Effects of Daubert on the Admissibility of Expert Testimony in State and Federal Criminal Cases*, 8 PSYCHOL. PUB. POL'Y & L. 339, 345 & tbl.1 (2002) (providing data that reflected that the most common prosecution expert witnesses in all state and federal narcotics trials are law enforcement officers).

<sup>229</sup> 289 F.3d 1076 (9th Cir. 2002).

<sup>230</sup> *Id.* at 1094.

<sup>231</sup> *Id.* at 1094-95. The Ninth Circuit was particularly careful to emphasize that "bare qualifications alone cannot establish the admissibility of scientific expert testimony." *Id.* at 1093-94. That emphasis and corresponding language, however, does not necessarily reflect the modern view in federal court. *E.g.*, *United States v. Hurst*, 185 F. App'x 133, 135 n.3 (3d Cir. 2006) ("[T]he detective testified as an expert based on his fourteen years of experience in auto theft investigations, his knowledge of the subject, and his 'skill . . . training, [and] education.'" (second and third alterations in original) (quoting FED. R. EVID. 702)).

<sup>232</sup> 484 F.3d 267 (4th Cir. 2007).

<sup>233</sup> *Id.* at 275 (alterations in original) (quoting the officer's testimony).

The Fourth Circuit upheld the district court's admission of that testimony,<sup>234</sup> noting that the officer "began by explaining that his experience and training in investigating narcotics trafficking confirmed that drug dealers often use coded words and phrases in describing their business."<sup>235</sup> Moreover, reasoned the court, the officer "explained that he listened to intercepted conversations to see if they contained words that appeared to have dual meanings, as in, for example, a dictionary meaning and a drug meaning."<sup>236</sup> Thus, the court concluded, "[b]y listening to a number of drug-related conversations in context, he was able to sometimes identify a word pattern that led him to decipher the code."<sup>237</sup>

Yet, the illustrative decision in *Wilson* still seems analytically incomplete. The Supreme Court and drafters of Rule 702 have identified specific factors for a reason. Utilizing that analysis suggests that the *Wilson* court (and several others like it)<sup>238</sup> should have taken a more thorough approach to admitting expert officer testimony. Although reliability of the proposed testimony is the touchstone of admissibility, the narcotic-expert's testimony should still be premised on (1) sufficient facts or data; (2) reliable methodology; (3) correct application of that methodology to the case; (4) objective testing of that methodology; (5) how the methodology is maintained and controlled; and (6) whether the law enforcement community generally accepts that methodology.<sup>239</sup>

Like the expert in *Wilson*, narcotics experts who premise their methodologies on the particulars of "the situation" and "this person" hardly fulfill any of the foregoing criteria. Such testimony and its equivalent are inadmissible as expert testimony predicated on specialized knowledge; at best, such testimony is nothing more than case-specific factual testimony.

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<sup>234</sup> *Id.* at 278.

<sup>235</sup> *Id.* at 275.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *E.g.*, United States v. Baptiste, 596 F.3d 214, 222-23 (4th Cir. 2010); United States v. Robertson, 387 F.3d 702, 704-05 (8th Cir. 2004).

<sup>239</sup> See Amstutz & Harges, *supra* note 217, at 92-93. In order for courts to remain faithful to their "gatekeep[ing]" responsibility regarding expert testimony, Professor Harges and A.D.A. Amstutz suggest that prosecutors in narcotics cases "must establish, to the satisfaction of the trial judge, through questioning of the officer, that the officer's testimony is both reliable and relevant." *Id.* To do so, they suggest the following:

The areas of inquiry should include the officer's general and specialized law enforcement experience, the education and training he has received in narcotics-related matters, whether he has trained or supervised others in narcotics-related matters, whether he has written any narcotics-related articles, whether he has qualified and/or testified as an expert in court before, and the methodology he used to arrive at his conclusions. The prosecutor should also probe whether this methodology and data are used by other experts in the field. Additionally, the prosecutor should use the *Daubert* factors to evaluate the reliability and relevance of the witness's testimony. The prosecutor should then move the court to declare the witness an expert in the appropriate narcotics-related field.

*Id.*

The question therefore shifts to asking what particular proffers satisfy *Daubert* to thereby allow an officer to testify as an expert. First, the Federal Rules advisory committee was right in saying that when a “witness is relying solely or primarily on experience,” the district court must require the witness to “explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts.”<sup>240</sup> After all, “[t]he trial court’s gate-keeping function requires more than simply ‘taking the expert’s word for it.’”<sup>241</sup>

Second, the Second Circuit’s test to limit the admissibility of non-expert lay testimony about drug jargon merits consideration regarding law enforcement expert testimony. In *United States v. Garcia*,<sup>242</sup> a cooperating witness testified that a clearly recorded conversation that he had with defendant about their joint employment in the asbestos industry was actually a coded conversation about a drug deal.<sup>243</sup> In holding that the district court improperly admitted the witness’s testimony, the Second Circuit noted that defendant and the witness spoke clearly and without ambiguity on the recording.<sup>244</sup> Thus, reasoned the court, “[i]n order to allow lay opinion testimony interpreting a facially coherent conversation such as this, the government would have to establish a foundation that called into question the apparent coherence of the conversation so that it no longer seemed clear, coherent, or legitimate.”<sup>245</sup>

The Second Circuit tacitly suggested that district courts going forward should lean toward excluding drug-jargon lay testimony where the witness seeks to translate a clearly spoken conversation that uses full sentences, involves “a legitimate topic,” uses “words that make sense contextually,” and does not involve “unusually short or cryptic statements . . . ‘sharp and abbreviated’ language, ‘unfinished sentences,’ or ‘ambiguous references.’”<sup>246</sup> The court cautioned that were district courts to do otherwise, “the testimony then would serve to direct the jury what to conclude on a matter that it should decide in the first instance.”<sup>247</sup>

The Second Circuit’s lay testimony analysis in *Garcia* is easily imported into the context of law enforcement expert drug-jargon testimony. Indeed, applying the logic of *Garcia* suggests that members of law enforcement should *only* be allowed to testify as experts in drug jargon cases when the following conditions are met: (1) defendant’s conversation is am-

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<sup>240</sup> FED. R. EVID. 702 advisory committee’s note—2000 Amendment.

<sup>241</sup> *Id.*

<sup>242</sup> 291 F.3d 127 (2d Cir. 2002).

<sup>243</sup> *Id.* at 134-35.

<sup>244</sup> *Id.* at 142.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* (quoting *United States v. Aiello*, 864 F.2d 257, 265 (2d Cir. 1988)).

<sup>247</sup> *Id.*

biguous;<sup>248</sup> (2) the language that defendant employed during the conversation is consistent with terminology that is widely accepted as drug jargon;<sup>249</sup> and (3) separate proof exists that defendant, in fact, engages in drug jargon as part of his illicit activities.<sup>250</sup>

Finally, courts must not permit law enforcement experts to *also* testify as fact witnesses. Although the Second Circuit in *Dukagjini* was not willing to “prohibit categorically” such testimony,<sup>251</sup> importantly it did recognize several associated problems like (1) juror confusion, (2) police experts straying from reliable methodology, and (3) jurors deferring too readily to the proffered testimony.<sup>252</sup> Given the additional risk that occurs if agents or law enforcement members proffer hearsay testimony such as informants’ or accomplices’ statements,<sup>253</sup> risks of case-agent expert testimony outweigh their judicial-efficiency benefit. After all, the government would need only to proffer a separate member of law enforcement—removed from the investigation—to testify as an expert.<sup>254</sup>

<sup>248</sup> Cf. *United States v. Cruz*, 363 F.3d 187, 193 (2d Cir. 2004) (precluding expert testimony stating that “to watch someone’s back” means acting as a lookout for a drug transaction because the phrase is “neither ‘coded nor esoteric’” (first internal quotation marks omitted)).

<sup>249</sup> Cf. *United States v. Freeman*, 498 F.3d 893, 902-04 (9th Cir. 2007) (limiting law enforcement expert testimony to drug jargon terms familiar to the expert); *United States v. Dukagjini*, 326 F.3d 45, 50, 55 (2d Cir. 2003) (limiting drug jargon interpretations to “‘words of the trade, jargon,’ and the general practices of drug dealers”).

<sup>250</sup> Cf. *Dukagjini*, 326 F.3d at 55 (stating a witness cannot “essentially use[] his knowledge of the case file and witness interviews . . . to conclude that they were discussing heroin”).

<sup>251</sup> *Id.* at 56.

<sup>252</sup> *Id.* at 53-54; *accord, e.g.*, *United States v. Johnson*, 529 F.3d 493, 499-500 (2d Cir. 2008); *United States v. Thomas*, 74 F.3d 676, 682-83 (6th Cir. 1996); *United States v. Solis*, 923 F.2d 548, 549-50 (7th Cir. 1991).

<sup>253</sup> *E.g.*, *United States v. Locascio*, 6 F.3d 924, 938 (2d Cir. 1993) (holding that “expert witnesses can testify to opinions based on hearsay or other inadmissible evidence if experts in the field reasonably rely on such evidence in forming their opinions” under Rule 703 because officers routinely rely upon hearsay in reaching their conclusions).

<sup>254</sup> As a concluding aside more than anything, it is worth questioning many courts’ assumption that drug jargon and the operations of drug traffickers, for example, are outside the lay juror’s province. *See, e.g.*, *United States v. Hicks*, 575 F.3d 130, 144 (1st Cir. 2009); *United States v. Neeley*, 308 F. App’x 870, 876 (6th Cir. 2009); *United States v. Upton*, 512 F.3d 394, 401 (7th Cir. 2008); *United States v. Sanchez-Hernandez*, 507 F.3d 826, 831 (5th Cir. 2007); *United States v. McCoy*, 90 F. App’x 201, 203-04 (9th Cir. 2004); *United States v. Thomas*, 74 F.3d 676, 682 (6th Cir. 1996). According to the Supreme Court, juries are “presumed to follow [a court’s] instructions.” *Weeks v. Angelone*, 528 U.S. 225, 234 (2000) (citing *Richardson v. Marsh*, 481 U.S. 200, 211 (1987)). With that logic in mind, courts have held that juries understand limiting instructions, for example, *United States v. Lara*, 181 F.3d 183, 202 (1st Cir. 1999), instructions on mens rea, for example, *Francis v. Franklin*, 471 U.S. 307, 324 n.9 (1985), and inferentially incriminating confessions, for example, *Richardson v. Marsh*, 481 U.S. 200, 206 (1987). Courts should not allow prosecutors to have it both ways by concluding, on one hand, that juries understand those complex topics but, on the other hand, do not understand, for example, that “a great deal of money is involved in the crack business.” *United States v. McDonald*, 933 F.2d 1519, 1521 (10th Cir. 1991) (upholding the admission of expert testimony about the tools of a drug dealer’s trade).

Taken together, courts should therefore limit officer expert testimony in federal drug prosecutions to members of law enforcement who (1) do not also participate in the underlying criminal investigation, and (2) are sequestered from other witnesses in the case prior to their testimony. Then, prior to qualifying any member of law enforcement as an expert, district courts must insist upon an explanation from the expert about (1) how her experience led to the conclusion reached, (2) how that experience is an appropriate basis for the offered opinion, and (3) how the experience is reliably applied to the facts.

## II. LIMITATION ON ADMISSIBILITY OF EXPERT TESTIMONY

This Part considers the primary limitation on the admissibility of expert testimony: Rule 704(b). In doing so, Section A addresses Rule 704(b)'s exclusion of any expert opinion that directly or indirectly comments on the ultimate issue of defendant's mental state.<sup>255</sup> Section B then discusses federal cases examining the reach of an agent's testimony and the possibility that, while testifying, the agent could implicitly comment on defendant's mental state in violation of Rule 704(b). Finally, Section C asserts that,

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<sup>255</sup> Admittedly, Federal Rule of Evidence 403 may operate as a fallback basis for excluding expert testimony when prior objections pursuant to Rules 702 and 704(b) fail. *See* FED. R. EVID. 403. The rule embodies the fundamental restriction on admitting unfairly prejudicial evidence: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.* At the time of its passage in 1974, Rule 403 garnered virtually no attention from Congress, and it adopted the Rule as submitted. *See* Andrew K. Dolan, *Rule 403: The Prejudice Rule in Evidence*, 49 S. CAL. L. REV. 220, 221 & n.2 (1976) (citing S. REP. NO. 93-1277 (1974), 1974 U.S.C.C.A.N. 7051). From an operational standpoint, Rule 403 utilizes a balancing approach—weighing the probative value of and need for the evidence against the harm likely to result from its admission. *Id.* at 221 n.3. Although technically a rule of exclusion, *see* Michael J. Pavloski, Comment, *Old Chief v. United States: Interpretation and Misapplication of Federal Rule of Evidence 403*, 33 NEW ENG. L. REV. 797, 802 (1999), Rule 403 favors admissibility by placing the burden on the party opposing admission to prove a *substantial* imbalance of prejudicial impact over probative value. *See* Louis A. Jacobs, *Evidence Rule 403 After United States v. Old Chief*, 20 AM. J. TRIAL. ADVOC. 563, 567 (1997). When it comes to expert testimony specifically, *Daubert* highlighted the potential applicability of Rule 403 to expert testimony and expressly suggested that the Rule could be an appropriate vehicle to exclude even relevant expert testimony. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 595 (1993). Given that district courts have wide discretion in admitting expert testimony, *General Electric Co. v. Joiner*, 522 U.S. 136, 139 (1997), Rule 403 seemingly should play an important role as the last "safety net" for excluding unreliable expert testimony. *See* *United States v. Curry*, 977 F.2d 1042, 1050 (7th Cir. 1992); *United States v. Rouco*, 765 F.2d 983, 995 (11th Cir. 1985). Yet, in the context of drug trafficking prosecutions, Rule 403 has provided only minimal protection to defendants against the admission of law enforcement expert testimony. *See, e.g., United States v. Glover*, 479 F.3d 511, 516-17 (7th Cir. 2007); *United States v. Romero*, 57 F.3d 565, 572 (7th Cir. 1995); *United States v. Castillo*, 924 F.2d 1227, 1232-33 (2d Cir. 1991). Accordingly, Rule 403 is not a subject of this Article.

allowing testimony from officers that implicitly comments on defendant's mens rea expands Rule 704(b) too generously and threatens the Due Process Clause of the Fourteenth Amendment. Finally, this Part concludes that district courts should continue to receive officer expert testimony but, in doing so, they should prevent testimony that (1) connects defendant's factual behavior to the mens rea in the charging statute, (2) indicates that the facts of defendant's case satisfy defendant's mens rea, or (3) responds to the prosecutor's hypotheticals that mirror the factual circumstances of the case.

A. *Rule 704(b)*

Prior to the enactment of Federal Rule of Evidence 704(a) in 1975,<sup>256</sup> courts often adhered to the "ultimate issue" rule. This rule prohibited witnesses from expressing opinions on ultimate issues more properly decided by the trier-of-fact.<sup>257</sup> Nineteenth-century courts broadly excluded lay witnesses' opinion testimony in an effort to protect the sovereignty of the jury's fact-finding role.<sup>258</sup> Nonetheless, early twentieth-century courts began to admit opinion evidence if useful, if not available elsewhere, and if not otherwise superfluous.<sup>259</sup>

The judiciary's gradual abandonment of the ultimate issue rule in the early to middle twentieth century also marked early reliance on expert testimony.<sup>260</sup> Many courts followed Professor John Wigmore's proposed rule—that the courts admit any information helpful to the jury, whether opinion or fact, which governed lay witnesses.<sup>261</sup> Courts nevertheless frequently adhered to the ultimate issue rule for expert witnesses.<sup>262</sup> They also

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<sup>256</sup> Anne Lawson Braswell, Note, *Resurrection of the Ultimate Issue Rule: Federal Rule of Evidence 704(b) and the Insanity Defense*, 72 CORNELL L. REV. 620, 623 (1987) (noting the date of Rule 704's passage). Rule 704(a) provides as follows: "Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." FED. R. EVID. 704(a). The original Rule 704 became 704(a) following the 1984 addition of subsection (b). See Insanity Defense Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 2067 (1984) (codified at 18 U.S.C. § 17 (2006)).

<sup>257</sup> FED. R. EVID. 704 advisory committee's note; see also Maury R. Olicker, Comment, *The Admissibility of Expert Witness Testimony: Time to Take the Final Leap?*, 42 U. MIAMI L. REV. 831, 831 (1988).

<sup>258</sup> Olicker, *supra* note 257, at 837.

<sup>259</sup> See *id.*

<sup>260</sup> See *id.* at 837-38; see also Braswell, *supra* note 256, at 621-22 ("The [ultimate issue] rule stemmed from concern that jurors might adopt an influential witness's opinion without independently analyzing contested facts." (citing MCCORMICK ON EVIDENCE § 12, at 30 (Edward W. Cleary ed., 3d ed. 1984))).

<sup>261</sup> See Olicker, *supra* note 257, at 837.

<sup>262</sup> *Id.* at 383.

prohibited witnesses from testifying about subjects within the common knowledge of laymen.<sup>263</sup>

According to the drafters, the enactment of Rule 704 ended this overly broad restriction on expert testimony that deprived the jury of useful information.<sup>264</sup> Yet, the drafters also recognized the need for *some* limitation on the admission of expert opinion testimony. Thus, they added subsection (b),<sup>265</sup> which provides as follows:

No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.<sup>266</sup>

Rule 704(b) has auspicious roots. Indeed, the quoted language was added to Rule 704 in 1984 when Congress passed the Insanity Defense Reform Act of 1984.<sup>267</sup> In doing so, it bypassed the Judicial Conference and the Rules Enabling Act to quickly amend the Federal Rules.<sup>268</sup> Why? Recall John Hinckley, Jr. and his attempt in 1984 to assassinate President Ronald Reagan followed by his subsequent acquittal by reason of insanity.<sup>269</sup> During his trial, a number of expert witnesses on both sides testified directly about Hinckley's mental sanity.<sup>270</sup> After three days of deliberations, the jury acquitted Hinckley and public outrage quickly followed.<sup>271</sup> That outrage prompted Congress to announce the need to "eliminate the confusing spectacle of competing expert witnesses testifying to directly contradictory con-

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<sup>263</sup> *Id.*

<sup>264</sup> FED. R. EVID. 704 advisory committee's note ("The rule [against opinions as to ultimate issues] was unduly restrictive, difficult of application, and generally served only to deprive the trier of fact of useful information.").

<sup>265</sup> In addition to including subsection (b), the drafters also emphasized that "[t]he abolition of the ultimate issue rule does not lower the bar[] so as to admit all opinions." *Id.* As the committee note observes, "[u]nder Rules 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for exclusion of evidence which wastes time." *Id.*

<sup>266</sup> FED. R. EVID. 704(b).

<sup>267</sup> Pub. L. No. 98-473, 98 Stat. 2068 (1984) (codified at 18 U.S.C. § 17 (2006)).

<sup>268</sup> Ordinarily, the Rules Advisory Committee of the Judicial Conference drafted the Federal Rules of Evidence under the supervision of the United States Supreme Court, pursuant to the authority granted to the Court by the Rules Enabling Act. *See* 28 U.S.C. § 2072 (2006).

<sup>269</sup> *See* LINCOLN CAPLAN, *THE INSANITY DEFENSE AND THE TRIAL OF JOHN W. HINCKLEY, JR.* 64-68 (1984).

<sup>270</sup> *See id.* at 63-72.

<sup>271</sup> *See, e.g.,* Herbert H. Denton, *President Leans Toward Review of Insanity Defense*, WASH. POST, July 2, 1982, at A4; Peter Perl, *Public that Saw Reagan Shot Expresses Shock at the Verdict*, WASH. POST, June 23, 1982, at A8.

clusions as to the ultimate legal issue to be found by the trier-of-fact.<sup>272</sup> In so doing, Rule 704(b) was born.<sup>273</sup>

In establishing 704(b), the Senate Judiciary Committee found persuasive the American Psychiatric Association's view that an expert must make a "leap in logic" to testify as to an ultimate issue formulated by law.<sup>274</sup> This was a leap that the Committee thought should be left to the jury, as established in 704(b).<sup>275</sup> The Senate Committee did, however, admit that experts serve an important function and "must be permitted to testify fully about the defendant's [psychiatric] diagnosis, mental state and motivation . . . at the time of the alleged act."<sup>276</sup>

The House Judiciary Committee's analysis echoed that of the Senate by emphasizing the nature and limits of psychiatric expertise.<sup>277</sup> Although the House Committee acknowledged that a "proper interpretation" of Rule 704 would similarly limit psychiatric testimony, it still concluded that subsection (b) was necessary to prevent a psychiatrist from opining on defendant's guilt.<sup>278</sup>

Since its promulgation in 1984, Rule 704(b) has only minimally barred the admission of expert testimony, and thus has seemingly validating early criticisms questioning its utility.<sup>279</sup> Indeed, although "Rule 704(b) clearly excludes expert opinion as to the defendant's appreciation for his acts,"

<sup>272</sup> S. REP. NO. 98-225, at 230 (1983).

<sup>273</sup> Rule 704(b) might represent a congressional overreaction to the result of Hinkley's trial. Criticisms of 704(b)—which surfaced almost immediately—assailed the rule as contrary to the original spirit of 704 and the federal rules in general. *E.g.*, Braswell, *supra* note 256, at 627; David Cohen, Note, *Punishing the Insane: Restriction of Expert Psychiatric Testimony by Federal Rule of Evidence 704(b)*, 40 U. FLA. L. REV. 541, 552-61 (1988).

<sup>274</sup> S. REP. NO. 98-225, at 230-31.

<sup>275</sup> Some commentators suggest this argument "makes no sense" given that the expert is "the most qualified to relate the science to the legal standard." Paul R. Rice & Neals-Erik William Delker, *A Short History of Too Little Consequence*, 191 F.R.D. 678, 715 n.162 (2000). The American Psychiatric Association nevertheless reasoned, in part, as follows:

When, however, "ultimate issue" questions are formulated by the law and put to the expert witness who must say "yea" or "nay," then the expert witness is required to make a leap in logic. He no longer addresses himself to the medical concepts but instead must infer or intuit what is in fact unspeakable, namely, the probable relationship between medical concepts and legal or moral constructs such as free will.

S. REP. NO. 98-225, at 231 (quoting Insanity Defense Work Group, *American Psychiatric Association Statement on the Insanity Defense*, 140 AM. J. PSYCHIATRY 681, 686 (1983)).

<sup>276</sup> *Id.* (quoting Insanity Defense Work Group, *supra* note 275, at 686).

<sup>277</sup> See H.R. Rep. No. 98-577, at 2 (1983). The House Committee specifically stated as follows:

While the medical and psychological knowledge of expert witnesses may well provide data that will assist the jury in determining the existence of the defense, no person can be said to have expertise regarding the legal and moral decision involved. Thus, with regard to the ultimate issue, the psychiatrist, psychologist or other similar expert is no more qualified than a lay person.

*Id.* at 16.

<sup>278</sup> *Id.* at 16 n.29.

<sup>279</sup> See Rice & Delker, *supra* note 275, at 714.

expert testimony about whether defendant's specific mental illness might affect his *ability* to make such an appreciation remains admissible.<sup>280</sup> Courts also readily allow an expert to describe defendant's mental disease—so long as the expert does not address a governing legal standard.<sup>281</sup> Similarly, they allow testimony about the mental capacity of a person in defendant's state.<sup>282</sup> From a summary standpoint, it seems that courts view the concept of an ultimate issue narrowly.<sup>283</sup>

For purposes of this Article, two important questions persist: (1) How do courts apply 704(b) to experts who are not psychiatrists?; and (2) How should courts interpret the Rule when members of law enforcement seek to testify as experts in drug-trafficking cases?

#### B. *Rule 704 in Action: Law Enforcement Expert Testimony and Defendant's Mens Rea*

As discussed in some detail above,<sup>284</sup> Federal Rule of Evidence 704(b) prohibits expert witnesses from testifying about whether defendant has the particular mental state that the charged crime requires.<sup>285</sup> As the discussion

<sup>280</sup> *United States v. Brown*, 32 F.3d 236, 240 (7th Cir. 1994). The *Brown* court continued to explain that “[t]he testimony in this case, though, is not specific to [defendant’s] mental state, but concerns the characteristics of his mental disorder, which is permitted by Rule 704(b).” *Id.*; see also *Rice & Delker*, *supra* note 275, at 714 (“Rule 704(b) is so focused in what it excludes, it admits virtually ninety-nine percent of the ‘soft’ psychiatric testimony that embarrassed the Congress and enraged the public.”).

<sup>281</sup> *United States v. Reno*, 992 F.2d 739, 743 (7th Cir. 1993) (“While complicated hypothetical questions that restate the legal test for sanity are therefore not allowed, questions regarding the presence of a mental disorder or the characteristics of the disease are clearly allowed.”). Testimony describing the characteristics of a mental illness “is exactly the kind that Rule 704 permits” and is “exactly [the] sort” of testimony contemplated in Rule 702 as assisting “the jury in understanding [defendant’s mental illness] and how a person might behave if acting consistently with the illness.” *Id.* at 743 n.2.

<sup>282</sup> *United States v. Salamanca*, 990 F.2d 629, 637 (D.C. Cir. 1993) (holding that the trial court correctly restricted psychologist expert testimony concerning the relationship between alcohol abuse and mental disease, “disallowing questioning as to ‘the ultimate fact,’ and providing leeway for [defendant] to elicit [on the cross examination] the witness’s opinion about the capacities of a person of his purported mental condition who had consumed the quantity of beer [that defendant] allegedly drank on the night of the assault”).

<sup>283</sup> *Rice & Delker*, *supra* note 275, at 712 (“The only testimony that the revision eliminates from the trial is the most useful testimony the expert could offer—the expert’s opinion about the defendant’s state of mind at the time the crime was committed.”). The narrow interpretation of 704(b) is significant given that an evidentiary code reduces “the power and flexibility that [judges] had under the common law, to redesign the rules to fit the particular factual circumstances confronting them.” *Id.* at 715-16. Given that *stare decisis* still governs the judicial interpretation of specific rules, precedent on this narrow interpretation of 704(b) binds subsequent decisions and can lead courts to inflexibly decide Rule 704(b) issues. See Glen Weissenberger, *The Proper Interpretation of the Federal Rules of Evidence: Insights from Article IV*, 30 CARDOZO L. REV. 1615, 1635-38 (2009).

<sup>284</sup> See discussion *supra* Part II.A.

<sup>285</sup> FED. R. EVID. 704(b).

below suggests, however, Rule 704(b) rarely imposes much of a limit on the scope of law enforcement expert testimony.

In *Mejia*, discussed above, Costa Rican law enforcement used wiretaps to capture defendants discussing drug transactions with other individuals.<sup>286</sup> Based on those wiretaps, Costa Rican officials intercepted three shipments of drugs.<sup>287</sup> A federal grand jury subsequently named defendants in a single count indictment charging conspiracy to distribute five or more kilograms of cocaine with the knowledge or intent that such cocaine would be unlawfully imported into the United States.<sup>288</sup> Defendants were Colombian nationals arrested in Panama by Panamanian authorities and transferred to the custody of the United States.<sup>289</sup> Following their conviction, defendants contended that one of the government's experts (different from the one discussed above), a former DEA agent who did not participate in the investigation, improperly offered an opinion regarding their mental state during his testimony.<sup>290</sup>

At trial, the DEA agent testified about drug trafficking in Central and South America, including specific testimony about shipping routes, drug pricing for cocaine, and the means of communication among drug dealers in that area.<sup>291</sup> In particular, defendants objected to the following exchange:

Q: Do the drug trafficking organizations know the ultimate destination of the goods that they traffic even if it's only part of the way?

A: They don't know the ultimate destination per city, per street, per warehouse, but they know it's going to the United States.<sup>292</sup>

In rejecting defendants' 704(b) challenge, the D.C. Circuit found it "plain" that the DEA agent was testifying "about drug organizations in general, and not the defendants' organization in particular."<sup>293</sup> The court also highlighted the district court's *sua sponte* intervention during the trial, during which it clarified that the DEA agent was not testifying "about any intent on the part of either of the gentlemen seated at this table here in connection with any facts in this case."<sup>294</sup>

Yet, keep in mind that the statute of conviction requires that the government prove *knowledge* or intent on the part of defendant to unlawfully

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<sup>286</sup> United States v. *Mejia*, 448 F.3d 436, 438-39 (D.C. Cir. 2006).

<sup>287</sup> *Id.*

<sup>288</sup> *Id.* at 439 (citing 21 U.S.C. §§ 959(a), 960(a)(3), 960(b)(1)(B)(ii), 963 (2006)).

<sup>289</sup> *Id.* at 438-39.

<sup>290</sup> *Id.* at 449.

<sup>291</sup> *Id.* at 441.

<sup>292</sup> *Mejia*, 448 F.3d at 449 (emphasis added) (quoting trial transcript).

<sup>293</sup> *Id.*

<sup>294</sup> *Id.* (quoting trial transcript) (internal quotation marks omitted).

import the controlled substance into the United States.<sup>295</sup> Juxtapose the statute's mens rea requirement alongside the expert's testimony that Central and South American drug organizations *know* the destination for their unlawful goods.<sup>296</sup> The government inappropriately suggests to the jury only one outcome: defendants, as Columbian nationals involved in drug transactions in Costa Rica, must *know* that those transactions will result in transporting cocaine to the United States.<sup>297</sup>

The Seventh Circuit has nonetheless held similarly in *United States v. Love*.<sup>298</sup> In *Love*, defendant agreed with a confederate to supply a cocaine base for a drug transaction.<sup>299</sup> Before defendant could provide the agreed upon drug quantity, however, federal agents arrested him outside the site of the deal.<sup>300</sup> The defendant was charged with conspiracy to possess a cocaine base in violation of 21 U.S.C. § 846.<sup>301</sup> At trial, the government's expert testified that it was uncommon "for persons involved in a drug conspiracy" to allow the presence of other people not involved in the particular transaction.<sup>302</sup> The court rejected defendant's challenge that such testimony violated Rule 704(b), reasoning that the expert did not refer to defendant's intent defendant or to his mental state.<sup>303</sup>

Again, however, this type of expert testimony at least tacitly comments on defendant's mental state. It suggests that defendant's mere presence at the location of the drug transaction is equivalent to an intention to participate in a drug conspiracy. Minimally, the expert testimony left the jury to draw only one conclusion: defendant's presence equaled involvement in a drug conspiracy.<sup>304</sup>

Finally, the Third Circuit's decision in *United States v. Davis*<sup>305</sup> best illustrates the problematic admission of officer expert testimony about defendant's mental state.<sup>306</sup> The *Davis* court evaluated whether the district court properly allowed a state police officer to answer a government hypothetical that closely mirrored the facts.<sup>307</sup> "Two police officers traveling in South Philadelphia in an unmarked car saw six or seven shots fired from the passenger side of a black Honda" carrying defendant in the passenger seat

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<sup>295</sup> See 21 U.S.C. § 959(a)(1)-(2) (2006).

<sup>296</sup> *Mejia*, 448 F.3d at 449.

<sup>297</sup> See *id.* at 438, 449.

<sup>298</sup> 336 F.3d 643, 647 (7th Cir. 2003).

<sup>299</sup> *Id.* at 645.

<sup>300</sup> *Id.*

<sup>301</sup> *Id.* at 646.

<sup>302</sup> *Id.* at 645.

<sup>303</sup> *Id.* at 647.

<sup>304</sup> See *Love*, 336 F.3d at 645.

<sup>305</sup> 397 F.3d 173 (3d Cir. 2005).

<sup>306</sup> *Id.* at 179.

<sup>307</sup> *Id.*

and four other confederates.<sup>308</sup> The officers, joined by a marked police car, chased the Honda and eventually forced it to stop.<sup>309</sup> Defendant was thereafter shot while attempting to flee on foot.<sup>310</sup> The officers recovered “\$169.00 in cash and one plastic baggie containing nineteen zip-lock packets of cocaine base” from him.<sup>311</sup>

At defendant’s subsequent jury trial for various drug and weapons charges, the government proffered a Philadelphia police officer to testify as an expert.<sup>312</sup> During a portion of his testimony, the government asked him to assume the following facts: (1) “five [people] were in a car, four of whom possessed handguns,” (2) “one person possessed a handgun with 12 packets,” (3) “another person possessed a handgun with 19 packets,” and (4) “one person . . . possessed a handgun with 44 packets.”<sup>313</sup> With those facts in mind, the government then asked the officer whether that conduct is consistent with drug trafficking or simple drug possession.<sup>314</sup> The officer responded, “[i]t would be my opinion that would be possession with intent to deliver the narcotics.”<sup>315</sup> The officer explained, “[t]he gun would be one factor, the narcotics would be the other,” and “[t]he number of people in the vehicle and the circumstances of the arrest” would all play a factor.<sup>316</sup>

Defendant contended that the court should not admit such testimony pursuant to Rule 704(b).<sup>317</sup> In rejecting defendant’s challenge and upholding the admission of the officer’s testimony, the court reasoned that his testimony “was given in response to hypothetical, rather than specific, questions regarding the intent of individual defendants on trial.”<sup>318</sup> And, although the hypothetical question closely mirrored the facts, the court reasoned that the officer had no connection to the case, and “the government did not repeatedly refer to the individual defendant’s state of mind” while questioning the officer.<sup>319</sup>

The *Davis* decision, like *Mejia* and *Love*, problematically affirms the admission of expert officer testimony. This testimony divests the jury of its

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<sup>308</sup> *Id.* at 176-77.

<sup>309</sup> *Id.*

<sup>310</sup> *Id.* at 177.

<sup>311</sup> *Davis*, 397 F.3d at 177.

<sup>312</sup> *Id.* at 179. Although the facts are initially unclear on this point, the opinion later clarifies that the government’s expert was not involved in arresting or investigating defendant. *Id.*

<sup>313</sup> *Id.* at 177 (quoting Joint Appendix at 314a, *Davis*, 397 F.3d 173 (3d Cir. 2005) (No. 02-4521)) (internal quotation marks omitted).

<sup>314</sup> *Id.*

<sup>315</sup> *Id.* (quoting Joint Appendix, *supra* note 313, at 314a) (internal quotation marks omitted).

<sup>316</sup> *Davis*, 397 F.3d at 177 (alterations in original) (quoting Joint Appendix, *supra* note 313, at 314a-15a).

<sup>317</sup> *Id.* at 179.

<sup>318</sup> *Id.*

<sup>319</sup> *Id.* (quoting *United States v. Davis*, 233 F. Supp. 2d 695, 703 (E.D. Pa. 2002)) (internal quotation marks omitted).

duty to independently evaluate defendant's mens rea.<sup>320</sup> Although the officer in *Davis* did not partake in the investigation, the prosecutor's hypothetical alongside the witness's response inappropriately concluded for the jury that the drug weight that defendant possessed demonstrated an *intent* to deliver the narcotics.<sup>321</sup>

Notwithstanding these and other examples of failed Rule 704(b) challenges,<sup>322</sup> courts do agree that there is "a line that expert witnesses may not cross."<sup>323</sup> Consider, for example, the Third Circuit's decision in *United States v. Watson*.<sup>324</sup> There, the government repeatedly violated Rule 704(b).<sup>325</sup> In *Watson*, defendant appealed his conviction for distributing and possessing with intent to distribute a cocaine base.<sup>326</sup> Defendant contended that the district court erred in allowing expert testimony concerning his mental state.<sup>327</sup> During trial, the government introduced evidence that law enforcement "recovered four packages and approximately 100 small plastic bags," which collectively contained "2.4 grams of crack cocaine and 7.42 grams of marijuana" while arresting and processing defendant at a bus station.<sup>328</sup>

To introduce evidence of the drug seizure and corresponding amounts, the government relied on testimony from three law enforcement expert witnesses.<sup>329</sup> The first, one of the two Pennsylvanian police officers who arrested defendant, engaged in the following colloquy with the prosecutor:

[PROSECUTOR:] Now, based on your experience and training of purchasing drugs and working as a Narcotics Investigator, have you formed an opinion, as to whether or not the substance contained in Government Exhibit 1 was possess [sic] with the intent to distribute, transfer or deliver or the intent to personally use that drug?

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<sup>320</sup> See *id.*

<sup>321</sup> See *id.*

<sup>322</sup> See, e.g., *United States v. Anchrum*, 590 F.3d 795, 804-05 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 3435 (2010); *United States v. Schene*, 543 F.3d 627, 641 (10th Cir. 2008); *United States v. Johnson*, 488 F.3d 690, 699 (6th Cir. 2007); *United States v. Samples*, 456 F.3d 875, 884-85 (8th Cir. 2006); *United States v. Combs*, 369 F.3d 925, 940 (6th Cir. 2004); *United States v. Hayward*, 359 F.3d 631, 637 (3d Cir. 2004); *United States v. Williams*, 343 F.3d 423, 435 (5th Cir. 2003); *United States v. Gonzales*, 307 F.3d 906, 911 (9th Cir. 2002); *United States v. Amick*, No. 99-4557, 2000 WL 1566351, at \*3 (4th Cir. Oct. 20, 2000) (per curiam); *United States v. Campos*, 217 F.3d 707, 712 (9th Cir. 2000); *United States v. Dixon*, 185 F.3d 393, 402 (5th Cir. 1999); *United States v. Mancillas*, 183 F.3d 682, 706 (7th Cir. 1999); *United States v. Ramsey*, 165 F.3d 980, 984-85 (D.C. Cir. 1999); *United States v. Plunk*, 153 F.3d 1011, 1018 (9th Cir. 1998); *United States v. Toms*, 136 F.3d 176, 185 (D.C. Cir. 1998); *United States v. Webb*, 115 F.3d 711, 715-16 (9th Cir. 1997); *United States v. Richard*, 969 F.2d 849, 855 (10th Cir. 1992).

<sup>323</sup> *United States v. Mitchell*, 996 F.2d 419, 422 (D.C. Cir. 1993).

<sup>324</sup> 260 F.3d 301 (3d Cir. 2001).

<sup>325</sup> *Id.* at 310.

<sup>326</sup> *Id.* at 304.

<sup>327</sup> *Id.* at 304-05.

<sup>328</sup> *Id.* at 305.

<sup>329</sup> *Id.* at 305-06.

[DEFENSE:] Objection. This witness is not competent to testify as to the mental state of the Defendant. That's the jury's prerogative, and Federal Rule [of Evidence] 704(b) specifically precludes it.

THE COURT: Overruled.

[PROSECUTOR:] You may answer the question, sir.

[OFFICER:] I believe it was possess [sic] with the intent to distribute to somebody else.<sup>330</sup>

Later, the government called another officer as an expert who testified that 100 plastic bags found on defendant demonstrated defendant's possession with the intent to distribute.<sup>331</sup> An excerpt of the troubling colloquy provided is as follows:

[PROSECUTOR:] [H]ave you formed an opinion, as to whether or not the substance contained in Government Exhibit 1 was possessed with the intent to distribute, transfer or deliver versus the intent to personally consume that substance?

[OFFICER:] Yes, sir. Based on my experience, through my undercover investigations, I've seen, on numerous occasions, subjects that have amounts of crack cocaine like this, as well as these packaging bags, which they were cutting off and packaging in these bags for resale, which I've also purchased.

And that would be consistent with someone who is selling cocaine versus someone who would be using it for their personal use.<sup>332</sup>

Finally, the government called the second arresting officer to testify as an expert about the nature of defendant's bus travel itinerary.<sup>333</sup> That officer stated, in part, that "a trip of a short nature like [defendant's], a 10-plus hour trip to Philadelphia, spending four hours there, on my experience, has been that they've gone into the city to purchase drugs to, ultimately, take back and resell at their starting point."<sup>334</sup>

The court concluded that this testimony commented on defendant's mens rea and therefore violated Rule 704(b).<sup>335</sup> In doing so, it acknowledged:

Expert testimony is admissible if it merely "support[s] an inference or conclusion that the defendant did or did not have the requisite mens rea, so long as the expert does not draw the ul-

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<sup>330</sup> *Watson*, 260 F.3d at 305 (second, fourth, and seventh alterations in original).

<sup>331</sup> *Id.* at 305-06.

<sup>332</sup> *Id.*

<sup>333</sup> *Id.*

<sup>334</sup> *Id.* at 306.

<sup>335</sup> *Id.* at 310.

ultimate inference or conclusion for the jury and the ultimate inference or conclusion does not necessarily follow from the testimony.”<sup>336</sup>

Yet, the court also tidily summarized how testimony might violate Rule 704(b):

Rule 704(b) may be violated when the prosecutor’s question is plainly designed to elicit the expert’s testimony about the mental state of the defendant, or when the expert triggers the application of Rule 704(b) by directly referring to the defendant’s intent, mental state, or mens rea. Rule 704 “prohibits testimony from which it necessarily follows, if the testimony is credited, that defendant did or did not possess the requisite mens rea.”<sup>337</sup>

With that background law in mind, the court held that the first officer’s testimony violated Rule 704(b) by directly stating that defendant “possess[ed] with the intent to distribute to someone else.”<sup>338</sup> Indeed, the court reasoned that “[the prosecutor’s] question to [the officer] was plainly designed to elicit the expert’s testimony about [defendant’s] intent.”<sup>339</sup> Although the *government* used the word “intent” when questioning the second officer, the court also concluded that such a tactic violated Rule 704(b) given that it was designed to circumvent the Rule.<sup>340</sup> Finally, the court also concluded that the expert testimony about defendant’s bus itinerary violated Rule 704(b) because “[t]he unmistakable import of [the agent’s] opinion was that [defendant] intended to buy drugs to distribute them.”<sup>341</sup>

The time taken to describe *Watson* in some detail is well spent. Indeed, it is this type of blatant conduct—witnesses using the word “intent,” a prosecutor using the word “intent,” or witnesses replacing “he” or “defendant” with “them” when referencing mens rea—that violates Rule 704(b). Similar examples are difficult to find and are limited to somewhat outlandish scenarios such as when: (1) The government recited “hypothetical” facts mirroring the facts in the case and then asked the law enforcement expert whether those facts were consistent with possession for personal use or intent to distribute;<sup>342</sup> (2) The solicited expert implied that because most drivers

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<sup>336</sup> *Watson*, 260 F.3d at 309 (alteration in original) (quoting *United States v. Bennett*, 161 F.3d 171, 183 (3d Cir. 1998)).

<sup>337</sup> *Id.* at 309 (quoting *Bennett*, 161 F.3d at 182) (citations omitted); *see also* *United States v. Gibbs*, 190 F.3d 188, 212-13 (3d Cir. 1999) (noting that Rule 704(b) reversal may be appropriate when an officer’s opinion testimony is unhelpful to the jury and serves only to bolster the government’s case).

<sup>338</sup> *Watson*, 260 F.3d at 309 (alteration in original) (internal quotation marks omitted).

<sup>339</sup> *Id.*

<sup>340</sup> *Id.*

<sup>341</sup> *Id.* at 309-10.

<sup>342</sup> *United States v. Boyd*, 55 F.3d 667, 669 (D.C. Cir. 1995) (“It was a flagrant breach of the Rules of Evidence for the Government to elicit the opinion of an expert on the ultimate issue of fact that was for the jury alone to decide.”); *accord* *United States v. Cook*, 53 F.3d 1029, 1031 (9th Cir. 1995) (affirming defendant’s conviction but noting that the prosecution’s use of a hypothetical about a mental defect came “very close” to violating Rule 704(b)); *United States v. Dennison*, 937 F.2d 559, 565 (10th

know there are drugs in their vehicles, defendant must have known of the marijuana in his vehicle;<sup>343</sup> or (3) drug courier profiles were used to prove that defendant was a courier, and therefore, they knew that he was transporting drugs.<sup>344</sup>

Stated differently, when questioning an expert, the government must minimally avoid any reference (explicit or implicit) to “intent,” and the expert must likewise avoid similarly referencing defendant’s intent when answering questions.<sup>345</sup> The point, though, is hopefully reasonably clear: the tie goes to admitting the expert’s testimony (and upholding that admission on appeal).<sup>346</sup> Only in the clearest of cases will testimony run afoul of Rule 704(b).<sup>347</sup>

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Cir. 1991) (affirming exclusion of expert testimony that alcohol and drug consumption by a person suffering from a borderline personality disorder renders him incapable of forming specific intent); *United States v. Manley*, 893 F.2d 1221, 1223-24 (11th Cir. 1990) (per curiam) (rejecting government’s use of hypothetical questions to elicit opinion testimony on mens rea).

<sup>343</sup> See, e.g., *United States v. Gutierrez-Farias*, 294 F.3d 657, 662-63 (5th Cir. 2002).

<sup>344</sup> See, e.g., *United States v. Mendoza-Medina*, 346 F.3d 121, 129 (5th Cir. 2003); *United States v. Ramirez-Velasquez*, 322 F.3d 868, 879 (5th Cir. 2003); *Gutierrez-Farias*, 294 F.3d at 661-63.

<sup>345</sup> See, e.g., *United States v. Bennett*, 161 F.3d 171, 183 (3d Cir. 1998) (“[Rule 704(b)] expert testimony is admissible if it merely ‘support[s] an inference or conclusion that the defendant did or did not have the requisite mens rea, so long as the expert does not draw the ultimate inference or conclusion for the jury and the ultimate inference or conclusion does not necessarily follow from the testimony.’” (alteration in original) (quoting *United States v. Morales*, 108 F.3d 1031, 1038 (9th Cir. 1997)); *United States v. Frost*, 125 F.3d 346, 383-84 (6th Cir. 1997) (“Decisions applying Rule 704(b) to the expert testimony of law enforcement officials have found it significant whether the expert actually referred to the intent of the defendant or, instead, simply described in general terms the common practices of those who clearly do possess the requisite intent, leaving unstated the inference that the defendant, having been caught engaging in more or less the same practices, also possessed the requisite intent.” (quoting *United States v. Lipscomb*, 14 F.3d 1236, 1239 (7th Cir. 1994)) (internal quotation marks omitted)); see also *United States v. Smart*, 98 F.3d 1379, 1388 (D.C. Cir. 1996). Here, the court stated:

[A] court should assess two key elements in deciding whether expert testimony violates Rule 704(b): (1) the language used by the questioner and/or the expert, including use of the actual word “intent”; and (2) whether the context of the testimony makes clear to the jury that the opinion is based on knowledge of general criminal practices, rather than “some special knowledge of the defendant’s mental processes.”

*Id.*; see also *United States v. Are*, 590 F.3d 499, 512-13 (7th Cir. 2009); *United States v. Woodson*, No. 97-4143, 1998 WL 654449, at \*2 (4th Cir. Sept. 18, 1998) (per curiam); *Lipscomb*, 14 F.3d at 1241-42; *United States v. Martin*, 186 F. Supp. 2d 553, 560-61 (E.D. Pa. 2002).

<sup>346</sup> See, e.g., *United States v. Cook*, 53 F.3d 1029, 1031 (9th Cir. 1995) (calling the government’s behavior “overkill” but still affirming the trial court’s admittance of the evidence).

<sup>347</sup> See, e.g., *United States v. Foster*, 939 F.2d 445, 454 (7th Cir. 1991) (concluding that the challenged testimony “merely assisted the jury,” as opposed to deciding for them); *United States v. Alvarez*, 837 F.2d 1024, 1031 (11th Cir. 1988) (“[T]he expert left this inference for the jury to draw. He did not expressly ‘state [the] inference.’” (second alteration in original)); *United States v. Dotson*, 817 F.2d 1127, 1132 (5th Cir. 1987) (“[T]he responses of the expert were . . . focused on the evidence, rather than addressing the ultimate issue . . .”), *vacated in part*, 821 F.2d 1034 (5th Cir. 1987).

C. *Law Enforcement Expert Testimony Threatens Rule 704(b) and the Due Process Clause*

As discussed above, law enforcement members routinely offer expert testimony concerning whether defendant who possessed a certain amount of illegal drugs did so with the intent to distribute them. A majority of appellate courts have affirmed the admission of such testimony given that,<sup>348</sup> for example, “[Rule 704(b)] does not prevent the expert from testifying to facts or opinions from which the jury could conclude or infer the defendant had the requisite mental state.”<sup>349</sup>

Of course, applied broadly, that quoted rationale comports with the text of Rule 704(b). But, in the narrow context of federal drug prosecutions, problematic expert testimony arises when it (1) connects defendant’s factual behavior to the mens rea set forth in the charging statute,<sup>350</sup> (2) indicates that the facts of defendant’s case satisfy the statute’s mens rea requirement,<sup>351</sup> or (3) responds to a prosecutor’s hypothetical that the prosecutor has modeled after the very facts in dispute.<sup>352</sup> Keeping in mind the ease with which the government can prove federal drug cases, each of the three foregoing instances too easily connects the separate factual and legal dots for the jury. In each scenario, officers do not merely testify about factual matters but rather implicitly indicate that those facts satisfy the statutory mens rea requirement.<sup>353</sup>

Recall, for example, the core federal drug statute—21 U.S.C. § 841(a)—which prohibits an individual from knowingly or intentionally manufacturing, distributing, dispensing, or possessing “with the intent to manufacture, distribute, or dispense, a controlled substance.”<sup>354</sup> To prove defendant’s mens rea, the government must minimally prove a “knowing” or “intentional” drug-trafficking violation—keeping in mind that Section 841 does not seek to reach personal use.<sup>355</sup> Thus, in order to prove the requisite mens rea, the government needs only to proffer a member of law enforcement to testify that the amount of drugs found on a particular defendant is more consistent with distribution than it is with personal use.<sup>356</sup> Allowing for that expert testimony, however, implicitly suggests that defen-

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<sup>348</sup> See cases cited *supra* note 322.

<sup>349</sup> *United States v. Richard*, 969 F.2d 849, 854-55 (10th Cir. 1992).

<sup>350</sup> *E.g.*, *United States v. Mejia*, 448 F.3d 436, 449 (D.C. Cir. 2006).

<sup>351</sup> *E.g.*, *United States v. Love*, 336 F.3d 643, 646-47 (7th Cir. 2003).

<sup>352</sup> *E.g.*, *United States v. Davis*, 397 F.3d 173, 177 (3d Cir. 2005).

<sup>353</sup> *See, e.g.*, *Mejia*, 448 F.3d at 449; *Davis*, 397 F.3d at 177; *Love*, 336 F.3d at 646-47.

<sup>354</sup> 21 U.S.C. § 841(a) (2006).

<sup>355</sup> *United States v. Mendoza*, 722 F.2d 96, 103 (5th Cir. 1983) (inferring from the quantity of drugs that it was for distribution rather than personal use and therefore in violation of 21 U.S.C. § 841(a)).

<sup>356</sup> *E.g.*, *Brooks v. State*, 700 So. 2d 473, 474 (Fla. Dist. Ct. App. 1997).

dant's possession of a certain drug weight is consistent with a knowing or intentional drug-trafficking violation. Protecting against that type of commentary on defendant's mens rea is, of course, ostensibly what the text of Rule 704(b) is designed to prevent.<sup>357</sup>

More problematic, though, are the constitutional implications of interpreting Rule 704(b) to allow for a law enforcement expert's implicit commentary on defendant's mens rea. Federal courts restrict prosecutors only from using the literal word "intent" in their questions—and similarly prohibit an expert's explicit reference to defendant's intent—but otherwise impose no limits on the government's questions.<sup>358</sup> The government's resulting wide latitude to tacitly comment on a drug defendant's mens rea relieves it from proving defendant's mens rea beyond a reasonable doubt.

Of course, the Supreme Court long ago propounded a fundamental tenet of the criminal-justice system: the Due Process Clause of the United States Constitution requires the prosecutor to prove to the trier-of-fact "beyond a reasonable doubt of every fact necessary to constitute the crime . . . charged."<sup>359</sup> That quoted language—better known as the presumption of innocence—translates into the requirement that the prosecution must prove beyond a reasonable doubt each element of the crime charged.<sup>360</sup> Defendant's guilty mind—or mens rea—is indisputably an element of a criminal offense.<sup>361</sup>

Thus, consider the prosecution's burden to prove defendant's mens rea in the context of a prosecution for murder—defined for illustrative purposes as "the killing of a human being . . . with malice aforethought."<sup>362</sup> In that instance, the prosecutor must introduce evidence sufficient to prove "(1) a killing; (2) of a human being; (3) by another human being; (4) with malice aforethought."<sup>363</sup> Focusing on the mens rea element, the question becomes how a prosecutor might prove defendant's "malice aforethought" or other mens rea. Speaking generally, one commentator suggests:

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<sup>357</sup> FED. R. EVID. 704(b).

<sup>358</sup> See, e.g., *United States v. Frost*, 125 F.3d 346, 383-84 (6th Cir. 1997); *United States v. Smart*, 98 F.3d 1379, 1388 (D.C. Cir. 1996).

<sup>359</sup> *In re Winship*, 397 U.S. 358, 364 (1970). Both the Fifth and Fourteenth Amendments contain a Due Process Clause. The Fifth Amendment applies to the federal judicial system, and the Fourteenth Amendment governs the states. *Dusenbery v. United States*, 534 U.S. 161, 167 (2002) ("The Due Process Clause of the Fifth Amendment prohibits the United States, as the Due Process Clause of the Fourteenth Amendment prohibits the States, from depriving any person of property without 'due process of law.'").

<sup>360</sup> *Jackson v. Virginia*, 443 U.S. 307, 314-16 (1979).

<sup>361</sup> E.g., *Staples v. United States*, 511 U.S. 600, 605 (1994) (discussing mens rea as an element of a crime and noting that "the requirement of some *mens rea* for a crime is firmly embedded [in common law]").

<sup>362</sup> CAL. PENAL CODE § 187(a) (West 2011).

<sup>363</sup> JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 72 (4th ed. 2006).

[T]he prosecution will ask the factfinder to infer the accused's state of mind at the time of the crime from the evidence, or lack of evidence, presented to them. Absent mindreading, a confession, or some other statement by the defendant regarding his mental state at the time, these inferences constitute the sole method of proving mens rea.<sup>364</sup>

It is therefore uniquely within the trier-of-fact's province to find, as a factual matter, whether defendant did or did not possess the mens rea associated with the crime charged.<sup>365</sup> When a member of law enforcement takes the stand as an "expert" and thereafter testifies that defendant's activities are consistent with drug trafficking, the witness has unconstitutionally usurped the jury's role.<sup>366</sup>

Drug-profiling testimony most clearly manifests this problem. When members of law enforcement testify as experts about drug-courier profiles, courts become concerned that the jury will rely on that testimony as substantive evidence of defendant's guilt (because defendant's activities might resemble the profile).<sup>367</sup> Although discussed above in the context of Rule 702, courts have also noted potential problems with drug-courier-profile evidence in the context of Rule 704(b).<sup>368</sup> Again, though, regardless of which Rule applies to the judiciary's concern, the concern itself remains the same: a jury may accept that defendant is guilty simply because his behavior matches the profile described by a law enforcement member's expert testimony.<sup>369</sup>

Although predominantly characterized by the judiciary as a concern tied solely to the federal rules, law enforcement expert testimony may also threaten defendant's due process trial rights. The Due Process Clause, after

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<sup>364</sup> Joseph V. De Marco, Note, *A Funny Thing Happened on the Way to the Courthouse: Mens Rea, Document Destruction, and the Federal Obstruction of Justice Statute*, 67 N.Y.U. L. REV. 570, 587 (1992).

<sup>365</sup> See, e.g., *Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1993); *Patterson v. New York*, 432 U.S. 197, 210 (1977); *Cool v. United States*, 409 U.S. 100, 104 (1972) (per curiam); *In re Winship*, 397 U.S. 358, 364 (1970); *Leland v. Oregon*, 343 U.S. 790, 795-96 (1952).

<sup>366</sup> Cf. *Moreno*, *supra* note 35, at 38 (noting judiciary's recognition that law enforcement expert testimony could usurp the jury's function).

<sup>367</sup> See cases cited *supra* note 187.

<sup>368</sup> Compare *United States v. Mendoza-Medina*, 346 F.3d 121, 128 (5th Cir. 2003) ("[D]rug courier profiles can violate Federal Rule of Evidence 704(b) when they are used to prove that the defendant was a courier and therefore knew that he was transporting drugs." (footnote omitted)), with *United States v. Murillo*, 255 F.3d 1169, 1176-78 (9th Cir. 2001) (holding that the expert testimony from a DEA agent was properly admitted pursuant to Rule 702 as modus operandi testimony), *overruled in part* by *United States v. Mendez*, 476 F.3d 1077 (9th Cir. 2007). Notably, still other courts view the issue as one governed by Rule 403. See *United States v. Campos*, 217 F.3d 707, 712 & n.4 (9th Cir. 2000) ("[Defendant's] objection to the admission of [the agent's] testimony based on her contention that it was improper drug courier profile evidence does not encompass an objection to the testimony based on Rule 704(b), but rather, implicates Rule 403.").

<sup>369</sup> Deon J. Nossel, Note, *The Admissibility of Ultimate Issue Expert Testimony by Law Enforcement Officers in Criminal Trials*, 93 COLUM. L. REV. 231, 246-47 (1993).

all, assures the existence of “a fair decision-making process.”<sup>370</sup> The presumption of innocence implicitly embodied in the Due Process Clause “lies at the foundation of the administration of our criminal law.”<sup>371</sup> According to the Supreme Court, to guard this right, “courts must be alert to factors that may undermine the fairness of the factfinding process. In the administration of criminal justice, courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt.”<sup>372</sup>

Allowing members of law enforcement to testify as experts in a drug-trafficking trial is precisely the kind of “diluting” the Court is talking about. When a member of law enforcement takes the stand and testifies about the modus operandi of drug traffickers—a pattern of activity that often includes lawful conduct—the prosecution’s job has ended. The jury only needs to match defendant’s conduct with the testimony proffered by the “expert” in order to reach a conclusion on defendant’s mental state and, ordinarily, a corresponding finding of guilt. The harm is more than academic; indeed, any defendant who testifies in her own defense to rebut the officer’s testimony engages in a credibility contest that she is destined to lose.<sup>373</sup>

Accordingly, guarding defendant’s presumption of innocence must require federal courts to do more than routinely admit expert testimony from, for example, a member of law enforcement who (1) served as the investigating agent, (2) testifies as a lay witness, (3) testifies as an expert in drug trafficking, or (4) as part of that testimony, concludes that defendant’s activities are consistent with drug trafficking. The meaning of “doing more” seems both easy and obvious. Indeed, fixing the problem would simply require district courts to stop admitting law enforcement expert opinion testimony that (1) connects defendant’s factual behavior to the mens rea set forth in the charging statute,<sup>374</sup> (2) indicates that the facts of defendant’s

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<sup>370</sup> JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 10.6(a), at 403 (7th ed. 2004).

<sup>371</sup> Coffin v. United States, 156 U.S. 432, 453 (1895).

<sup>372</sup> Estelle v. Williams, 425 U.S. 501, 503 (1976).

<sup>373</sup> See, e.g., WELSH S. WHITE, *MIRANDA’S WANING PROTECTIONS: POLICE INTERROGATION PRACTICES AFTER DICKERSON* 192 (2001) (“While empirical data relating to judges’ or juries’ assessment of credibility in suppression of confession cases is lacking, it is generally believed that . . . where the confession’s admissibility depends on whether the judge believes the police or the suspect’s testimony, judges invariably believe the police.”); Shannon L. McCarthy, Comment, *Criminal Procedure—Not There Yet: Police Interrogations Should Be Electronically Recorded or Excluded from Evidence at Trial—Commonwealth v. DiGiambattista*, 813 N.E.2d 516 (Mass. 2004), 39 SUFFOLK U. L. REV. 333, 340 (2005) (“Juries routinely give more credit to police testimony when presented with conflicting testimony about the circumstances of an interrogation.”); Nossel, *supra* note 369, at 245 (“The admission of ultimate issue expert testimony by law enforcement officers risks unfairly prejudicing defendants because of the danger that the jury will give more credence than is warranted to the testimony.”).

<sup>374</sup> See *United States v. Mejia*, 448 F.3d 436, 449 (D.C. Cir. 2006).

case satisfy the statute's mens rea,<sup>375</sup> or (3) responds to a prosecutor's hypothetical that, itself, is modeled after the very facts in dispute.<sup>376</sup>

Members of law enforcement who also did not investigate the underlying case may surely testify, assuming Rule 702 has otherwise been satisfied, about such things as drug weight, modus operandi of drug traffickers, employing counter-surveillance, and the like.<sup>377</sup> But, Rule 704(b) should operate to bar the follow-up colloquy between the prosecutor and expert indicating that, because defendant engaged in such practices, he must necessarily be a drug trafficker. That is a factual matter for the jury to resolve that—keeping in mind the text of Section 841—too closely relates to an opinion about defendant's mens rea.

As a concluding aside, it is important to note that preventing the government from examining experts in this manner during federal drug prosecutions deprives the jury of no factual information. Instead, the jury would simply hear the factual information about drug trafficking but would not hear the officer's opinion on whether defendant's specific activities are consistent with drug trafficking.

## CONCLUSION

Members of law enforcement are the government's go-to expert witnesses in federal drug prosecutions. But, admitting testimony from members of law enforcement raises problematic rule-based issues, including (1) the propriety of certifying members of law enforcement as experts without first testing the methodology underlying their proposed testimony; and (2) the possibility that the expert's testimony may inferentially comment on defendant's mental state.

The latter concern suggests an additional related problem: any expert testimony even tacitly related to defendant's mental state could be overly suggestive and render it too easy for the jury to make critical factual conclusions about defendant's mental state. If so, the routine admission of testimony from state officers or federal FBI agent may unconstitutionally lessen the prosecution's burden of proof by allowing the jury to simply infer defendant's mens rea from the expert's opinion testimony. Such testimony wholly undermines the jury's hallowed role as fact-finder.

Ironically, addressing the varied problems with law enforcement expert testimony in federal drug prosecutions would take little effort to fix. The drafters of the Federal Rules of Evidence must (1) make clear that law

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<sup>375</sup> See *United States v. Love*, 336 F.3d 643, 646-47 (7th Cir. 2003).

<sup>376</sup> See *United States v. Davis*, 397 F.3d 173, 177 (3d Cir. 2005).

<sup>377</sup> For examples of admissions of such testimony, see *United States v. Winbush*, 580 F.3d 503, 512 (7th Cir. 2009) (drug weight); *United States v. Webb*, 115 F.3d 711, 713-14 (9th Cir. 1997) (modus operandi); *United States v. de Soto*, 885 F.2d 354, 360 (7th Cir. 1989) (counter-surveillance).

enforcement expert testimony is appropriate so long as the witness was not also actively involved in the criminal investigation, and (2) the expert is sequestered from the other witnesses until the time of his testimony.

Even if no federal court adopts this proposal, district courts should still insist, as a prerequisite to qualifying an agent as an expert, on an explanation about (1) how the expert's experience led to the conclusion reached; (2) how that experience is an appropriate basis for the offered opinion; and (3) how the experience is reliably applied to the facts.