No. 23-14

In the Supreme Court of the United States

DELILAH GUADALUPE DIAZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. Its members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges with experience in both federal and state courts throughout the United States. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous *amicus* briefs each year in the U.S. Supreme Court and other federal and state courts to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

INTRODUCTION & SUMMARY OF ARGUMENT

This case turns on the interpretation of Federal Rule of Evidence 704(b). Specifically, the Court must decide whether that rule allows a law enforcement officer—functioning as an expert witness in a drug trafficking case—to testify that most defendants caught with drugs at the border know that they are transporting drugs. The answer to this question is "no": law enforcement officers cannot properly testify as experts about the *mens rea* of similarly situated defendants as

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief.

a class. That conclusion follows from the plain text of Rule 704(b), as Petitioner explains. *See* Pet'r Br. 17-30. Simply put, Rule 704(b) forbids any expert opinion "about whether" a defendant has a mental state; expert testimony about classwide *mens rea* unquestionably concerns the *mens rea* of the defendant and is therefore prohibited by the Rule. *See id.* at 20.

That reading of the Rule resolves this case. The parties' dispute, however, also reflects different views of how the plain meaning of the Rule applies to expert testimony by law enforcement officers. Properly understanding the nature of such testimony—and how it developed and the difficulties it poses in criminal cases—is essential to an appreciation of why Petitioner's plain text interpretation of Rule 704(b) is well grounded in the realities of trial.

Amicus Curiae therefore submits this brief to explain that the problems with classwide *mens rea* testimony stem as much from the testimony itself as from who is offering it: the law enforcement officer testifying based on his or her training and experience.

As we describe in Part I, the widespread use of law enforcement officers as experts is a relatively new, but now pervasive, phenomenon. And the use of officer experts to testify on issues of *mens rea* is a still more recent variation of that trend.

Such testimony raises unique concerns that courts have struggled to address. In principle, Federal Rules of Evidence 702 and 704(b) provide helpful guidance as judges perform their gatekeeping duty to ensure that only relevant, reliable expert testimony is admitted without usurping the jury's factfinding role. But experience reveals a concerning breakdown in courts'

gatekeeping function when law enforcement officers take the stand as experts. Too often, courts rely on nothing more than "training and experience" as proxies for reliability, thus failing to subject officer expert testimony to the scrupulous testing that the Rules of Evidence demand. That breakdown in the application of Rule 702 makes Rule 704(b) all the more important as a safeguard: not only to protect the role of the jury as trier of facts, but also the rights of the accused. The Ninth Circuit's reading of Rule 704(b), however, eviscerates this protection, allowing law enforcement officers to testify on matters going directly to defendants' *mens rea* and usurp the jury's role.

As we explain in Part II, the importance of adhering to Rule 704(b)'s text is further supported by the practical and constitutional concerns posed by officer expert testimony based only on training and experience. Such testimony—particularly when it concerns *mens rea*—is effectively immune to reliability testing from courts or adversarial challenge from defendants. When officer experts' opinions are based on their personal experiences investigating crime, unmoored from any specific methodology or discernible principles, courts struggle to measure the unmeasurable, unduly deferring to officer experts' *ipse dixit*. Defendants, in turn, find it nearly impossible to cross examine such officer experts or to present rebuttal witnesses. And these practical concerns give rise to constitutional ones, impeding defendants' ability to confront witnesses against them and experience a fair trial. A textualist reading of Rule 704(b) appreciably mitigates these concerns by defining (and limiting) the scope of proper officer expert testimony on *mens rea*.

The need for that interpretation is bolstered by the potential for abuse of officer experts in other settings. We explain this point in Part III, which demonstrates how a ruling for Respondent here could have sweeping implications throughout criminal law.

Accordingly, for the reasons set out by Petitioner, and for the reasons set out by *Amicus Curiae* below, the Court should hold that expert testimony from law enforcement officers on classwide *mens rea* has no rightful place in our administration of criminal justice.

ARGUMENT

I. RULES 702 AND 704(b) ARE FAILING TO ACHIEVE THEIR CORE PURPOSE WHEN IT COMES TO "OFFICER EXPERTS"

"No one will deny that the law should in some way effectively use expert knowledge wherever it will aid in settling disputes. The only question is as to how it can do so best." Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 Harv. L. Rev. 40, 40 (1901). Courts play an essential role in deciding that question, principally through the interpretation and application of the rules of evidence.

Fundamentally, the Federal Rules of Evidence serve as a bulwark against the unchecked admission of irrelevant and unreliable expert evidence. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 590-92 (1993). And in criminal cases, they serve a particularly important purpose: helping courts carry out their "primary constitutional duty … to do justice in criminal prosecutions." *United States v. Nixon*, 418 U.S. 683, 707 (1974); *see also Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 340 (2009) (Kennedy, J.,

dissenting) (describing the rules governing expert witnesses as "part of the protections for the accused").

Here, the Court addresses this objective in the context of a specific type of expert testimony: the law enforcement officer testifying on issues of *mens rea* based on his or her training and experience. In this Part, we first describe the rise of this relatively new phenomenon. Next, we explain how, in principle, courts are well-equipped with Rules 702 and 704(b) to address the issues it presents. Finally, we explain how, in practice, some courts are not using those tools as required—instead allowing officer experts broad discretion to testify, based on personalized experiences immune from objective testing, on issues well beyond their expertise (including the *mens rea* of defendants as a class). Allowing such testimony not only does violence to the text and purpose of the rules, but also intrudes on the jury's fundamental role as finder of fact.

A. The Evolution of the Expert Witness and Rise of the "Officer Expert"

The use of witnesses with specialized knowledge is not a recent development. Before trial by jury was the norm, experts were used in cases in one of two ways: (1) through "a jury of persons especially fitted to judge the peculiar facts upon which the particular issue at bar turns," and (2) independent experts enlisted to make recommendations directly to the judge. *See* Hand, *supra*, at 40-42. But as the adversarial trial system developed (and elevated the role of lawyers), so too did the rise of the modern expert. *See* Tal Golan, *Revisiting the History of Scientific Expert Testimony*, 73 Brook. L. Rev. 879, 881-86 (2008).

Over time, the "self-informing" jury gave way to a passive jury; complex questions involving science and technology entered courtrooms; and the "skilled witness" appeared as a regular courtroom fixture. *See* Jennifer L. Mnookin, *Idealizing Science and Demonizing Experts: An Intellectual History of Expert Evidence*, 52 Vill. L. Rev. 763, 768-71 (2007). "By the 1950s, expert witnesses were a mainstay in American courts, from doctors to forensic analysts to pollsters showing market trends in unfair trade practice suits." Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 Harv. L. Rev. 1995, 2017 (2017).

Yet notwithstanding these developments, widespread reliance on the "olde constable" as an expert witness in criminal cases is of a much more recent vintage. "Scholars trace the rise of law enforcement expert testimony to the 1950s and 60s," *United States v. Holguin*, 51 F.4th 841, 867 (9th Cir. 2022) (Berzon, J., concurring in part, dissenting in part), when "reformers recast policemen as trained investigators, [and] judges began to recognize officers as professional experts on the patterns of urban crime—including on matters previously deemed either commonsensical or requiring *scientific* expertise," Lvovsky, *Presumption*, *supra*, at 2016.

Since the beginning of this trend, the use of officer experts has increased drastically. In the 1960s, for instance, police officers or FBI agents accounted for only 6% of experts called by prosecutors. *See* Edward J. Imwinkelried, *The Next Step After* Daubert*: Developing A Similarly Epistemological Approach to Ensuring the Reliability of Nonscientific Expert Testimony*, 15 Cardozo L. Rev. 2271, 2279 (1994). By the 1980s,

police officers had emerged as "a new type of 'skilled witness'" in many more contexts. *United States v. Mejia*, 545 F.3d 179, 189 (2d Cir. 2008) (cleaned up).

Today, "[t]he most common prosecution expert witness is a police officer or a federal agent." Joëlle Anne Moreno, *What Happens When Dirty Harry Becomes an (Expert) Witness for the Prosecution?*, 79 Tul. L. Rev. 1, 4 (2004). In short, there has been a sea change in this field. The officer expert is now called to testify about, *inter alia*, the nature and structure of organized crime or criminal gangs, the meaning of code words or jargon, and (as here) issues of *mens rea* for defendants as a class or "classwide *mens rea*." *See Mejia*, 545 F.3d at 189-90; Brian R. Gallini, *To Serve and Protect? Officers As Expert Witnesses in Federal Drug Prosecutions*, 19 Geo. Mason L. Rev. 363, 375-85 (2012).

B. The Rise of Guardrails on Expert Testimony Under Rules 702 and 704(b)

The rise of the officer expert raises important questions about the proper application of the Rules of Evidence. Most central to that issue are two rules: Rule 702, governing the admission of expert testimony generally, and Rule 704(b), setting limits to the admission of expert evidence going to the mental state or condition of the defendant. These two Rules—interpreted correctly and applied faithfully—provide essential guardrails on officer experts, including with respect to testimony on issues of defendants' *mens rea*. We will describe those rules in greater detail before turning to an explanation of their significance when it comes to the challenges posed by officer experts and properly circumscribing their testimony.

1. Rule 702 safeguards the jury from irrelevant and unreliable evidence

We start with Rule 702, which has two counterbalancing policy goals. *See* Wright & Miller, 29 Fed. Prac. & Proc. Evid. § 6262 (2d ed. 2023). On the one hand, this rule seeks to "promote the trier of fact's search for truth by helping it to understand other evidence or accurately determine the facts in dispute." *Id.* On the other hand, it aims to "preserve the trier of fact's traditional powers to decide the meaning of evidence and the credibility of witnesses by placing limits on the admissibility of expert opinion." *Id.* In achieving a balance between these goals, perhaps the most important limit imposed by Rule 702 is the requirement that expert testimony presented to the jury meet "*exacting* standards of reliability." *Weisgram v. Marley Co.*, 528 U.S. 440, 455 (2000) (emphasis added).

In *Daubert v. Merrell Dow Pharmaceuticals*, this Court read Rule 702 as establishing "a standard of evidentiary reliability," which it described as a requirement that expert "testimony must be supported by appropriate validation—*i.e.*, 'good grounds,' based on what is known." 509 U.S. at 590. The Court was clear that courts were entrusted as the gatekeepers to ensure that this reliability requirement was met: "under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Id.* at 589. And the *Daubert* Court provided some "general observations" of factors that could guide the reliability determination, including whether the evidence "can be (and has been) tested," "whether the theory or technique has been subjected to peer review and publication," "the known

or potential rate of error," and the level of "acceptance" of the technique in question. *Id.* at 593-94.

A few years after the *Daubert* ruling—in *General Electric Co. v. Joiner*—this Court again emphasized "the 'gatekeeper' role of the trial judge in screening such [expert] evidence," and noted that "nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." 522 U.S. 136, 142, 146 (1997).

Finally, tripling down on the point, the Court in *Kumho Tire Co. v. Carmichael* clarified that the "general principles" announced in *Daubert* applied to *all* "expert matters described in Rule 702," "whether the testimony reflects scientific, technical, or other specialized knowledge." 526 U.S. 137, 149 (1999). Therefore, before the introduction of *any* form of expert evidence, the trial judge "must determine whether the testimony has a reliable basis in the knowledge and experience of the relevant discipline." *Id.* (cleaned up). In addition, this Court emphasized that courts' "gatekeeping duty" to ensure relevance and reliability in expert testimony is designed "to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Id.* at 152.

In 2000, following this so-called *Daubert* trilogy of cases, Congress amended Rule 702 to require the proponent of expert testimony to show, *inter alia*, that "the testimony is the product of reliable principles and methods." Fed. R. Evid. 702(c). And in 2023, Congress

again amended Rule 702, not to impose any new procedures, but in meaningful part "to emphasize that each expert opinion must stay within the bounds of what can be concluded from a reliable application of the expert's basis and methodology." Fed. R. Evid. 702, Advisory Committee Notes to the 2023 amend.

The Advisory Committee Notes—which this Court has recognized are "a useful guide in ascertaining the meaning of the Rules," *Tome v. United States*, 513 U.S. 150, 160 (1995)—do not exempt officer experts from this "exacting" reliability requirement. Instead, the Notes explain that officer expert testimony based on "extensive experience" should be admitted only "[s]o long as the principles and methods are reliable and applied reliably to the facts of the case." Fed. R. Evid. 702, Advisory Committee Notes to the 2000 amend.

2. Rule 704(b) protects the jury from unhelpful expert testimony that intrudes on its role as finder of fact

Rule 704(b), which is at the center of this case, adds yet another layer of protection against encroachments on the role of the jury as the finder of fact. It provides:

> In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense.

Fed. R. Evid. 704(b).

As the Second Circuit held, "the rule recognizes that expert testimony concerning a defendant's mental state poses a uniquely heightened danger of

intruding on the jury's function." *United States v. DiDomenico*, 985 F.2d 1159, 1164 (2d Cir. 1993). "[W]ithout it, juries could simply follow the expert's commentary about defendant's *mens rea* despite its independent duty to evaluate *mens rea*." Gallini, *supra*, at 366. And so, Congress made clear where the responsibility to assess issues of *mens rea* lies: "Those matters are for the trier of fact alone." Fed. R. Evid. 704(b).

C. The Guardrails Imposed by Rules 702 and 704(b) Are Malfunctioning in Too Many Cases Involving Officer Experts

Together, Rules 702 and 704(b)—underwritten by the *Daubert* trilogy—guard against the introduction of unreliable expert testimony that could run afoul of the maxim that "the truth-finding task [is] assigned solely to juries." *Carella v. California*, 491 U.S. 263, 265 (1989) (per curiam). Unfortunately, those guardrails too often fall when it comes to the admission of officer expert testimony in criminal cases—especially on matters of *mens rea*.

At bottom, the problem is twofold. *First*, courts are not performing their gatekeeping function to subject such experience-based testimony to "exacting standards of reliability." *Weisgram*, 528 U.S. at 455. *Second*, and relatedly, courts are misinterpreting Rule 704(b) and failing to limit officer experts from testifying only to matters within their purported expertise.

1. Courts are failing their gatekeeping duties when officer experts testify

Reputable empirical evidence indicates that the Rules and the *Daubert* principles have "had little or no impact in real criminal cases." Moreno, *supra*, at 17;

see also 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, 344-45 (2002).[2] And nowhere is that more evident than in the admission of officer expert testimony.

In far too many cases, the standards of reliability otherwise governing the admission of expert testimony apparently "disappear" "whenever the expert is a police officer." Moreno, *supra*, at 18; *see also* Gallini, *supra*, at 365 ("Federal courts rarely undertake the analysis required to determine whether the [officer] expert's testimony has a sound methodological basis."). Instead, "[l]aw enforcement officers are routinely permitted to testify as experts based on their law enforcement experience." Anne Bowen Poulin, *Experience-Based Opinion Testimony: Strengthening the Lay Opinion Rule*, 39 Pepp. L. Rev. 551, 554 (2012).

As several scholars have concluded, officers testifying as experts face little to no judicial scrutiny, since most courts give officer experts significant deference in criminal matters. *See generally, e.g.*, Anna Lvovsky, *Rethinking Police Expertise*, 131 Yale L.J. 475, 485-91

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[2] This includes a failure to subject forensic evidence used in criminal trials to the same standards of reliability as those required in civil cases. *See* NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES 106 (2009) ("Review of reported judicial opinions reveals that, at least in criminal cases, forensic science evidence is not routinely scrutinized pursuant to the standard of reliability enunciated in *Daubert*."); *see also* JED S. RAKOFF, WHY THE INNOCENT PLEAD GUILTY AND THE GUILTY GO FREE 57-70 (2021) (noting that most techniques categorized as forensic science "are unscientific, involve a great deal of disguised guesswork, and too frequently result in false convictions").

(2021); Lvovsky, *Presumption*, *supra*, at 2023-36; Seth W. Stoughton, *Principled Policing: Warrior Cops and Guardian Officers*, 51 Wake Forest L. Rev. 611, 649 (2016).

The result is a pattern of hyper-deference—rather than gatekeeping under Rule 702—when officers are held out as experts in the criminal setting. Such deference is not only at odds with the text and purpose of the Rules of Evidence, but also imperils defendants' rights and undermines the historic function of juries.

2. Courts under-enforce Rule 704(b)'s limits on expert testimony

In addition to unduly lax scrutiny under Rule 702, many courts have under-enforced the limits of Rule 704(b)—most drastically (and impactfully) in the context of drug-related cases where whether the defendant is guilty or not turns on knowledge or intent.

To be sure, courts pay occasional lip service to the principle that Rule 704(b) requires the drawing of "a very fine line" in the use of officer experts testifying about issues of defendants' *mens rea*. *United States v. Augustin*, 661 F.3d 1105, 1124 (11th Cir. 2011); *United States v. Mitchell*, 996 F.2d 419, 422-23 (D.C. Cir. 1993) ("Rule 704(b) invites the drawing of rather subtle lines"); *see also United States v. Gonzalez-Rodriguez*, 621 F.3d 354, 364 (5th Cir. 2010) (noting "a fine but critical line" between permissible expert testimony on drug operations and impermissible testimony that is the "functional equivalent" of an opinion on *mens rea*).

In practice, though, courts in jurisdictions like the Ninth Circuit are misinterpreting Rule 704(b) and

allowing prosecutors to step completely over the line by permitting officer experts to testify about the *mens rea* of defendants *as a class*. *See, e.g.*, Mark J. Kadish, *The Drug Courier Profile: In Planes, Trains, and Automobiles; and Now in the Jury Box*, 46 Am. U. L. Rev. 747, 776 (1997); *see also* Dana R. Hassin, *How Much is Too Much? Rule 704(b) Opinions on Personal Use vs. Intent to Distribute*, 55 U. Miami L. Rev. 667, 675-76 (2001). In cases where Rule 704(b) should be paramount, it is often sidelined.

* * *

The rise of officer experts is a comparatively modern development. The use of such experts to testify about *mens rea* is a still more decidedly recent twist on that trend. Given widespread judicial failure to properly interpret and apply the Rules of Evidence to such expert testimony, the time has come for this Court to reaffirm "the jury's historic role as a bulwark between the State and the accused." *Southern Union Co. v. United States*, 567 U.S. 343, 350 (2012) (cleaned up). Petitioner's interpretation of Rule 704(b) achieves that end by clarifying the important line that Rule 704(b) draws as to matters of *mens rea* specifically: "Those matters are for the trier of fact alone." In contrast, the position pressed by Respondent risks allowing experts to do exactly what the Rules say they cannot—and, thus, risks undermining core protections for criminal defendants, as well as the most central purpose of criminal juries.

II. THE REFLEXIVE ACCEPTANCE OF "OFFICER EXPERT" TESTIMONY ON ISSUES OF *MENS REA* RAISES PRACTICAL AND CONSTITUTIONAL CONCERNS

As established above, too many courts have uncritically accepted expert opinion testimony from law enforcement officers on issues of *mens rea*. This not only offends the text and purpose of the Rules of Evidence, but also creates practical problems that lead to constitutional concerns. For these reasons, too, the Court should be wary of arguments designed to blast open to the door to such officer expert testimony.

The practical problems—illustrated in Petitioner's case and discussed below—are most stark where officers offer expert testimony (based on "training and experience") about the *mens rea* of defendants as a class.[3] In such cases, courts are often unable to meaningfully test the reliability of the officer expert's testimony. Moreover, criminal defendants often struggle to cross-examine officer experts on that particular basis, and are unable to offer a rebuttal expert to challenge the officer witness's testimony. These practical problems underwrite serious constitutional concerns that threaten defendants' Sixth Amendment confrontation rights and the Due Process guarantee of a fair trial.

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[3] There is no dispute that—subject to the proper reliability testing under Rule 702 and the limits under Rule 704(b)—officer experts can testify about certain investigative techniques.

A. Courts and Criminal Defendants Lack Effective Means of Testing Officer Expert Testimony

The testimony of officer experts who opine on issues of *mens rea* based on training and experience can be virtually immune from meaningful reliability testing. Courts face an uphill battle in determining its reliability, *see Holguin*, 51 F.4th at 867-69 (Berzon, J., concurring in part, dissenting in part), leading most courts to rely on nothing more than officers' experience. And because such testimony is offered as self-validating, criminal defendants cannot meaningfully challenge it by "traditional and appropriate means" like "[v]igorous cross-examination" and "presentation of contrary evidence." *Daubert*, 509 U.S. at 596.

1. Courts cannot meaningfully test experience-based officer testimony

Start with the difficulties faced by the court acting as gatekeeper. As explained above, Rule 702 and the *Daubert* trilogy demand that trial courts subject *all* expert testimony to rigorous reliability testing. And, importantly, courts cannot abdicate their gatekeeping duty and accept what an expert says at face value merely because he has been qualified as an expert. *See Kumho Tire*, 526 U.S. at 158-59 (Scalia, J., concurring). If admissibility could be established by the say so of an admittedly qualified expert, the reliability prong would be subsumed by the qualification prong and rendered superfluous. Qualifications do not beget

reliability, and courts still must perform their duty to scrutinize expert opinions to ensure they are reliable.[4]

But as a general proposition, experience-based expert testimony can present unique challenges to the court's gatekeeping function. *See* Samuel Gross et al., *Expert Information and Expert Evidence: A Preliminary Taxonomy*, 34 Seton Hall L. Rev. 141, 142 (2003) ("[T]he problem of assessing reliability is especially acute with respect to non-scientific expert evidence."); Poulin, *supra*, at 569-70. And these difficulties only deepen when the expert is an officer. *See Holguin*, 51 F.4th at 867 (Berzon, J., concurring in part, dissenting in part) (finding "traditional justifications for experience-based expert testimony" inapplicable to "law enforcement expertise").

For instance, when it comes to drugs and gangs, "[u]nlike traditional expertise, '[t]here is no objectively ascertainable or empirically supportable measure of personal experience' with drug jargon and 'no objective means of regulating or certifying gang experts.'" *Id.* (citation omitted). Therefore, in practice, the "assessment of the reliability of criminal modus operandi experts is almost totally void of reliability analysis employing any of the *Daubert* factors," as "trial courts appear to employ precedent, or past admissions of similar testimony, as the key reliability factor." Jeffrey M. Schumm, *Precious Little Guidance to the "Gatekeepers" Regarding Admissibility of Nonscientific*

[4] That is the teaching of *Kumho Tire*, where the Court considered an eminently qualified tire expert but found that his testimony flunked Rule 702 because its reliability depended only on the *ipse dixit* of the expert himself. *See* 526 U.S. at 153-57.

Evidence: An Analysis of Kumho Tire Co. v. Carmichael, 27 Fl. St. U. L. Rev. 865, 882-83 (2000).

Simply put, unable to apply "exacting" reliability testing that Rule 702 and the *Daubert* trilogy demand, courts routinely rely on little more than the officers' "training and experience" to justify the admission of their testimony. *E.g.*, *United States v. Parra*, 402 F.3d 752, 758-59, 765 (7th Cir. 2005); *United States v. Davis*, 397 F.3d 173, 178-79 (3d Cir. 2005); *United States v. Lopez-Lopez*, 282 F.3d 1, 13-14 (1st Cir. 2002); David L. Faigman et al., Mod. Sci. Evidence § 1:27 (2023-2024 Ed.) ("[C]ourts continue to permit many prosecution experts with hardly a glance at the methods underlying their testimony. Perhaps the best example is the testimony of police officers testifying as expert witnesses.").

That trend is troubling for many reasons—including that there is reason to doubt whether experience-based officer testimony *actually* relies on "specialized knowledge" that assists the trier of fact. *See United States v. Campos*, 217 F.3d 707, 719 (9th Cir. 2000) (Pregerson, J., concurring in part, dissenting in part) ("Agent Darvas testified that his 'expert' opinion on drug courier's knowledge was based as much, if not more, on a common sense review of the facts than on his 'specialized knowledge' as a law enforcement officer."); Hon. 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.").

As *Kumho Tire* teaches, "training and experience" is not a talisman for reliability under *Daubert*; qualifications are not a substitute for reliability. But that is the precise error too many courts are committing—often because they have no idea how to assess the reliability of an officer expert's asserted experience.

Under a proper application of the Rules, an officer's "training and experience" would be deemed an insufficient measure of reliability in its own right to permit officer expert testimony. *See, e.g.*, *United States v. Valencia-Lopez*, 971 F.3d 891, 898-99 (9th Cir. 2020) (noting that "the record contains no evidence as to why [] experience, by itself, equals reliability for his testimony" and that in the context of experience-based expert testimony "not subject to routine testing, error rate, or peer review type analysis," the reliability determination "becomes more, not less, important"); *cf. United States v. Mrabet*, No. 23 Cr. 69, 2023 WL 8179685, at *2 (S.D.N.Y. Nov. 27, 2023) (Rakoff, J.) (rejecting proposed expert testimony based only on an officer's "training, education, and experience" because "an expert opinion requires some explanation as to how the expert came to his conclusion and what methodologies or evidence substantiate that conclusion") (cleaned up).

Far too often, though, courts look the other way, treating qualification as inherent evidence of reliability for officer experts. The result is that such testimony is often admitted with inadequate gatekeeping, and thus in contravention of an important guardrail. In such cases, proper application of Rule 704(b)

becomes even more important as a safeguard for defendants, since other protections have fallen by the wayside.

2. Often, defendants can neither cross-examine nor rebut experience-based "officer expert" testimony

That conclusion is amplified by yet another practical difficulty in many officer-expert cases: the unique challenges that defendants face in responding to it.

Cross-examination takes on greater practical importance when a witness is offering purportedly "expert" testimony. "Unlike an ordinary witness … an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation." *Daubert*, 509 U.S. at 592. This latitude risks admission of "powerful and quite misleading" testimony. *Id.* at 595. And in criminal cases—unlike in civil cases like *Daubert*—expert testimony can contribute to wrongful convictions. Cross-examination thus serves as a bulwark against dubious testimony.

But when law enforcement officers testify as experts based on their experiences alone, that otherwise formidable bulwark crumbles. *Cf. United States v. Dukagjini*, 326 F.3d 45, 53 (2d Cir. 2003) ("[E]xpert testimony by a fact witness or case agent can inhibit cross-examination, thereby impairing the trial's truth-seeking function," in part, because "he is providing an opinion that, unlike a factual matter, is not easily contradicted."). In practice, "the *Daubert* factors (peer review, publication, potential error rate, etc.) simply are not applicable" to officer experts, and there is an

"absence of any empirical research-based confirmation" to draw on. *See Holguin*, 51 F.4th at 867 (Berzon, J., concurring in part, dissenting in part) (citation omitted).

That means officer experts can (and do) offer opinions based on self-validating experiences without any reliable norms, standards, or otherwise objective scientific measures to effectively undermine their lived experienced. *See id.* (observing that "cross-examination during such testimony can provide only limited means for testing"). As a result, the defendant simply cannot conduct a meaningful examination to attack the testimony of the officer expert. Instead, defendants may opt to forgo examination altogether rather than risk bolstering the officer expert's testimony. *Cf. Dukagjini*, 326 F.3d at 53-54 ("Challenges to the expert are often risky because they can backfire and end up bolstering the credibility of the witness," so "a defendant may have to make the strategic choice of declining to cross-examine the witness at all.").

These problems are exacerbated when the officer expert testifies about *mens rea*. With even less means to challenge that expert's testimony, the defendant's ability to cross-examine goes from difficult to impracticable. Examination is futile where the officer expert—testifying based on personal training and experience—can respond as if cross-examination were a mere Thanksgiving dinner dispute: "Well, that has been my experience." This case illustrates the point.

On direct examination, Agent Flood described his 28 years of service with Homeland Security Investigation, 500-plus investigations, and 50-plus times in court. *See* Pet. App. C at 10a-13a. The government

asked, "based on [his] training and experience," whether "large quantities of drugs [are] entrusted to drivers that are unaware of those drugs." *Id.* at 15a. Agent Flood responded, "No," then added, "in most circumstances, the driver knows they are hired." *Id.*

Ms. Diaz, on cross-examination, tried to challenge that testimony, referencing Homeland Security announcements that identified schemes where drug trafficking organizations used unknowing couriers. *Id.* at 23a. But Agent Flood reframed. Although he noted some familiarity with such schemes ("I—I know of three schemes"), he opined that fact patterns fitting those schemes did not "necessarily mean that they are unknowing couriers" because, in his personal experience, Agent Flood "had investigations involving each [scheme] where actually the person stated they were hired to bring drugs across the border." *Id.*

Thus, in this case, the personal experiences of the officer expert, Agent Flood—and *his* investigations—permitted him to neutralize any challenge to his generalized testimony about what occurs in "most circumstances." And if Agent Flood did have personal experience with schemes involving unknowing couriers, such that it would undermine any generalizations about classwide *mens rea* that the government wants to make, the government knows what to do: find another agent with different experiences. Instead of Agent Flood, maybe call Agent Johnson, who would testify that, based on *his* experience, the use of an unknowing courier "has not happened." Jury Trial Tr. at 10-11, *United States v. Venegas-Reynoso*, No. 10 Cr. 1257 (D. Ariz. filed Aug. 15, 2011), ECF No. 74. Or perhaps call DEA Agent Hella, who has "[n]ever been able to

corroborate the story of a blind mule." *United States v. Medina-Copete*, 757 F.3d 1092, 1106 n.4 (10th Cir. 2014).

Prosecutors in the Ninth Circuit and other jurisdictions with similar interpretations of Rule 704(b) need only find the right agent, with the right experience, to testify "generally" about the *mens rea* of a class of individuals that conveniently mirror the defendant at trial. *See, e.g.*, Nat'l Ass'n of Fed. Defenders *Amicus* Br. at 22-24. Defendants like Ms. Diaz simply cannot meaningfully prepare for and examine an agent based on such personalized experience. *See Holguin*, 51 F.4th at 868 (Berzon, J., concurring in part, dissenting in part) (noting that "objections and cross-examination during such testimony can provide only limited means for testing" because "[s]uch inquiries require the defendant … to respond to the witness's testimony on the fly without prior knowledge of the assumed connection between the expert's background and the specific testimony offered"). Instead, those defendants are left in the untenable position of arguing their innocence divorced from reality in a vacuum of experiences unique to Agents Flood, Johnson, Hella, or some other curated agent to testify based solely on *their* experience. As a result, they lose access to vigorous cross-examination, "the greatest legal engine ever invented for the discovery of truth." *California v. Green*, 399 U.S. 149, 158 (1970) (cleaned up).

Compounding the inability to conduct a meaningful cross-examination is the lack of "contrary evidence" to present to the jury. *See Daubert*, 509 U.S. at 596 (describing "presentation of contrary evidence" as a traditional means to attack expert evidence). Defendants like Ms. Diaz are, for all practical purposes,

unable to call an opposing expert to rebut the officer expert who testifies based on his experience, untethered to objective principles or methodology.

Consider, again, this case. The government proffered Agent Flood as an expert to testify based on his almost 30 years of experience and his 500 investigations. The source of his expert testimony is his personal experience on the beat, investigating crimes. There is no rebuttal expert available to swear, under oath, that Agent Flood in fact had a different experience over those 30 years. Because there is no methodology, there is no expert on the other side applying a different methodology and reaching a different result.

Moreover, even in the unlikely event that the defendant succeeds in finding a suitable rebuttal expert, she will be fighting the perception that juries tend to view non-officer experts as "hired guns." *See, e.g.*, Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 Va. L. Rev. 1109, 1125-30 (1997); Mnookin, *supra*, at 769-71; Seth Stoughton, *Evidentiary Rulings As Police Reform*, 69 U. Miami L. Rev. 429, 449-50 (2015). And the court may not even be willing to admit her rebuttal expert, as empirical evidence demonstrates that while courts are happy to hear from expert officers, they are reluctant to allow defendants to introduce their own expert testimony. *See* Moreno, *supra*, at 3 ("A recent study of federal appellate criminal cases found that more than 95% of prosecutors' experts are admitted at trial, while fewer than 8% of defense experts are allowed to testify."); 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, 49 (2009) ("One of the unfortunate truths in criminal litigation is that trial courts frequently admit testimony from the government's experts and exclude the defendant's proposed expert testimony.").

Rather than the "battle of the experts" traditionally waged in civil matters, criminal defendants frequently are subjected to the tyranny of the single curated police officer expert opining on the *mens rea* of defendants as a class based only on their own views.

B. Officer experts often present an aura of trustworthiness but lack neutrality

The prejudice of admitting officer expert testimony about classwide *mens rea* is compounded because officer experts are testifying with the "aura of special reliability and trustworthiness surrounding expert testimony." *See United States v. Young*, 745 F.2d 733, 766 (2d Cir. 1984) (Newman, J., concurring) (cleaned up); *see Ake v. Oklahoma,* 470 U.S. 68, 81 n.7 (1985) (noting that "testimony emanating from the depth and scope of specialized knowledge is very impressive to a jury").

So, when the prosecution calls a law enforcement officer to testify as an *expert* "about participation in prior and similar cases, the possibility that the jury will give undue weight to the expert's testimony is greatly increased." *United States v. Alvarez*, 837 F.2d 1024, 1030 (11th Cir. 1988). This expert-imprimatur phenomenon is especially true for law enforcement officers, who juries perceive as *particularly* trustworthy. *See* Stoughton, *supra*, at 449-50 (jurors may "perceive that police officers, unlike many other expert witnesses, are not 'hired guns,' and so their testimony

may be viewed as more credible than that of a paid, professional witness"); Stephen Garvey et al., *Juror First Votes in Criminal Trials*, 1 J. Empirical Legal Stud. 371, 396 (2004) (in a 2004 analysis of juror decision-making in criminal trials, finding that "[m]ost of the jurors believed the police testimony they heard").

This aura surrounding qualification should further caution against the uncritical admission of experience-based officer expert testimony. This is especially true because these officer experts are not like the traditional reticent expert appearing at the Old Bailey. *See* Mnookin, *supra*, at 769-71. These agents are not neutral experts studying the issue dispassionately. Their job is investigating crime. Whatever training and experience they bring to the courtroom has been acquired through a lens focused on finding criminality. In short, these agents are biased, and that bias "might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party." *United States v. Abel*, 469 U.S. 45, 51 (1984); *see* Moreno, *supra*, at 30 (discussing the hazards of reasoning from experience, which include the risk that the witness will rely on intuition or will reach conclusions that are "personal, idiosyncratic, and subjective"); Gross et al., *supra*, at 156-58 (discussing the risk of bias in law enforcement testimony based on experience).

C. The Near Automatic Admission of Officer Expert Testimony Leads to Constitutional Concerns

The practical problems we have just described also give rise to weighty constitutional concerns—which, as explained, militate against an unduly broad view of permissible testimony under Rule 704(b).

1. Right to Confrontation

The Confrontation Clause entitles a defendant not only to the right of physical confrontation but also the right of cross-examination. It "commands, not that evidence be reliable, but that reliability be assessed … by testing in the crucible of cross-examination." *Crawford v. Washington*, 541 U.S. 36, 61 (2004). But officer experts often rely on conversations with non-testifying witnesses, cooperators, codefendants, or other police officers. *See Mejia*, 545 F.3d at 188-89.

For instance, in *United States v. Campos*, where an alleged drug-courier denied knowledge, an agent testified about the *mens rea* of such defendants as a class and relied, in part, on his "number of occasions to talk to individuals in organizations that smuggle marijuana across the border," who told him that "nobody in their right mind would entrust that amount of marijuana to somebody that doesn't know what they are doing." 217 F.3d 707, 714-15 (9th Cir. 2000) (Pregerson, J., concurring in part, dissenting in part).

Similarly, in *United States v. Mejia*, the officer expert grounded his testimony on "between fifteen and fifty custodial interrogations of Long Island MS–13 members." 545 F.3d at 199 (holding that the testimony violated the Confrontation Clause).

Even in this very case, Agent Flood testified based on "various investigation techniques," including speaking with cooperating defendants, cooperating sources, and other agents. Pet. App. 11a-12a.

Where officer experts are given an undue berth under Rule 704(b), they often smuggle in out-of-court statements to the jury that raise serious Sixth

Amendment concerns. Several courts have raised this concern. *See United States v. Maher*, 454 F.3d 13, 19 (1st Cir. 2006) ("Post-*Crawford*, the admission of non-testifying informants' out-of-court testimonial statements, through the testimony of police officers, is a recurring issue in the courts of appeals."); *Mejia*, 545 F.3d at 198-99. So have some scholars. *See, e.g.*, Ross Andrew Oliver, *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, 1555-58 (2004). Nonetheless, this kind of testimony regularly gets to the jury, often without scrutiny. A proper interpretation of Rule 704(b) would mitigate that issue.

2. Right to a Fair Trial

"[C]ourts must be alert to factors that … undermine the fairness of the factfinding process." *Estelle v. Williams*, 425 U.S. 501, 503 (1976). In criminal cases, the factfinding process is "assigned solely to juries." *Carella*, 491 U.S. at 265 (per curiam). But officer expert testimony about classwide *mens rea* can far too readily usurp that function. *Cf. Sandstrom v. Montana*, 442 U.S. 510, 520 (1979) ("[T]he decision on the issue of intent must be left to the trier of fact alone.").

As the Second Circuit has observed, "[a]n increasingly thinning line separates the legitimate use of an officer expert … from the illegitimate and impermissible substitution of expert opinion for factual evidence." *Mejia*, 545 F.3d at 190. "In such instances, it is a little too convenient that the Government has found an individual who is expert on precisely those facts that the Government must prove to secure a guilty verdict." *Id.* at 191. Yet despite that warning, prosecutors in the

Ninth Circuit—and in jurisdictions with a similarly loose reading of Rule 704(b)—have found that "convenien[ce]" to be an effective means to secure guilty pleas and verdicts in drug courier cases. *See* Nat'l Ass'n of Fed. Defenders *Amicus* Br. at 17-21 (explaining how prosecutors use officer experts).

In far too many cases, in far too many jurisdictions, the "officer expert" appears not as an expert assisting the jury, but as "a chronicler of the recent past whose pronouncements on elements of the charged offense serve as shortcuts to proving guilt." *Mejia*, 545 F.3d at 190; Gallini, *supra*, at 408 ("The government's … wide latitude to tacitly comment on a drug defendant's *mens rea* relieves it from proving defendant's *mens rea* beyond a reasonable doubt."). As a result, "[t]he officer expert transforms into the hub of the case, displacing the jury by connecting and combining all other testimony and physical evidence into a coherent, discernible, internally consistent picture of the defendant's guilt." *Mejia*, 545 F.3d at 190-91; *see also* Gallini, *supra*, at 409 ("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."). By displacing the jury's role in finding *mens rea*, officer experts imperil due process values.

And that is just one aspect of the issue. Viewed from another perspective, officer expert testimony on classwide *mens rea* can come awfully close to group propensity arguments—which are widely recognized to threaten defendants' right to a fair trial. *See* Kadish, *supra*, at 776 (noting how officers often "testify … that the defendant[] … acted like a drug courier,

therefore, he is a drug courier"). As a result of this testimony, the burden of proof is essentially reversed: the defendant must establish she is an outlier, and not within the overwhelmingly predominant cohort described by the expert witness.

Simply put, classwide *mens rea* testimony amounts to improper "profile" evidence that asks the jury "to infer the defendant's guilt from the past acts of *third persons*." Wright & Miller, *supra*, § 5234. "Such evidence presents the defendant with an impossible dilemma" because "evidence of crimes committed by a third person who is not on trial saddles a defendant with the burden of proving the innocence of another." Kadish, *supra*, at 785 (cleaned up). Testimony about the *mens rea* of defendants as a class therefore represents a perverse form of impermissible propensity evidence, and it erodes "a basic premise of our criminal justice system: Our law punishes people for what they do, not who they are." *Buck v. Davis*, 580 U.S. 100, 123 (2017).

* * *

Rule 704(b) is unambiguous and should be read as Petitioner explains. That follows from considerations of text and structure. But the practical and constitutional concerns that stem from the reading of Rule 704(b) advanced by Respondent offer yet another reason to adopt Petitioner's straightforward reading.

III. ALLOWING OFFICER EXPERTS TO TESTIFY ABOUT CLASSWIDE *MENS REA* WOULD POSE ADDITIONAL RISKS

This case arises in the context of drug trafficking prosecutions. But the decision in this case will extend

beyond drug-related cases. Blessing the Ninth Circuit's atextual interpretation of Rule 704(b) would add a new, dubious maneuver to every prosecutor's playbook. Expert testimony from law enforcement officers will conveniently mirror the defendant's actions, but framed in terms like "generally" or "usually."

Looking ahead, it would be all too easy for law enforcement agencies to develop "expertise" to infer the knowledge or intent for various crimes based on generalized profiles. *See Mejia*, 545 F.3d at 190 ("Any effective law enforcement agency will necessarily develop expertise on the criminal organizations it investigates …."); *see also* Pet'r Br. at 21-22. We could expect law enforcement agencies to cultivate the perfect expert across a range of offenses. One for securities fraud, another for income tax fraud, a third for accounting fraud, and still others for money laundering, terrorism, gangs, and so on. These concerns would also extend beyond offense-related "expert" testimony to, for example, the *mens rea* of the defendant who joins an unpopular political group, *see, e.g.*, *United States v. Lightfoot*, 228 F.2d 861, 865-67 (7th Cir. 1956) (holding that defendant's familiarity with excerpts of the "writings of Marx, Engels, Lenin and Stalin" were "properly admitted as bearing upon [defendant's] knowledge and intent"), *rev'd*, 355 U.S. 2 (1957); or the defendant who practices a certain religion, *see, e.g.*, *United States v. Hayat*, 710 F.3d 875, 900-01 (9th Cir. 2013) (relying on drug-courier precedent to affirm expert testimony that the "kind of person" who would carry a certain Islamic supplication was "[a] person who is engaged in jihad").

The way to prohibit these nefarious ends is to forbid their beginning. And they begin with a misreading of Rule 704(b). The Court should therefore adopt the interpretation of that rule advocated by Petitioner.

CONCLUSION

For the reasons set out above and in Petitioner's brief, the judgment below should be reversed.

Respectfully submitted,

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