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## How Much is Too Much? Rule 704(b) Opinions on Personal Use vs. Intent to Distribute

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## SECTION II: EVIDENTIARY ISSUES IN CRIMINAL CASES

### How Much is Too Much? Rule 704(b) Opinions on Personal Use vs. Intent to Distribute

#### INTRODUCTION

Defendant *X* is on trial for the possession of a controlled substance with intent to distribute. *X* was not observed selling drugs, but he was found with the drugs at the time of his arrest. Because the jury will be required to decide what reasonable inferences may be drawn from the available circumstantial evidence,<sup>1</sup> an integral part of the government's case will be the introduction of testimony from a non-arresting law enforcement officer as an expert witness in narcotics distribution. The limited prohibition of ultimate issue testimony as set out in Federal Rule of Evidence 704(b),<sup>2</sup> however, poses a problem for both the prosecutor and the expert by restricting the testimony regarding the issue of intent without specifying what testimony remains permissible.

Part of the confusion surrounding the application of Rule 704(b) to drug-related cases stems from its legislative history. It is not altogether clear that Rule 704(b) was meant to apply to opinion testimony beyond that of mental health experts.<sup>3</sup> Despite this ambiguity, the courts have construed the plain language of the Rule as applying to all expert opinion testimony regarding the intent of the defendant. Thus, Rule 704(b) has impacted the prosecution of drug-related crimes where the government maintains the burden of proving that the defendant knowingly or

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1. See *United States v. Echeverri*, 982 F.2d 675, 678 (1st Cir. 1993).

2. FED. R. EVID. 704 states:

(a) 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.

(b) 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.

3. See S. REP. NO. 225, at 230-31 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3412-13.

intentionally possessed a controlled substance with intent to distribute.<sup>4</sup>

In grappling with the perhaps unintended application of Rule 704(b) outside of the psychiatric realm, the courts have progressively become more restrictive as to what form expert testimony may take. The one absolute that remains is that the expert may not opine as to the defendant's intent at the time the offense was committed. A prosecutor can no longer use strategies such as setting up a hypothetical scenario that mirrors the facts of the case in order to question the expert, or utilizing an arresting officer as the narcotics expert. Both of these tactics have been deemed misleading or confusing to the jury. Finally, the seemingly permissible device of eliciting testimony that possession of certain amounts of a controlled dangerous substance is "consistent" with the intent to distribute, or that certain quantities of drugs are "possessed for the purpose of distribution" without reference to the defendant's intent,<sup>5</sup> appears to be increasingly disfavored by the courts. The linguistic divergence seems more semantic than psychological and, as one court noted, the distinction is useless.<sup>6</sup>

This Comment examines what may be properly asked and answered within the parameters of the exception carved out of the ultimate issue rule as established by Rule 704(b), and concludes that the ban on the ultimate question of intent extends to discussions of the purposes for which the drugs are possessed or behavior consistent with possession of drugs. Therefore, prosecutors must stop short of asking the question to which all of the expert's testimony leads. While this seemingly incomplete method of presenting evidence may not be the most desirable or the most effective way to deal with the problem created by Rule 704(b), it is the best manner to avoid a potential defense appeal on what is essentially a technical problem.<sup>7</sup>

## HISTORY

### *Expert Opinion Testimony Prior to the Federal Rules Of Evidence*

The rationale employed for introducing expert witness opinion tes-

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4. 21 U.S.C. § 841(a) (1996).

5. See *United States v. Mitchell*, 996 F.2d 419, 422 (D.C. Cir. 1993) (remarking that Rule 704(b) invites the drawing of rather subtle lines where modus operandi evidence and responses to purely hypothetical questions effectively speak to intent although there was no explicit reference to the intent of "the defendant").

6. *State v. Baskerville*, 735 A.2d 39 (N.J. Super. Ct. 1999).

7. "To what extent an expert can explain legal issues is subject to ill-defined parameters. Courts have difficulty drawing a line between inadmissible conclusions of law and admissible assistance to the trier of fact in understanding the evidence." Robert D. Fleming, *Hazards of Expert Witnesses: Disclosing Work Product and Limiting Testimony*, 66 DEF. COUNS. J. 538, 545-46 (1999).

timony as evidence presented to the trier of fact rests upon the belief that the average juror is not able to sufficiently adduce certain types of facts without the benefit of an expert's opinion.<sup>8</sup> The basis for this theory is that highly specific or complicated matters create a need for experts to explain events and concepts that are "beyond the ken" of the average person, and, within that context, create a lens through which the jury may more adroitly view the facts before it.

Historically, however, another school of thought prevailed wherein expert witnesses were not permitted to testify to ultimate issues in the case, out of fear that expert opinions would "invade the province of the jury" and might encourage the jury to adopt, without critical reflection, whatever the expert might say, thus abandoning their responsibility to weigh evidence and determine facts.<sup>9</sup> Under this view, it was the physical facts of the investigation that were readily understood by the jury when they were properly described, and it was for the jury to draw the proper conclusion. Thus, there was no occasion for the opinion of an expert witness.<sup>10</sup> The belief was that, absent inability or incompetence of jurors on the basis of their day-to-day experience and observation to comprehend the issues and to evaluate the evidence, the opinions of experts intruded on the province of the jury to draw inferences and conclusions, and thus, were both unnecessary and improper.<sup>11</sup>

The controversy between these two competing theories appeared to have been resolved with the enactment of the Federal Rules of Evidence in 1975. A simple, single standard emerged:<sup>12</sup> "Evidence is admissible, if and only if, it assists the jury in reaching its determination of fact."<sup>13</sup> This standard applied to all witness testimony, thus permitting the liberal use of expert and lay witness testimony to opinions on ultimate fact issues.

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8. See FED. R. EVID. 702 (providing that experts may testify to "scientific, technical, or other specialized knowledge" if such testimony will assist the trier of fact to understand the evidence or to determine a fact in issue).

9. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES 709-11 (4th ed. 2000). However, commentators regarded the rule against opinions as unduly restrictive, difficult to apply, and effectively depriving the trier of fact of useful information. 7 WIGMORE §§ 1920 (1921); MCCORMICK ON EVIDENCE § 12 (John W. Strong ed., 5th ed. 1999). The assumption that a jury, upon hearing an expert answer the very question they must decide, will simply adopt the expert's conclusion and fail to reach an independent decision based on all the evidence offered at trial was rejected in the original Rule 704. See Paul R. Rice & Neals-Erik William Delker, *A Short History of Too Little Consequence*, 191 F.R.D. 678, 711 (2000).

10. *People v. Grutz*, 105 N.E. 843, 847 (N.Y. 1914).

11. *Kulak v. Nationwide Mut. Ins. Co.*, 386 N.Y.S.2d 87 (N.Y. 1976).

12. See FED. R. EVID. 701-706; see also *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169 (1988) (discussing that the liberal thrust of the Federal Rules of Evidence is consistent with the Federal Rule's general approach of relaxing the traditional barriers to "opinion" testimony).

13. Maury R. Olicker, *The Admissibility Of Expert Witness Testimony: Time To Take The Final Leap?*, 42 U. MIAMI L. REV. 831, 838 (1988) (citations omitted).

*The Insanity Defense Reform Act of 1984:  
The John Hinckley, Jr. Exception*

The policy of permissibility in the Federal Rules of Evidence towards expert testimony was caught in the glare of the media maelstrom following the acquittal of John Hinckley, Jr. for the shooting and attempted assassination of President Ronald Reagan, Press Secretary James Brady, and two others in 1981.<sup>14</sup> During the trial, prosecution and defense expert psychiatrists testified as to Hinckley's mental condition and offered divergent opinions as to his ability to form the specific intent to commit homicide.<sup>15</sup> The jury subsequently found Hinckley not guilty by reason of insanity.<sup>16</sup> The public was outraged and, at the White House's urging, Congress responded swiftly to the Hinckley verdict with the enactment of the Insanity Defense Reform Act.<sup>17</sup> The Act amended Federal Rule of Evidence 704, adding subsection (b) to limit the use of expert opinion testimony.<sup>18</sup>

Clearly, the thrust of the legislative intent behind the Act was to limit *psychiatrists* to "presenting and explaining their diagnosis," and to prevent them from being asked to speak in terms of "legal or moral constructs" that could be construed by a jury as outcome determinative.<sup>19</sup> The Senate Committee Report expressly stated: "the purpose of

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14. See *United States v. Cameron*, 907 F.2d 1051, 1061 (11th Cir. 1990).

15. Jonathon B. Sallet, *After Hinckley: The Insanity Defense Reexamined*, 94 *YALE L.J.* 1545 (1985).

16. Lynda C. Fentiman, *Whose Right is it Anyway?: Rethinking Competency to Stand Trial in Light of the Synthetically Sane Insanity Declarant*, 40 *U. MIAMI L. REV.* 1109, 1169 (1986).

17. Insanity Defense Reform Act of 1984, 18 U.S.C. § 20 (1984). See S. REP. NO. 225, at 230-31 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3412-13 ("Under this proposal, expert psychiatric testimony would be limited to presenting and explaining their diagnoses, such as whether the defendant had a severe mental disease or defect and what the characteristics of such a disease or defect, if any, may have been.") The Senate Report includes a quote from the American Psychiatric Association Statement on the Insanity Defense:

Psychiatrists, of course, must be permitted to testify fully about the defendant's diagnosis, mental state and motivation (in clinical and commonsense terms) at the time of the alleged act so as to permit the jury or judge to reach the ultimate conclusion about which they and only they are expert. Determining whether a criminal defendant was legally insane is a matter for legal fact-finders, not for experts.)

*Id.* at 3413; see also *Cameron*, 907 F.2d at 1061-62 (11th Cir. 1990) (changes made by the Insanity Defense Reform Act with regard to the use of psychiatric evidence in federal criminal trials eliminates all affirmative defenses or excuses based on mental disease or defect, changes the burden of proof to require the defendant to prove the affirmative defense of insanity by clear and convincing evidence, limits the use of expert psychological testimony on ultimate issues, and creates a special verdict of not guilty by reason of insanity); 18 U.S.C. §§ 17(a, b), 4242(b).

18. Note that this legislation was initially adopted by Congress with the Advisory Committee only being given the right to comment. See Insanity Defense Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 2057.

19. See FED. R. EVID. 704 advisory committee's note; see also *Washington v. United States*,

the amendment is to eliminate the confusing spectacle of competing expert witnesses testifying to directly contradictory conclusions as to the ultimate legal issue to be found by the trier of fact.”<sup>20</sup>

The exclusion of ultimate issue testimony under Rule 704(b) is Congress’s acknowledgment that expert testimony may otherwise be admissible either on the issue of specific intent or on the issue of insanity.<sup>21</sup> Thus, Rule 704(b) partially revived the ultimate issue rule in cases requiring a jury to determine whether or not a criminal defendant’s mental state satisfies the applicable legal standard.<sup>22</sup> The effect of the Rule 704(b), is to forbid an expert witness from offering an opinion stated in legal terms about the defendant’s mental state at the time of the crime.<sup>23</sup> The expert may not venture an opinion on whether the defendant possessed the required intent at the time of the alleged crime.<sup>24</sup> This limitation requires the jury, as the finder of fact, to reach a conclusion as to the defendant’s mental state without the benefit of the most useful testimony the expert could offer—the expert’s opinion about the defendant’s mental state at the time the crime was committed.<sup>25</sup> It is far less clear, however, that Congress intended this limitation to reach the testimony of non-mental health experts, such as law enforcement officers.

#### THE APPLICATION OF 704(B): MENTAL HEALTH EXPERTS AND BEYOND

The circuits have discussed the legislative history of Rule 704(b) as possibly supporting the argument that the Rule only applies to psychiatrists and other mental health experts, which is a very restrictive view of the Rule. Significantly, however, none of the circuits have actually held that Rule 704(b) has such a limited reach.<sup>26</sup>

The application of the Rule 704(b) limitation to testimony from all experts, centers on the rationale for precluding ultimate opinion psychi-

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390 F.2d 444, 456 (D.C. Cir. 1967) (“there is no justification for permitting psychiatrists to testify on the ultimate issue”).

20. S. REP. NO. 225, at 230-31 (1984), *reprinted in* 1984 U.S.C.A.N. 3182, 3412-13.

21. *See* United States v. Cameron, 907 F.2d 1051, 1061 (11th Cir. 1990).

22. Rice & Delker, *supra* note 9, at 714.

23. *Id.*

24. United States v. Boyd, 55 F.3d at 667, 670 (D.C. Cir. 1995); United States v. Reno, 992 F.2d 739, 742 (7th Cir. 1993).

25. Rice & Delker, *supra* note 9, at 711.

26. *See* United States v. Bennett, 161 F.3d 171, 183 (3d Cir. 1998) (excluding expert testimony that went “beyond merely assisting the jury, explaining the nature” of defendant’s mental disease or describing the “typical effect” of such disease, to stating explicitly whether the defendant possessed the required mental intent); *see also* United States v. Morales, 108 F.3d 1031, 1035 (9th Cir. 1997); United States v. Gastiaburo, 16 F.3d 582, 588 (4th Cir. 1994); United States v. Lipscomb, 14 F.3d 1236, 1240-43 (7th Cir. 1994); United States v. Richard, 969 F.2d 849, 855 n.6 (10th Cir. 1992).

atric testimony to exclude any opinions to the ultimate mental state of the defendant that is relevant to the legal conclusion sought to be proven.<sup>27</sup> The Senate Report issued on the matter notes that Rule 704 is designed to reach all such "ultimate" issues, e.g., premeditation in a homicide case, or lack of predisposition in entrapment.<sup>28</sup>

A recent case out of the Fourth Circuit contends that Rule 704(b) was an attempt to constrain psychiatric testimony on behalf of defendants asserting the insanity defense, and that its application to drug dealer cases is "murky at best."<sup>29</sup> Even this declaration, however, did not prevent the court from conforming to the widespread practice of all of the circuits in applying Rule 704(b) to all ultimate issues of intent. The reality is that the application of Rule 704(b) extends to the testimony of all expert witnesses, regardless of what Congress may have intended to do when it passed the Insanity Defense Reform Act of 1984.<sup>30</sup>

Rule 704(b) "recognizes the importance of ensuring that the jury does not place undue weight on expert testimony pertaining, expressly or impliedly, to the intent of the defendant."<sup>31</sup> Particular caution is necessary when law enforcement agents testify as expert witnesses because there is the potential that juries may unduly grant more weight to the agent's testimony, conflating his status as both an expert and an

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27. *United States v. Campos*, 217 F.3d 707, 711 (9th Cir. 2000) (stating that Rule 704(b) is not limited to psychiatrists and other mental health experts, but rather, extends to all expert witnesses, applying to both the insanity defense and to any ultimate mental state of the defendant that is relevant to the legal conclusion sought to be proven).

28. S. REP. NO. 225, at 229-31 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3412-13. The language suggests an acknowledgment that expert testimony may be admissible on either specific intent or insanity. *See United States v. Skodnek*, 896 F. Supp. 60, 64 (D.Mass. 1995).

29. *United States v. Gastiaburo*, 16 F.3d 582, 588 (4th Cir. 1994).

30. "[C]anons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l. Bank v. Germain*, 503 U.S. 249, 253-54 (1992); *see, e.g., United States v. Ron Pair Enter. Inc.*, 489 U.S. 235, 241-42 (1989); *Rubin v. United States*, 449 U.S. 424, 430 (1981) (finding that when the words of a statute are unambiguous, then "judicial inquiry is complete."); *see also United States v. Morales*, 108 F.3d 1031, 1036 (9th Cir. 1997) ("The language of Rule 704(b) is perfectly plain. It does not limit its reach to psychiatrists and other mental health experts. Its reach extends to all expert witnesses."); *United States v. Valle*, 72 F.3d 210, 214 (1st Cir. 1995) (holding that "Rule 704(b) prohibits all direct expert testimony concerning a criminal defendant's intent, regardless of the witness's field of expertise, so long as intent is an element of the crime charged"); *United States v. Lipscomb*, 14 F.3d 1236, 1242 (7th Cir. 1994) (expressing a certain reluctance to read Rule 704(b) so generously, but feeling constrained by "the fact that this court and others have routinely assumed that Rule 704(b) imposes an additional limitation, however slight, on the expert testimony of law enforcement officials"); *United States v. Lamattina*, 889 F.2d 1191, 1193-94 (1st Cir. 1989) (discussing FBI agent's testimony in loan-sharking case).

31. *United States v. Lipscomb*, 14 F.3d 1236, 1242-43 (7th Cir. 1994); *see also United States v. Smart*, 98 F.3d 1379, 1388 (D.C. Cir. 1997); *United States v. Alvarez*, 837 F.2d 1024, 1030 (11th Cir. 1988).

officer.<sup>32</sup>

The law enforcement officer is permitted to testify as an expert to facts that are within his area of "specific knowledge" acquired through his training and experience.<sup>33</sup> "Law enforcement officials can give valuable assistance to the trier of fact as expert witnesses; police officers are often the only credible witnesses in certain fields, such as the habits of narcotics distributors, who are readily available to testify."<sup>34</sup> The expert opinions and testimony of the officers is merely an analysis of evidence in light of their specialized knowledge of drug trafficking.<sup>35</sup> For example, testimony that the actions of a defendant indicated that he was guarding a car and that a person transporting \$30,000 worth of crack cocaine and multiple firearms would not allow a complete outsider to ride in the car, are not impermissible opinions on the ultimate legal issue, because they are merely explanations of analysis of facts which would tend to support a jury finding on the ultimate issue.<sup>36</sup>

When a law enforcement official states an opinion about the criminal nature of a defendant's activities, it is essential that it is made clear, "either by the court expressly or in the nature of the examination, that the opinion is based on the expert's knowledge of common criminal practices, and not on some special knowledge of the defendant's mental processes."<sup>37</sup> For instance, testimony that the expert had never arrested a courier who was unaware that he or she was carrying drugs and that, in his opinion, "unwitting couriers" and "blind mules" do not exist is permissible, provided it is clear that the agent's extensive experience is the basis for the agent's testimony about what is "typical."<sup>38</sup>

#### THE SPECIAL RISK ASSOCIATED WITH THE TESTIMONY OF THE ARRESTING OR INVESTIGATORY OFFICER

While it is not improper for the government to elicit expert witness opinion testimony from law enforcement officers who also testified as

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32. See generally Deon J. Nossel, *The Admissibility of Ultimate Issue Expert Testimony by Law Enforcement Officers in Criminal Trials*, 93 COLUM. L. REV. 231 (1993) (expressing concern that under certain circumstances expert testimony in drug cases embracing ultimate issues might be so prejudicial as to require exclusion if its probative value is substantially outweighed by the risk of undue prejudice).

33. See FED. R. EVID. 702.

34. Gail Sweeney Stephenson, Note, *Police Expert Witnesses and the Ultimate Issue Rule*, 44 LA. L. REV. 211, 221 (1983).

35. See *Specht v. Jensen*, 853 F.2d 805, 815 (10th Cir. 1988) (Seymour, J., dissenting) (arguing that the admissibility of expert opinion testimony should be based on whether or not the testimony created "actual prejudice").

36. See *United States v. Buchanan*, 70 F.3d 818, 832-33 (5th Cir. 1996).

37. *United States v. Lipscomb*, 14 F.3d 1236, 1242 (7th Cir. 1994).

38. See *United States v. Campos*, 217 F.3d 707, 712 (9th Cir. 2000).



fact witnesses because they were the arresting or investigating officer,<sup>39</sup> it is preferable to garner the expert testimony from an officer who is removed from direct involvement with the facts of the case. This preference maintains the fiction that the expert's testimony is that of a neutral observer who is not commenting on the behavior of any particular individual, specifically this defendant, but is simply describing what her years of experience have lead her to believe to be true of certain observed behaviors. Otherwise, the jury, as the trier of fact, must discern between the officer's dual roles, as fact witness and as expert witness, in determining how much weight to accord to her testimony, needlessly adding a layer of potential confusion to the process.<sup>40</sup>

#### OTHER CONSIDERATIONS: LIMITATIONS OF APPLICATION

While "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,"<sup>41</sup> the abolition of the ultimate issue rule does not lower the bar so far as to admit all opinion testimony.<sup>42</sup> The evidence must still be "otherwise admissible" under the rules governing expert testimony.<sup>43</sup> Rule 704(b) forbids a witness from testifying about a direct opinion on a defendant's guilt or innocence.<sup>44</sup> Federal Rule of Evidence 702 restricts expert testimony to testimony that assists the jury in determining a "fact in issue."<sup>45</sup> Furthermore, Federal Rule of Evi-

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39. *United States v. Young*, 745 F.2d 733, 760 (2d Cir. 1984). *But see*, *United States v. Feliciano*, 223 F.3d 102, 121 (2d Cir. 2000) ("[T]he line between the [expert's opinion] and fact witness testimony is often hard to discern, and that the "facts" testified to are often stated very broadly and generally. For example, [the expert] testified, without supplying specific dates and locations, that he participated in undercover purchases of crack cocaine, powder cocaine, and heroin from [the defendant's gang]"). *See also* Phylis Skloot Bamberger, *The Second Circuit Review—1984-1985 Term: Evidence: Commentary: The Dangerous Expert Witness*, 52 *BROOK. L. REV.* 855 (1986).

40. *United States v. De Soto*, 885 F.2d 354, 360 (7th Cir. 1989). In *DeSoto*, Lieutenant Dailey was called by the government to testify both as an eyewitness and as an expert on law enforcement and drug dealer methodology. The court stated that "[w]hen these two roles are intertwined, the possibility of juror confusion is increased. This situation placed an especially heavy burden on the district court to ensure that the jury understood its function in evaluating the evidence." *Id.*

41. *FED. R. EVID.* 704(a).

42. *FED. R. EVID.* 704 advisory committee note.

43. "704(b) is not necessary to limit confusion from expert testimony if Rules 403 and 702 are properly enforced. Rule 704(b) actually makes expert witnesses less useful to fact-finders because it encourages indirect and incomplete testimony." 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, 639 (1987).

44. *United States v. Kinsey*, 843 F.2d 383, 388 (9th Cir. 1988). The Rule recognizes that the jury, upon hearing the testimony regarding the intent of a defendant from an expert, may give the expert opinion undue weight.

45. *FED. R. EVID.* 702.

dence 403 provides for judicial discretion in the exclusion of evidence on grounds of prejudice, confusion, or waste of time.<sup>46</sup> Theoretically, these provisions provide “ample assurances against the admission of opinions that would merely tell the jury what result to reach.”<sup>47</sup>

#### WHAT CONSTITUTES PERMISSIBLE TESTIMONY?

##### *Predicate Fact Testimony*

Without general background testimony from experts regarding typical drug-related behavior, jurors might not understand the significance of certain facts, such as the amount of the narcotics in question. From this perspective, this type of testimony provides a factual predicate for the jury to draw an inference that the defendant possessed the narcotics for the purpose of retail distribution.<sup>48</sup> A sampling of the reasoning utilized by the circuits bear out the universal acceptance of this argument.<sup>49</sup>

The First Circuit permits a law enforcement officer to testify as a factual witness as to criminal behavior he has witnessed during his career in law enforcement.<sup>50</sup> Additionally, the circuit allows expert witness opinion testimony as to “the approximate street value of narcotics found during a search, and that the quantity of narcotics is consistent with distribution as opposed to personal use, because it affords the jury appropriate assistance in determining the defendant’s intent.”<sup>51</sup>

Other circuits have similar approaches. The Second Circuit has consistently reaffirmed that it permits experts to rely on their field experience in order to provide general opinion testimony regarding drug-

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46. FED. R. EVID. 403 states: “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.”

47. See *State v. Baskerville*, 735 A.2d 39 (N.J. Super. 1999); *Lampkins v. United States*, 401 A.2d 966, 970 (D.C. App. 1979).

48. See *supra* note 47. *Accord* *United States v. Brown*, 7 F.3d 648, 653 (7th Cir. 1993) (allowing testimony that, based on the expert’s experience, the evidence indicated that the amount of crack seized from Brown “was intended for distribution”).

49. None of the circuits have found this type of testimony to be impermissible on its face. However, the circuits have been inconsistent in enunciating the scope and application of Rule 704(b). See *United States v. Woodson*, No. 97-4143, 97-4168, 1998 U.S. App. LEXIS 23227 (4th Cir. Sept. 18, 1998).

50. See *United States v. Andrade*, 94 F.3d 9, 13 (1st Cir. 1996) (allowing expert testimony that the amount of cocaine defendant possessed could make more than 140 “jums,” officer had never seen a mere user with more than eight to ten jums at once, and that crack was usually sold in \$10 and \$20 amounts in that locale); *United States v. Dimarzo*, 80 F.3d 656, 659-60 (1st Cir. 1996) (permitting agent to testify that in his twenty-nine years of experience, innocent observers are not invited to accompany criminals engaged in completing a drug deal).

51. *United States v. Valle*, 72 F.3d 210 (1st Cir. 1995), *aff’d in part, rev’d in part on other grounds*, *Andrade*, 94 F.3d at 13.

related offenses.<sup>52</sup> The Fifth Circuit has concluded that an expert can testify about whether the defendant exhibited certain characteristics or behaviors that are imbued with special meaning in relation to narcotics trafficking, as long as the expert leaves the ultimate issue of the defendant's mental state unresolved.<sup>53</sup> The Sixth Circuit noted, in *United States v. Cox*, that the practical effect of Rule 704(b) was "not to change the quantum or quality of expert testimony utilized to convict an offender, but to change the style of question and answer that can be used to establish both the offense and the defense thereto."<sup>54</sup>

Rule 704(b) prohibits an expert from "expressly stating the final conclusion or inference as to a defendant's actual mental state" and mandates that the expert leave the inference, however obvious, for the jury to draw.<sup>55</sup> In accordance with the plain language of 704(b), all of the circuits have concluded that an expert witness cannot expressly state a conclusion as to the defendant's mental state, nor use the proscribed word "intent."<sup>56</sup> In close cases, however, in which the prosecutor asks whether the possession was for purposes of distribution or personal use, the courts tend to "punt" on the actual determination as to whether or not this crosses the Rule 704(b) threshold and state that even if this language does constitute error, it is harmless error.<sup>57</sup>

A predominate view is that Rule 704(b) is not strictly construed and prohibits only a direct statement of the defendant's intent.<sup>58</sup> This broad reading permits expert witness opinion testimony to reach a question such as, "Do you have an opinion as to what a person being in possession of cocaine would be consistent with or not consistent with?"<sup>59</sup> Per-

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52. See, e.g., *United States v. Taylor*, 18 F.3d 55, 60 (2d Cir. 1994).

53. See, e.g., *United States v. Dixon*, 185 F.3d 393, 402 (5th Cir. 1999); *United States v. Buchanan*, 70 F.3d 818, 832 (5th Cir. 1995); *United States v. Williams*, 957 F.2d 1238 (5th Cir. 1992).

54. 826 F.2d 1518, 1525 (6th Cir. 1987) (citing *United States v. Prickett*, 790 F.2d 35, 37 (6th Cir. 1986)); *United States v. Mest*, 789 F.2d 1069, 1071 (4th Cir. 1986).

55. *United States v. DiDomenico*, 985 F.2d 1159, 1164-65 (2d Cir. 1993).

56. All of the circuits have generally read Rule 704(b) as prohibiting all direct expert testimony concerning a criminal defendant's intent, regardless of the witness's field of expertise, so long as intent is an element of the crime charged. *Dixon*, 185 F.3d at 398; *United States v. Mancillas*, 183 F.3d 682, 706 (7th Cir. 1999); *United States v. Toms*, 136 F.3d 176, 185 (D.C. Cir. 1998); *United States v. Bennett*, 161 F.3d 171, 183 (3d Cir. 1998); *United States v. Morales*, 108 F.3d 1031, 1036 (9th Cir. 1997); *United States v. Valle*, 72 F.3d 210, 216 (1st Cir. 1995); *United States v. Richard*, 969 F.2d 849, 854-55 (10th Cir. 1992); *United States v. Kristiansen*, 901 F.2d 1463, 1465 (8th Cir. 1990); *United States v. Alvarez*, 837 F.2d 1024, 1031 (11th Cir. 1988).

57. *United States v. Woodson*, No. 97-4143, 97-4168, 1998 U.S. App. LEXIS 23227 (4th Cir. Sept. 18, 1998); cf. *Valle*, 72 F.3d at 216; *United States v. Speer*, 30 F.3d 605, 609-10 (5th Cir. 1994).

58. See *United States v. Triplett*, 922 F.2d 1174, 1182 (5th Cir. 1991); *United States v. Masat*, 896 F.2d 88, 93 (5th Cir. 1990).

59. See, e.g., *Speer*, 30 F.3d at 609.

missible, non-violative answers by the expert may use the term “consistent” and “inconsistent.” For example, in response to the question, “Pursuant to your expertise, do you have an opinion regarding what bringing scales to weigh drugs during a purchase would be consistent with, personal use?”<sup>60</sup> The expert may respond, “From my experience, I think it would be inconsistent for a user to carry a scale around.”<sup>61</sup>

The Fourth Circuit appears to draw the line of admissibility at testimony explicitly stating that, in light of the officer’s experience, it is his expert opinion that the defendant intended to distribute the narcotics; this is the only prohibited inference that must be left to the jury.<sup>62</sup> The Fourth Circuit is not alone. The Tenth Circuit concurs that Rule 704(b) only prevents experts from expressly stating the final conclusion or inference as to a defendant’s actual mental state.<sup>63</sup>

The Eleventh Circuit has ruled that, whereas the expert is permitted to testify as to surrounding circumstances and his opinion based on his experience, he may not expressly “state the inference.”<sup>64</sup> Rule 704(b), however, does not prevent the expert witness from testifying as to facts or opinions from which the jury could conclude or infer that the defendant possessed the requisite mental state.<sup>65</sup>

In most of the circuits, law enforcement officers are permitted to rely on their field experience and testify that particular amounts of drugs are “consistent” with either personal use or distribution, because the courts reason that the jury is still free to reject the expert’s inference.<sup>66</sup> This is not true in all circuits. For example, the Court of Appeals for the District of Columbia, expanded the notion of what constitutes a violation of Rule 704(b) to include the proscription of language such as “consis-

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60. *Id.*

61. *Id.* at 610.

62. *United States v. Kimble*, 960 F.2d 147 (4th Cir. 1992).

63. *See United States v. McSwain*, 197 F.3d 472, 483 (10th Cir. 1999); *United States v. Schurrer*, 156 F.3d 1245 (10th Cir. 1998); *United States v. Richard*, 969 F.2d 849, 854-55 (10th Cir. 1992).

64. *See United States v. Nixon*, 918 F.2d 895, 905 (11th Cir. 1999) (finding that use of the word “conspiracy” by the expert witness during cross-examination was a factual conclusion, not a legal conclusion in the light of Rule 704).

65. *United States v. Alvarez*, 837 F.2d 1024, 1031 (11th Cir.1988) (when the obvious inference of the expert’s testimony was that defendants were aware of contraband aboard the vessel, testimony is not violative of Rule 704(b) because expert left this final inference for the jury to draw).

66. *United States v. Rivera*, 208 F.3d 204 (2d Cir. 2000) (citing *United States v. Taylor*, 18 F.3d 55, 60 (2d Cir. 1994)) (differentiating between the defendant’s contention that the government’s expert witness’s testimony that Rivera intended to distribute the heroin and the court’s recognition that expert testified that the amount of heroin Rivera possessed was more consistent with distribution rather than personal use). *See Rice & Delker*, *supra* note 9, at 714.

tent with 'intent to distribute.'"<sup>67</sup> This expansion may or may not impact future decisions of the other circuits, but it does present a red flag for all federal prosecutors who are trying drug-related cases similar to that of Defendant X. Therefore, the language used in both the question posed to the expert and the answer given is determinative of whether or not the evidence is permissible under Rule 704(b), but it is not dispositive of the outcome of the case.<sup>68</sup>

### THE MIRRORING HYPOTHETICAL

The mirroring hypothetical is one effective tool that is often used in eliciting helpful prosecution testimony from expert witnesses. This method of questioning appears, on its face, to be a neutral forum through which the expert may impart her opinion based on her expertise. Fact patterns, that just happen to be modeled after the same fact pattern the jury is being asked to analyze, are posed to the expert for her analysis.

The Court of Appeals for the District of Columbia has ruled that mirroring hypothetical are impermissible and constitute reversible error because these hypotheticals come too close to providing the jury with the ultimate inference of intent.<sup>69</sup> This circuit was the first circuit to proscribe mirroring hypotheticals.<sup>70</sup> It provided a two-part test for determining whether an expert's testimony violates Rule 704(b).<sup>71</sup> First, the court should look at "the language used by the questioner and/or the expert, including use of the actual word 'intent.'"<sup>72</sup> Second, the court examines whether the context of the expert's testimony makes it clear to the jury that the expert's opinion is based on knowledge of general criminal practices, not "some special knowledge of the defendant's mental processes."<sup>73</sup>

The most recent summation of the the Court of Appeals for the District of Columbia policy is found in *United States v. Watson*.<sup>74</sup> If some questions come close to the line of questioning that the court has found objectionable, there is no violation of Rule 704(b) so long as the questions ask and elicit general responses.<sup>75</sup> Questioning that produces

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67. See *In re Sealed Case*, 99 F.3d 1175, 1178-79 (D.C. Cir. 1996); *United States v. Boyd*, 55 F.3d 667, 672 (D.C. Cir. 1995).

68. There has only been one case, *United States v. Boyd*, 55 F.3d 667, 673 (D.C. Cir. 1995), in which a Rule 704(b) error alone was found to constitute reversible error.

69. *Boyd*, 55 F.3d at 669.

70. *Id.*

71. *United States v. Smart*, 98 F.3d 1379, 1388 (D.C. Cir. 1997) (adopting the Seventh Circuit's test).

72. *Id.*

73. *Id.*

74. 171 F.3d 695 (D.C. Cir. 1999).

75. *Id.* at 703.

responses suggesting some special knowledge of the defendant's mental processes is proscribed. Examples of this include expert testimony that the hypothetical person's conduct "met the elements" of the charged offense, that the hypothetical individual's possession was "consistent with intent to distribute," and that the hypothetical person's intent "was intent to distribute."<sup>76</sup> The prosecutor in *Watson* asked the expert about drug trafficking generally in the District of Columbia.<sup>77</sup> He also asked "how many 'dosage units' would be contained in 100 grams of cocaine base," to which the witness responded "700," and concluded that "[m]y experience easily tells me that if any one individual possesses what's equivalent to 700 bags of crack cocaine [sic] is in the business of making money selling drugs in the streets of Washington, D.C. or whatever."<sup>78</sup>

The Fifth Circuit has held that while an expert may testify about whether the defendant exhibited certain characteristics, he may not testify that a hypothetical person committing the same acts as the defendant would or would not be meeting the element of the crime charged.<sup>79</sup> For example, the government may introduce evidence that the defendant exhibited individual behaviors that would indicate to an expert that the defendant was involved in drug trafficking. The government, however, could not then introduce evidence by way of a hypothetical to create an inferential link for the jury to follow.<sup>80</sup>

The Seventh Circuit has taken a somewhat more lenient approach to this type of expert testimony.<sup>81</sup> In a case in which the only issue was whether the defendant had the intent to distribute crack cocaine found in his possession, the expert was permitted to offer his opinion as to what the circumstances of the case indicated to him.<sup>82</sup> The expert responded

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76. *Id.*

77. *Id.*

78. *United States v. Watson*, 171 F.3d 695, 703 (D.C. Cir. 1999).

79. *United States v. Dixon*, 185 F.3d 393, 401 (5th Cir. 1999).

80. *Id.*

81. *United States v. Romero*, 189 F.3d 576, 586 (7th Cir. 1999).

The defense contends that Agent Lanning invaded the province of the jury when he responded to "hypotheticals" that mirrored the actual actions of Romero. He responded that in his expert opinion the actions described such as cultivating a long-term relationship with a juvenile and traveling hundreds of miles to meet that juvenile tend to indicate an offender who is going to "act out" or go beyond mere fantasy. According to the defense, this testimony is tantamount to Lanning opining that Romero had the intent to molest Erich when he transported him in interstate commerce.

*Id.* The court concluded that "[w]hile his redirect testimony addressed some of Romero's actions served up in the form of hypotheticals, he never directly opined as to Romero's mental state when he crossed state lines with Erich in tow." *Id.*

82. *United States v. Brown*, 7 F.3d 648, 653 (7th Cir. 1996).

over a defense objection, “[t]hat this crack cocaine was intended for distribution.”<sup>83</sup> The expert pointed to “the fact that there was no paraphernalia, no smoking device found on the individual, and the weapon that was found.”<sup>84</sup> On appeal, the court reasoned that the expert had not crossed the Rule 704(b) line and that, viewed in context, the expert was “merely suggesting that . . . this crack probably would be distributed rather than used by [the defendant himself].”<sup>85</sup> The expert was merely expounding on his earlier testimony that a mere user of crack would usually carry a pipe and would rarely carry such a large supply of crack at one time, whereas dealers usually carry weapons to protect their supply.<sup>86</sup> Thus, the expert’s testimony analyzed the facts in a manner that supported an inference that the defendant had the intent to distribute without expressly stating the inference himself.<sup>87</sup>

When courts permit the use of mirroring hypotheticals, it is made clear to the jury, through a limiting instruction by the court, that the expert is not qualified to testify on the ultimate issue of intent.<sup>88</sup> An argument exists against the use of all hypotheticals that are not accompanied by limiting instructions or explanations of the expert’s qualifications. Hypotheticals lacking limiting instructions, in essence, allow the testimony to approach a de facto instruction to the jury, based on the expert witness’s opinion, of the defendant’s guilt as established through potentially arbitrary and collateral facts. This would thereby deny the defendant any real ability to counter the evidence.<sup>89</sup>

#### THE CORRECTIVE LIMITING INSTRUCTION

One key to avoiding the inherent pitfalls of expert opinion testimony is for the court to remind the jury that it remains the trier of fact for all of the ultimate issues, regardless of the opinions offered for its

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83. *Id.* at 650.

84. *Id.*

85. *Id.* at 653.

86. *Id.*

87. *Id.*

88. *See* United States v. Smart, 98 F.3d 1379, 1389 (D.C. Cir. 1996).

89. *See also* Gillion v. State, 573 So. 2d 810, 812 (Fla. 1991). Testimony about other drug transactions, through hypothetical scenarios, is also condemned based upon the rule of “res inter alios acta” which:

forbids the introduction against an accused of evidence of collateral facts which by their nature are incapable of affording any reasonable presumption or inference as to the principle matter in dispute, the reason being that such evidence would be to oppress the party affected, by compelling him to be prepared to rebut facts of which he would have no notice under the logical relevancy rule of evidence, as well as prejudicing the accused by drawing away the minds of the jurors from the point in issue.

*Id.*

consideration.<sup>90</sup> It is therefore advisable for the district court to admonish the jury:

The fact that an expert has given an opinion does not mean that it is binding upon you or that you are obligated to accept the expert's opinion as to the facts. You should assess the weight to be given to the expert opinion in the light of all of the evidence in this case.<sup>91</sup>

Furthermore, any potential prejudice or undue weight that resulting from the expert opinion testimony may be avoided by reminding the jury that "typical behavior and methods of narcotics traffickers [does] not preclude a finding that similar behavior by a defendant might nevertheless be consistent with innocent pursuits."<sup>92</sup>

#### THE BACK DOOR ENTRYWAY: GETTING INTENT IN

Despite limitations, there are ways for the government to get testimony regarding a defendant's intent admitted. First, the prosecutor must establish the witness's expertise based on her experience as a law enforcement officer with an extensive background in the relevant area. Both the prosecutor and the expert witness should make it explicitly clear that the expert's opinion stems from her experience and not from any specific knowledge of the facts of the specific defendant's case or his mental state. Second, the prosecutor should not use the arresting or investigating officer to testify as an expert. This will keep the factual and expert witnesses separated in the jurors' minds. Third, the prosecutor cannot merely avoid the use of mirroring hypotheticals.<sup>93</sup> The government must be certain that the expert's testimony offered for the jury's consideration is helpful without creating the possibility of confusion in the jurors' minds. The court is rightfully wary whenever a law enforcement officer testifies, in her expert opinion, regarding typical behavior or common tools of the trade for drug-related offenses when the testimony bears a resemblance to the charged conduct.<sup>94</sup> Fourth, verbal cir-

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90. See Stephen S. Saltzburg, *Opinions on Intent: Mirroring Facts of the Case*, 13 CRIM. JUST. 21, 24 (Fall 1998). Saltzburg observes:

In any case in which the trial judge is uncertain as to how to draw the line between permissible and impermissible opinion, the judge may be well advised to instruct the jury . . . that the expert witness has no knowledge of the facts of the case being tried and cannot offer any opinion regarding the intent or mental state of a particular defendant.

*Id.*

91. *United States v. Hubbard*, 61 F.3d 1261, 1275 (7th Cir. 1995).

92. *United States v. Perrone*, 936 F.2d 1403, 1411 (2d Cir. 1991).

93. See Saltzburg, *supra* note 90, at 24.

94. *United States v. Cruz*, 981 F.2d 659, 664 (2d Cir. 1992) (reversing convictions for conspiracy to possess cocaine for distribution and possession with intent to distribute cocaine; holding expert testimony cannot be used solely to "bolster the credibility of the government's fact-witnesses by mirroring their version of events").



cumlocutions such as “the drugs were for distribution [purposes]” are generally not advisable because of the heightened potential for these statements to be deemed error since any potential for reversal must be avoided. There is a distinct possibility that the courts, following the lead of the Court of Appeals for the District of Columbia, will come to view such statements as equivocal to stating an impermissible inference regarding the defendant’s intent.

What follows in this Comment are proposed questions and answers that would constitute permissible expert opinion testimony by law enforcement officers in a simple drug-related prosecution, given this author’s analysis of the restrictions imposed by Rule 704(b). These scripts allow a prosecutor to elicit all of the expert opinion testimony needed in order to enable the jury to make the necessary inference of the defendant’s intent without being violative of Rule 704(b), regardless of the circuit the trial is in. In all of the circuits, it is essential for the prosecutor to remind the jury that the questions asked are based upon the witness’s expertise in the field of narcotics investigations and not on any special knowledge of the defendant’s mental state. The following set of hypothetical questions and answers are modeled after the case of *United States v. Hubbard* and the answers are based on standard cocaine distribution practices from 1991.<sup>95</sup>

Q: Do you have any personal knowledge of the facts of this case?

A: No.

Q: As an expert in the area of narcotics distribution in this district/city/county, do you have an opinion as to what a typical distribution quantity of cocaine is in this district/city/county?

A: Yes.

Q: In your opinion, what is that amount?<sup>96</sup>

A: At the wholesale level, cocaine is typically distributed in quan-

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95. *Hubbard*, 61 F.3d at 1274. Frank Tucci, a DEA agent with over twenty-one years of experience, was permitted in this trial to testify as an expert concerning organized cocaine distribution. Although Tucci played no role in the investigation of this particular case against Hubbard, his testimony touched on a number of the key elements in the government’s case against Hubbard. The statistics used in these model answers are based on Tucci’s testimony in *Hubbard*.

96. The courts allow testimony regarding typical user quantities because it aids the jury by putting the drug dealer in context with the drug world. *United States v. Hunter*, 95 F.3d 14, 17 (8th Cir. 1996); *see also* *United States v. Wilson*, 964 F.2d 807, 810 (8th Cir. 1992). This reasoning is based on the assertion that it is a reasonable assumption that a jury is not well versed in the behavior and average consumption of drug users. *United States v. Tapia-Ortiz*, 23 F.3d 738, 741 (2d Cir. 1994) (“Testimony about the weight, purity, dosages, and prices of cocaine clearly relates to knowledge beyond the ken of the average juror.”); *United States v. Taylor*, 18 F.3d 55, 60 (2d Cir. 1994) (“Although [expert’s] testimony could be used by the jury to conclude that the amount of heroin found in Taylor’s apartment was probably for distribution purposes . . . testimony was helpful because the amount of heroin for personal use is hopefully not something within the ken of an average juror.”).

ties of one kilogram with a purity of approximately eighty-five percent or greater.

Q: Do you have an opinion as to how much one kilogram of cocaine was worth in this district/city/county in May, 1991?

A: Yes.

Q: How much was one kilogram of cocaine worth in May, 1991?

A: In May, 1991, the wholesale price of a kilogram of cocaine with a purity of eighty-eight percent would have been between \$19,000 and \$26,000.

Q: Do you have an opinion as to how cocaine is typically sold at the wholesale level in this district/city/county?

A: Yes.

Q: How is cocaine typically sold at the wholesale level?

A: Narcotics are typically sold at the wholesale level either for cash at the time of sale or on consignment, with the expectation that the buyer will promptly re-sell the cocaine and pay the wholesaler from the proceeds.

Q: Do you have an opinion as to what the most common form of payment for cocaine is in this district/city/county?

A: Yes.

Q: What is that form of payment?

A: Cash is the most common form of payment for narcotics because it is difficult to trace.

Q: Do you have an opinion as to what size bills are most commonly used in the payment for cocaine in this district/city/county?

A: Yes.

Q: What size bills are most commonly used to pay for cocaine in this district/city/county?

A: It depends on what type of cocaine is involved. For instance, crack cocaine is usually sold in dosage units, so smaller bills such as wads of tens and twenties are associated with the sale of crack cocaine.

Q: Do you have an opinion as to how many "dosage units" would be contained in one hundred grams of cocaine base?

A: Yes.

Q: How many "dosage units" would be contained in one hundred grams of cocaine base?

A: From one hundred grams of cocaine base someone could create the equivalent of approximately 700 bags of crack cocaine.<sup>97</sup>

If the case at trial involved code words, appropriate testimony

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97. See *United States v. Watson*, 171 F.3d 695, 703 (D.C. Cir. 1999).

would be as follows:<sup>98</sup>

Q: Do you have an opinion as to whether or not narcotics dealers speak in code when discussing their transactions in this district/city/county?

A: Yes.

Q: Is it typical for narcotics dealers to speak in code when discussing their transactions?

A: Yes.

In a case where the defendant was found with a weapon, a prosecutor might ask:

Q: Do you have an opinion as to whether or not narcotics distributors in this district/city/country typically carry firearms?

A: Yes.

Q: Tell us, do narcotics distributors typically carry firearms?

A: Yes. Narcotics distributors typically carry firearms (sometimes more than one) for protection.

Q: Do you have an opinion as to whether or not narcotics distributors in this district/city/county typically attempt to maintain a low profile in the community?

A: Yes.

Q: Do narcotics distributors typically attempt to maintain a low profile in the community?

A: Yes, so as to avoid the attention of authorities.

For a prosecution involving drugs and paraphernalia found in a legal/warranted home search, testimony might look like:

Q: Do you have an opinion as to whether there are certain "tools of the trade" in this district/city/county that would be necessary for cocaine trafficking?

A: Yes.

Q: What "tools of the trade" would be necessary for a cocaine distributor to have?

A: A typical cocaine distributor would have inositol to cut the purity of the cocaine base and scales to weigh the drugs. Generally, cocaine is packaged for distribution in corner-cut ziplock baggies.<sup>99</sup>

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98. Because the primary purpose of coded drug language is to conceal the meaning of the conversation from outsiders through deliberate obscurity, drug traffickers' jargon is a specialized body of knowledge and thus an appropriate subject for expert testimony. *See* United States v. Griffith, 118 F.3d 318, 321 (5th Cir. 1997); United States v. Theodoropoulos, 866 F.2d 587, 591 (3d Cir. 1989), *overruled on other grounds by* United States v. Price, 76 F.3d 526 (3d Cir. 1996). It is well established that experienced government agents may testify to the meaning of the jargon of the narcotics trade and drug dealers' code language.

99. *See* United States v. Navarro, 90 F.3d 1245, 1260 (7th Cir. 1996).

For a prosecution involving drugs and paraphernalia seized during or after an on-the-street buy:

Q: Do you have an opinion as to what a narcotics trafficker in this district/city/county would have with him when purchasing drugs from another dealer?

A: Yes.

Q: What would a narcotics trafficker have with him when he is purchasing drugs?

A: For any amount over [fill in statutorily defined personal use amount], the trafficker would want to carry a scale with him to measure the weight of the drugs.<sup>100</sup>

Q: Do you have an opinion as to what a narcotics trafficker in this district/city/county would have with him when selling drugs on the street?

A: Yes.

Q: What would a narcotics trafficker tend to have with him when selling drugs on the street?

A: He would typically have large amounts of cash in small denominations, he would be carrying a pager, and probably would use a "stash house."<sup>101</sup>

Q: Do you have an opinion as to what a narcotics trafficker in this district/city/county would probably *not* have with him when selling drugs on the street?

A: Yes.

Q: What wouldn't a narcotics trafficker be likely to have with him when selling drugs on the street?

A: It is unusual for narcotics traffickers to carry implementations for using the drugs, such as crack pipes or syringes, when they are selling the drugs on the street.

For a prosecution involving drugs, such as marijuana, and paraphernalia seized during an unrelated legal car stop:

Q: Do you have an opinion as to whether drug dealers in this district/city/county transport narcotics within their automobiles?

A: Yes.

Q: Do they?

A: Yes. Dealers often transport narcotics in hidden compartments within their automobiles so as to avoid police detection in the event of a stop.

Q: Do you have an opinion as to whether there are typical roles in

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100. See *United States v. Speer*, 30 F.3d 605, 610 (5th Cir. 1994).

101. See *United States v. Smart*, 98 F.3d 1379, 1385 (D.C. Cir. 1997).

this district/city/county that the different individuals in the automobile fill?

A: Yes.

Q: In your opinion, what are those roles?

A: Typically, the operator of an automobile, where guns and drugs are present is the “supplier” of the drugs, while the passenger sitting on the weapon is the “enforcer.”<sup>102</sup>

Q: Do you have an opinion as to whether or not a drug dealer in this district/city/county will invite others to participate in this type of transaction who are not aware of the nature of the transaction?

A: Yes.

Q: Is it normal for a drug dealer to invite others to participate in this type of transaction who are not aware of the nature of the transaction?

A: No. In my experience I have never come across a “blind mule” or an unwitting courier.<sup>103</sup>

Q: Do you have an opinion as to the shelf life of marijuana?

A: Yes.

Q: How long can marijuana stay fresh in large quantities?

A: In order to use one-half to three-quarters of a pound of marijuana before it turns stale by losing its THC content, a person would have to smoke approximately thirty to thirty-five joints per day.<sup>104</sup>

All of these examples stay within the purview of the expert’s knowledge without crossing the threshold into the defendant’s intent either directly or indirectly. Therefore, as necessitated by Rule 704(b) this line of questioning leaves the ultimate inference of the defendant’s intent to the jury.

#### CONCLUSION: THE UTILITY OF THE ULTIMATE ISSUE RULE

##### *The Practical Application Of Rule 704(B)*

“[T]he ultimate issue rule that was abolished in Rule 704(a) has been partially restored in Rule 704(b)” without an explanation of how this amendment improves the judicial process.<sup>105</sup> Furthermore, it is not

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102. See *United States v. Toms*, 136 F.3d 176, 184 (D.C. Cir. 1998).

103. See *United States v. Campos*, 217 F.3d 707, 712 (9th Cir. 2000); see also *United States v. Richard*, 969 F.2d 849, 854 (10th Cir. 1992).

104. See *United States v. Mancillas*, 183 F.3d 682, 705 (7th Cir. 1999).

105. Rice & Delker, *supra* note 9, at 711. Rice and Delker further stated that:

It is important to remember that the jury will be hearing competing experts and does not have to accept the diagnosis of either, or either’s application of the law to their diagnosis. Any limitation on this testimony after the jury has already heard the entire factual predicate simply hides probative information from the jury—a

entirely clear to the courts precisely to whom and how far the limitations of Rule 704(b) extend.<sup>106</sup> Experts make desirable witnesses because a jury wants to hear what they think about the same facts that the jury is weighing. Without the benefit of the proscribed testimony, the jury may not be able to make a fully informed decision.<sup>107</sup> Logically, the expert's opinion is the ultimate purpose of her testimony before the jury. Conversely, under Rule 704(b), an expert's opinion about what the defendant did or did not know and/or intended at the time of the crime is not evidence that a jury may consider: "The purpose of Rule 704(b) is to have jurors decide [the issue] without being told what conclusion an expert might draw."<sup>108</sup>

As the Seventh Circuit has noted:

[Rule 704(b)] denies juries the specialized knowledge of experts in just the type of complex case in which it is most useful. This runs counter to the role of experts in trials, criminal and civil, to which we have become accustomed, both at common law and under the Federal Rules.<sup>109</sup>

Statistically, Rule 704(b) does not create much of a problem by way of overturned convictions; however, realistically and logistically, it sets up an obstacle course for government prosecutions of drug-related crimes.<sup>110</sup> Prosecutors must take into account the concerns voiced by

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conclusion the jury probably has already anticipated—without justification or benefit.

*Id.* at 714 (citations omitted).

106. See Barry Tarlow, *Creative Expert Testimony on Predicate Matters and Rule 704(b)*, 21 CHAMPION 41, 41 (June 1997) ("A majority of the federal courts hold that Rule 704(b) only excludes testimony as to defendant's actual mental state during the charged offense or testimony which necessarily would imply that ultimate conclusion.").

107. See, e.g., *United States v. Reno*, 992 F.2d 739, 743-44 (7th Cir. 1993). The court observed that:

To assist the jury in determining whether Reno was acting consistently with a delusion or whether the delusions from which he suffered did not affect his behavior on the day of the robbery, Dr. Thrasher described what a person acting consistently with a delusion might do . . . Because Dr. Thrasher's testimony was merely of the type that would help the jury understand Reno's illness, the jury was free to consider that testimony along with evidence of Reno's behavior in reaching its conclusion about Reno's defense of insanity. Dr. Thrasher's testimony was helpful and in no way invaded the jury's province.

*Id.*

108. *United States v. West*, 962 F.2d 1243, 1247 (7th Cir. 1992).

109. *United States v. Brown*, 32 F.3d 236, 239 (7th Cir. 1994).

110. "The fact finder is simply left hanging if the expert is not permitted to cap off the testimony by stating a conclusion on the ultimate issue to which the expert is testifying. Sometimes, a conclusion on an ultimate issue ties the expert's testimony into a coherent whole, and as such it helps the jury to understand the issues in dispute." Daniel J. Capra, *Advisory Committee Notes to the Federal Rules of Evidence that May Require Clarification*, 182 F.R.D. 268, 281 (1998). Compare to the practical effect of Rule 704(b) to New York arson cases of *People v. Maxwell*, 497 N.Y.S.2d 735 (1986). In *Maxwell*, testimony of two expert witnesses,

various circuits regarding the newly revived proscription on ultimate issue testimony. By repeatedly referring to the expert's opinion based on his experience, without getting into the specifics of the defendant's case, the prosecutors is clearly offering the expert's testimony to assist the fact-finder in determining the ultimate issue of the defendant's intent. Additionally, the posture of these questions should specifically avoid setting up the explicit dichotomy between personal use and distribution; thus, focusing only on aspects of distribution in order to steer clear of the use of the phrase "consistent with." This evasion of the dichotomy removes the danger of surreptitiously treading into 704(b) territory because this line of inquiry circumvents any testimony that would require the expert to draw inferences.

#### THE PURPOSE OF EXPERT TESTIMONY ON THE ULTIMATE ISSUE

"If the expert witness is permitted to state his opinion on all of the questions of fact that the jury will have to answer in order to arrive at its ultimate conclusion" on the defendant's knowing possession of a controlled substance with intent to distribute, why must the expert be barred from stating the legal conclusion that is impelled by his answers to the questions of fact?<sup>111</sup> Forcing the court to impose an artificial barrier between what constitutes the expert's factual opinion and what may be construed as the expert's legal opinion, requires a very fine distinction that belies the tension between Rule 704(a) and (b).<sup>112</sup> It just does not make sense to force the government to jump through the hoops set up by Rule 704(b), when the jury is charged with weighing all of the evidence and basing its decision on the cumulative effect of the adversarial trial process. Part of this adversarial process is cross-examination, which ought to serve as enough of a protection for the defendant against the potential prejudice of undue weight granted to expert opinion testimony.

#### UP IN THE AIR: LEGISLATIVE INTENT AND JUDICIAL INTERPRETATION

While Rule 704(b) has not been truly detrimental to garnering or preserving convictions for possession with the intent to distribute controlled substances, its legislative history should give us pause. The

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stating that fires involved were not chemically, mechanically, electrically, or naturally caused and, thus, eliminating all non-suspect causes, did not constitute testimony that fires in question were incendiary in nature and, thus, was admissible since such testimony did not actually state a conclusion as to ultimate issue as to whether fires were intentionally set. *Maxwell*, 497 N.Y.S.2d at 736.

111. Olicker, *supra* note 13, at 863.

112. See Braswell, *supra* note 43, at 621; see generally Kathy Jo Cook, *An Opinion: Federal Judges Misconstrue Rule 704 (Or is that an Impermissible "Legal" Conclusion?)*, 43 CLEV. ST. L. REV. 45 (1995).

application of the rule to drug-related prosecutions is clearly outside the contemplation of the Insanity Defense Reform Act and the crime control bill under which it was enacted. The ensuing case law reflects the problem of drafting uniform legislation without the benefit and counsel of an advisory committee. The committee may be better equipped to predict potential theoretical conflicts between and among the various evidentiary rules, such as the conflicts that exist between Rule 704(a) and 704(b), and will take into account the practical aspects of following the literal rule of law. Unless and until the United States Congress clarifies that it meant for Rule 704(b) to apply exclusively to mental health experts, prosecutors must remain vigilantly aware of the differences in the decisions of the various circuit courts as they fine tune their interpretations of this exception. Prosecutors must adjust their predicate questions to the specifications of each individual circuit. As it stands now, the exception is a narrow one: Prosecutors are still permitted to build their cases step-by-step; they simply cannot cross the threshold of inference to the ultimate issue.

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