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Agent-Experts in Criminal Trials: The Ultimate Issue Rule as a Defense to the Imprimatur Problem

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AGENT-EXPERTS IN CRIMINAL TRIALS:
THE ULTIMATE ISSUE RULE AS A DEFENSE TO THE
IMPRIMATUR PROBLEM

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I. INTRODUCTION

X, Y, and Z have been under federal investigation for engaging in illegal activity for the past three years. Special Agent A of the Drug Enforcement Administration has been heavily involved in investigating the three suspects. Eventually, the government decides it has gathered sufficient evidence to secure a conviction against X and Y, but not Z. The government approaches Z and makes an offer Z cannot refuse: testify against X and Y, and Z will receive a substantially lesser charge and thus serve minimal time. Z agrees to

cooperate, so X and Y are charged with possession of methamphetamine with intent to distribute and participating in affairs of an enterprise through racketeering activity, in violation of the Racketeer Influenced and Corrupt Organization Act (R.I.C.O.).¹ The bulk of the government's case consists of Z's statements to Special Agent A as well as evidence gathered over the past three years, which includes recorded conversations, photographs, and surveillance videos. The question that remains is the extent to which Special Agent A can testify as an expert witness in the course of the government's trial against Defendants X and Y.

In criminal prosecutions, the government has relied heavily on the use of law enforcement agents as expert witnesses. An expert is "a person who, through education or experience, has developed skill or knowledge in a particular subject, so that he or she may form an opinion that will assist the fact-finder."² The justification for expert witness opinion is that evidence presented in certain cases is beyond the knowledge of the average juror, and, in order for jurors to fully grasp and understand the meaning of the evidence, an expert witness offers his or her opinion on the matter.³ Although the expert's opinion may be helpful, it poses several dangers to the traditional role of a jury: fact-finding.⁴

In order for an agent to testify as an expert, a judge must find that the witness is qualified to offer his or her expert opinion.⁵ Although this requirement would seem to operate as a gatekeeper, permitting only those who are competent to testify, statistics point to the contrary. A study⁶ taken in 2003 revealed the following:

1. 18 U.S.C. §§ 1961-1968 (2006).

2. BLACK'S LAW DICTIONARY 660 (9th ed. 2009).

3. See FED. R. EVID. 702; JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE MANUAL: STUDENT EDITION § 13.02[2] (6th ed. 2003).

4. *United States v. Gaudin*, 515 U.S. 506, 514 (1995). The Supreme Court does not limit the jury's role to determining questions of fact; jurors are responsible for applying the law to the facts and drawing conclusions. *Id.*; see also *United States v. Scheffer*, 523 U.S. 303, 312-13 (1998) (citing *United States v. Barnard*, 490 F.2d 907, 912 (9th Cir. 1973)). The jury functions as a "lie detector" in criminal trials, and in the course of fulfilling that role, its members are responsible for determining the weight and credibility of testimony. *Scheffer*, 523 U.S. at 313.

5. See FED. R. EVID. 104(a), 702.

6. The study concerned both state and federal appellate court cases that

Police officers, who are admitted frequently, represent the high end of the continuum of admissibility. Police officers were admitted 85.7% of the time overall. . . . Police officers continued to be admitted at a consistently higher rate than all other experts over time. This provides some evidence that courts are not as critical of police as experts. . . .

. . . .

In fact, prosecution experts were admitted significantly more often than defense proffered experts. . . . Not only is there a distinction between the admission of prosecution and defense experts overall, there is also a tendency for prosecution experts to be admitted more frequently than defense experts within each of the selected types of experts. . . .⁷

Jury members are too often presented with the testimony of a case agent whose opinion entails conclusions on ultimate issues, thereby leaving them with no real fact to find due to the expert's credibility.⁸ Furthermore, situations arise wherein officers simply repeat the testimony of a fact witness, effectively placing the government's seal on that fact witness's testimony.⁹ The imprimatur problem that arises when law enforcement officials offer expert opinion testimony in criminal trials can be diminished by prohibiting officials who were actively involved in investigating a case from offering testimony on ultimate issues. The prevalence of experts in criminal trials against the accused and the dangers associated with the use of such experts requires a remedy that balances the need for the experts with the dangers posed by improper expert testimony.

Part II sets forth the permissible types of testimony an agent acting as an expert may offer. Part III discusses instances where agents

discussed the admissibility of expert testimony from 1988 to 1999, and federal appellate court cases from 1999 to 2001. Jennifer L. Groscup & Steven D. Penrod, *Battle of the Standards for Experts in Criminal Cases: Police vs. Psychologists*, 33 SETON HALL L. REV. 1141, 1149-50 & n.41, 1165 tbl.1 (2003). The study included 1,800 cases involving both civil and criminal experts, although the results used in the article were from a selection of experts testifying in criminal cases. *Id.* at 1150.

7. *Id.* at 1151, 1155.

8. See *United States v. Dukagjini*, 326 F.3d 45, 53 (2d Cir. 2002) (noting that a case agent acting as expert has "unmerited credibility" in the eyes of jurors).

9. See *United States v. Cruz*, 981 F.2d 659, 663 (2d Cir. 1992); *Dukagjini*, 326 F.3d at 55.

acting as experts offer impermissible testimony, including testimony that exacerbates the imprimatur problem. Part IV illustrates how case agent expert opinion testimony can raise Sixth Amendment Confrontation Clause issues, and how this deepens the imprimatur problem. Part V will explain how prohibiting agent-experts from offering opinion testimony on ultimate issues will considerably reduce the imprimatur problem as well as the disclosure of inadmissible hearsay disguised in the form of agent-expert opinion. Part VI will provide an illustrative example of the proposal described in Part V.

II. PERMISSIBLE EXPERT OPINION TESTIMONY

A. *Organized Crime*

In recent years, federal prosecutors have increasingly offered expert opinion in R.I.C.O. cases involving organized crime.¹⁰ Experts are generally permitted to provide the jury with background information so they can better understand the case and how it came about.¹¹ Courts have been responsive in admitting such background testimony regarding the structure, organization, and composition of organized crime because such matters are beyond the knowledge of the average juror.¹² In explaining the structure of organized crime, law enforcement agents have permissibly testified to the various positions held within a crime organization.¹³ Additionally, agents have

10. See e.g., *United States v. Locascio*, 6 F.3d 924 (2d Cir. 1993).

11. *Id.* at 936 (citing FED. R. EVID. 702).

12. See, e.g., *United States v. Matera*, 489 F.3d 113, 121 (2d Cir. 2007) (New York Police Department detective was permitted to testify about the composition and structure of organized crime families, subject to the limitation that he testify to general matters and not on facts specific to the case at hand); *United States v. Amuso*, 21 F.3d 1251, 1263 (2d Cir. 1994) (FBI agent's testimony discussed "the existence and structure of New York crime families"); *Locascio*, 6 F.3d at 937 (FBI agent was permitted to offer his hearsay-based-opinion regarding the structure and operations of a specific crime family); *United States v. Pungitore*, 910 F.2d 1084, 1148 (3d Cir. 1990) (FBI agent's testimony concerned the Italian mafia crime families and their structure); *United States v. Daly*, 842 F.2d 1380, 1388 (2d Cir. 1988) (FBI agent testified as to the nature, structure, and operations of organized crime families).

13. *Daly*, 842 F.2d at 1388 ("[S]ubjects held to be appropriate for expert testimony have included explanations of organized crime structure such as the

permissibly proffered their opinions on the alleged rules followed by organized crime families.¹⁴

In *United States v. Daly*, FBI agent James Kossler's testimony identified the five active crime families that operate in New York.¹⁵ Kossler described the families' rules of conduct, code of silence, and membership requirements.¹⁶ In *United States v. Amuso*, the court explained its leniency in admitting expert testimony on the structure of organized crime families:

Despite the prevalence of organized crime stories in the news and popular media, these topics remain proper subjects for expert testimony. Aside from the probability that the depiction of organized crime in movies and television is misleading, the fact remains that the operational methods of organized crime families are still beyond the knowledge of the average citizen.¹⁷

B. Gangs

Similarly, courts have been receptive to admitting expert opinion testimony in gang-related cases. Police officers have provided testimony "regarding the history, leadership, and operations" of gangs.¹⁸ In doing so, officers have described the structure and boundaries of gang territory and how "'drug spot[s]' operate" within this territory.¹⁹

For instance, in *United States v. Mansoori*, a police officer gang specialist gave his opinion regarding the operations of a local gang. According to the court, the testimony supplied the jury with useful information, including the gang's involvement in narcotics trafficking.²⁰ Trial courts have admitted expert opinion in criminal trials involving various forms of organized crime on the basis that the

relative positions of 'capo,' 'captain,' and 'crew'. . . ." (citing *United States v. Ardito*, 782 F.2d 358, 363 (2d Cir. 1986))).

14. *Amuso*, 21 F.3d at 1263.

15. *Daly*, 842 F.2d at 1388.

16. *Id.*

17. *Amuso*, 21 F.3d at 1264 (citing *Locascio*, 6 F.3d at 936-37).

18. *United States v. Mansoori*, 304 F.3d 635, 652-53 (7th Cir. 2002).

19. *Id.* at 653.

20. *Id.* at 654.

characteristics of such enterprises are generally beyond the knowledge of the average juror²¹—a precondition to admissibility under the Federal Rules of Evidence.²²

C. Drug Courier Profile

Trial courts have also permitted prosecutors to offer an expert to provide drug courier profile testimony. Drug courier profile testimony “is an unofficial list of general behavior patterns engaged in by typical drug traffickers.”²³ Law enforcement agencies are trained to look for certain characteristics that are indicative of criminal activity in the course of their investigations. For instance, in 1974 the Drug Enforcement Administration (DEA) created the following characteristics of the drug courier profile:

- (1) travel for short periods to and from cities involved in heavy drug traffic;
- (2) use of cash, usually in small denominations, to purchase airline tickets;
- (3) absence of luggage;
- (4) use of an alias;
- (5) nervous behavior, such as looking over the shoulder; and
- (6) going to a pay phone immediately upon arrival.²⁴

In *United States v. Carson*,²⁵ agents were permitted to state their undercover observations of the defendant, which included the defendant exchanging an item for cash with people on the street.²⁶ The court held that the manner in which drugs are bought and sold is not likely to be within the knowledge of an average citizen.²⁷ Courts have continuously held that this type of expert opinion is helpful to the jury²⁸ because it is based on the observation of seemingly innocent conduct, which only a trained or experienced individual would be able

21. Groscup & Penrod, *supra* note 6, at 1150.

22. FED. R. EVID. 702.

23. Jay M. Zitter, Annotation, *Admissibility of Drug Courier Profile Testimony in Criminal Prosecution*, 69 A.L.R.5th 425, 425 (1999).

24. *Id.* at 436.

25. 702 F.2d 351 (2d Cir. 1983).

26. *Id.* at 369.

27. *Id.*

28. See, e.g., *United States v. Young*, 745 F.2d 733, 760 (2d Cir. 1984) (testimony that a narcotics transaction was taking place was helpful to the jury).

to distinguish as being indicative of criminal activity.²⁹ This type of testimony is generally useful in establishing the defendant's modus operandi.³⁰

Another type of related testimony an expert may offer is testimony regarding the characteristics of particular crimes or criminal activities.³¹ In *United States v. Espinosa*, a detective testified the defendant was involved in the sale of narcotics because he was using an apartment as a "stash pad" and engaged in a particular exchange of packages, which the detective determined was an exchange of narcotics for money.³² As jurors are unfamiliar with a criminal's usual modus operandi, an expert's opinion can aid the jury in developing inferences based on certain evidence or observations.³³

29. See *United States v. Espinosa*, 827 F.2d 604, 612 (9th Cir. 1987) (citing *United States v. Fleishman*, 684 F.2d 1329, 1335-36 (9th Cir. 1982)) (acknowledging the admissibility of expert testimony that the defendant's actions were in accordance with criminal activity).

30. See *United States v. Gaines*, 105 F. App'x 682, 699 (6th Cir. 2004) (DEA agent testified about the "tools of the drug trade to establish the modus operandi of drug traffickers"); *United States v. Amacher*, No. 90-5126, 1990 WL 197835, at *5 (6th Cir. Dec. 7, 1990) (DEA agent testified the amount of marijuana indicated that it was for distribution); *United States v. Maher*, 645 F.2d 780, 783-84 (9th Cir. 1981) (DEA agents testified defendant's activities were similar to the modus operandi of people conducting countersurveillance while transporting drugs).

31. See, e.g., *United States v. Escalante*, 221 F. App'x 946, 948 (11th Cir. 2007) (common practices of Mexican drug trafficking organizations); *United States v. Almada-Ahumada*, No. 99-50252, 2000 WL 286353, at *1 (3d Cir. Mar. 16, 2000) (general drug trafficking operations); *United States v. Love*, 336 F.3d 643, 647 (7th Cir. 2003) (common practice of narcotics dealers and the structure of typical drug transactions); *United States v. Navarro*, 90 F.3d 1245, 1261 (7th Cir. 1996) (use of plastic baggies and other drug paraphernalia); *United States v. Hubbard*, 61 F.3d 1261, 1274 (7th Cir. 1995) (methods and general practices of narcotics dealers); *United States v. Sturmoski*, 971 F.2d 452, 456, 459 (10th Cir. 1992) (role of firearms in the operation of a clandestine laboratory); *United States v. Lockett*, 919 F.2d 585, 590 (9th Cir. 1990) (typical cocaine packing operation); *United States v. Campino*, 890 F.2d 588, 591, 593 (2d Cir. 1989) (use of electronic equipment in drug operations); *United States v. Diaz*, 878 F.2d 608, 618 (2d Cir. 1989) (general operations of narcotics dealers); *United States v. Khan*, 787 F.2d 28, 34 (2d Cir. 1986) (practices and customs of Pakistani drug dealers).

32. *Espinosa*, 827 F.2d at 611.

33. *But see United States v. Castillo*, 924 F.2d 1227, 1233 (2d Cir. 1991) (holding an expert is not permitted to testify to the function of a scale or index card in a drug deal because such matters are not beyond the knowledge of the average

Similarly, in *United States v. Boissoneault*,³⁴ the DEA agent's testimony included characteristics of drug transactions and contrasted the behaviors of cocaine dealers with those who possess it only for personal use to help the jury in assessing the defendant's claim that the narcotics found on him were intended for personal use rather than distribution.³⁵

In *United States v. Hubbard*, a DEA agent was permitted to testify that "[n]arcotics dealers tend to use mobile telephones, pay phones, and pagers (possibly more than one) to conduct their illicit business in order to evade electronic monitoring."³⁶ He also testified that dealers generally carry weapons, transport contraband in hidden compartments in their vehicles, and maintain a low profile in the community.³⁷ The court held this testimony was admissible on the theory that jurors are not likely to have knowledge about drug trafficking.³⁸

D. Coded Words

Many case agent experts who testify concerning a criminal modus operandi are also asked to testify to the meaning of certain coded words that were used in the course of a criminal operation.³⁹ Criminals engaged in narcotics operations often utilize coded language to refer to narcotics so as to avoid criminal liability.⁴⁰ The agents, usually through their investigative techniques of listening in on conversations, collect and synthesize evidence—a process that typically entails the translation of coded words.⁴¹ Courts have

juror).

34. 926 F.2d 230 (2d Cir. 1991).

35. *Id.* at 231 (citing *Campino*, 890 F.2d at 593).

36. *Hubbard*, 61 F.3d at 1274.

37. *Id.*

38. *Id.* at 1275.

39. *See* *United States v. Hermanek*, 289 F.3d 1076, 1083 (9th Cir. 2001); *United States v. Gibbs*, 190 F.3d 188, 195 (3d Cir. 1999).

40. Ralph V. Seep, Annotation, *Admissibility of Expert Evidence Concerning Meaning of Narcotics Code Language in Federal Prosecution for Narcotics Dealing – Modern Cases*, 104 A.L.R. FED. 230, 232 (1991).

41. *See, e.g., Hermanek*, 289 F.3d at 1091.

overwhelmingly ruled in favor of admitting such testimony,⁴² finding it necessary for the effective presentation of evidence. Furthermore, testimony that translates coded words comports with the Federal Rules of Evidence.⁴³ This is because it can be seen as assisting the jury, and because the expert's opinion is based on facts that are reasonably relied upon by other experts in the field. It is important to note, however, that the scope of such expert opinion testimony is limited. Although courts have generally found expert opinion testimony that interprets coded words to be permissible, such testimony quickly

42. *See* *United States v. Simmons*, 923 F.2d 934, 946 (2d Cir. 1991) (DEA agent permissibly interpreted various coded words in telephone conversations that related to prices, quantity, and payment procedures for the sale of heroin); *United States v. Levasseur*, 816 F.2d 37, 45 (2d Cir. 1987) (holding that the trial court did not err in admitting an FBI agent's expert opinion on the proper interpretation of coded messages in a notebook); *United States v. Ardito*, 782 F.2d 358, 363 (2d Cir. 1986) (holding that the trial court correctly admitted the expert testimony of an FBI agent who described terms such as "captain" and "crew"); *United States v. Borrone-Iglar*, 468 F.2d 419, 421 (2d Cir. 1972) (agreeing with the trial court's decision to permit a narcotics detective to testify concerning the meaning of narcotics jargon used in telephone conversations); *see also* *United States v. Goodwin*, 496 F.3d 636, 642 (7th Cir. 2007); *United States v. Ceballos*, 302 F.3d 679, 688 (7th Cir. 2002); *United States v. Amuso*, 21 F.3d 1251, 1263-64 (2d Cir. 1994); *United States v. Ruggiero*, 928 F.2d 1289, 1305 (2d Cir. 1991); *United States v. Kusek*, 844 F.2d 942, 949 (2d Cir. 1988); *United States v. Daly*, 842 F.2d 1380, 1388 (2d Cir. 1988); *United States v. Martino*, 664 F.2d 860, 865 n.3 (2d Cir. 1981); *United States v. Cirillo*, 499 F.2d 872, 881 (2d Cir. 1974).

43. *See* FED. R. EVID. 702 ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."); FED. R. EVID. 703 ("The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.").

becomes impermissible when experts testify to the meaning of un-coded conversations.⁴⁴

E. Characteristics of Illegal Drug Activity

In addition, expert opinion testimony regarding characteristics of illegal drug activity is frequently offered in the course of criminal prosecutions involving narcotics charges.⁴⁵ Specific characteristics experts can testify to include the quantity, purity, and price of the illegal substance.⁴⁶ This type of testimony is most useful when the defendant is caught while possessing an illegal substance, but claims his possession was intended for personal use rather than distribution.⁴⁷

F. Ultimate Issue of Fact

Expert testimony that entails an opinion on an ultimate issue of fact is generally held admissible.⁴⁸ Courts have justified permitting

44. See *United States v. Dukagjini*, 326 F.3d 45, 55 (2d Cir. 2003) (case agent wrongfully interpreted “what’s left over there in that can,” “not to give him more than one or two,” and “make sure you get your thing, your new one,” when none of these statements were code). *But cf. Ceballos*, 302 F.3d at 686-87 (case agent permissibly testified that the phrase “it had come up short” referred to a shipment of narcotics that the defendant received).

45. Joëlle A. Moreno, *Strategies for Challenging Police Drug Jargon Testimony*, 20 CRIM. JUST. 28, 29 (2006).

46. This list is not exhaustive.

47. See *United States v. Valle*, 72 F.3d 210, 214-15 (1st Cir. 1995) (“[Agent] explained the amount of crack that users normally carry, the effects of an individual dose, and the price of each packet. Matters involving dosages, prices, and other particulars endemic to the ingestion and distribution of crack cocaine are beyond the ken of the average juror.”); *United States v. Boissoneault*, 926 F.2d 230, 231 (2d Cir. 1991) (agent “contrasted the behavior of street level dealers of cocaine with the behavior of persons involved solely in the personal use of cocaine”); *United States v. Pugliese*, 712 F.2d 1574, 1582 (2d Cir. 1983) (“[T]he quantity and purity of heroin used by addicts is not the type of information that is commonly available to laymen. Yet without this information, the jury would have been hampered in its assessment of defendants’ personal use defense.”).

48. See, e.g., *United States v. \$9,041,598.68*, 163 F.3d 238, 254-55 (5th Cir. 1999) (DEA agent testified that based on the testimony he had heard, the facts were consistent with money laundering); *United States v. Duncan*, 42 F.3d 97, 102-03 (2d Cir. 1988) (case agent permitted to testify that defendant filed false tax returns and laundered money, since defendant was not charged with filing false tax returns or

this type of testimony on the theory that it satisfies the broad test for admissibility by being helpful to the jury.⁴⁹ Furthermore, Rule 704 of the Federal Rules of Evidence states, “[T]estimony 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.”⁵⁰ This type of testimony typically arises when law enforcement officials testify to the role of the defendant in the course of a criminal operation.⁵¹

III. IMPERMISSIBLE EXPERT OPINION TESTIMONY

Although there are many permissible uses for an expert’s opinion, there are also numerous impermissible uses.⁵² The line between permissible testimony and impermissible testimony, however, is often not so black and white; courts may at times differ on

money laundering).

49. *See, e.g.*, *United States v. Daly*, 842 F.2d 1380, 1388 (2d Cir. 1988).

50. FED. R. EVID. 704. A reflection on the historical context reveals that federal courts initially banned testimony on an ultimate issue of fact that the trier of fact had the responsibility of determining. DAVID H. KAYE ET AL., *THE NEW WIGMORE, A TREATISE ON EVIDENCE: EXPERT EVIDENCE* 12-13 (Richard D. Friedman ed., 2004). However, Rule 704 of the Federal Rules of Evidence “specifically abolished” the ultimate issue rule, determining that it “was unduly restrictive, difficult of application, and generally served only to deprive the trier of fact of useful information.” FED. R. EVID. 704 advisory committee’s note (citations omitted).

51. *See United States v. Nungaray*, No. 96-50424, 1998 WL 339668, at *1 (9th Cir. Apr. 24, 1998) (DEA agent testified that defendant was a “broker”); *United States v. Pungitore*, 910 F.2d 1084, 1148 (3d Cir. 1990) (FBI agent testified to the meaning of coded language that concerned the roles of co-conspirators); *United States v. Anguilo*, 847 F.2d 956, 974 (1st Cir. 1988) (FBI agent’s testimony included the roles of the defendants in a crime family organization); *United States v. Resto*, 824 F.2d 210, 211 (2d Cir. 1987) (police officer’s testimony strongly suggested the defendant played the role of a “steerer”); *United States v. Brown*, 776 F.2d 397, 401 (2d Cir. 1985) (officer testified that defendant’s role was that of a “steerer”); *United States v. Fleishman*, 684 F.2d 1329, 1335 (9th Cir. 1982) (DEA agent testified defendant was a “lookout”). *But see United States v. Flores-De-Jesus*, 569 F.3d 8, 24 (1st Cir. 2009) (ATF agent impermissibly stated the names and roles of twenty-five individuals involved in a drug conspiracy).

52. Although there are many impermissible uses, this Comment addresses those which exacerbate the *imprimatur* problem that arises when law enforcement agents testify as experts.

the admissibility of certain types of testimony.⁵³ Collectively, these uses, whether at times permissible or impermissible, aggravate the imprimatur problem that arises when law enforcement officials offer their “expert opinion” in criminal trials.

A. Overview Testimony & The Imprimatur Problem

The imprimatur problem generally surfaces when a government agent acts as an overview witness and “testif[ies] before there is any evidence admitted to summarize and who [will] give essentially a second opening statement.”⁵⁴

Overview testimony is testimony by a law enforcement officer, often the lead case agent, who testifies in the early stages of the trial and paints a general picture of the prosecution’s theory of the case. The testimony often cuts to the ultimate issues of the case and includes an analysis of the evidence that may be admitted, based on the agent’s experience in similar cases or investigations.⁵⁵

Overview testimony is extremely helpful in complex criminal prosecutions because the witness essentially “summarizes and characterizes all the evidence in a clear and coherent way. . . . Indeed, such testimony is often the most persuasive version of the story because it comes in the guise of fact, not argument, and it bears the imprimatur and experience of a government agent.”⁵⁶ These concerns are elevated because the jury may be influenced by “statements of fact

53. Compare *Flores-De-Jesus*, 569 F.3d at 19 (“There may be value in having a case agent describe the course of his investigation in order to set the stage for the testimony to come about the nature of the conspiracy and the defendants involved.”), and *United States v. Goosby*, 523 F.3d 632, 638 (6th Cir. 2008) (overview testimony was permissible because it “was limited to ‘constructing the sequence of events’ in the investigation [and] provide[d] background information about the investigation” (citation omitted)), with *United States v. Casas*, 356 F.3d 104, 119 (1st Cir. 2004) (quoting *United States v. Griffin*, 324 F.3d 330, 349 (5th Cir. 2003)) (endorsing “unequivocal[] condemn[ation of] this practice as a tool used by the government to paint a picture of guilt before the evidence has been introduced”).

54. *Griffin*, 324 F.3d at 349 (quoting *United States v. Cline*, 188 F. Supp. 2d 1287, 1299 (D. Kan. 2002)).

55. Barry Tarlow, *RICO Report: Queen for a Day—Proffer Your Life Away*, CHAMPION, Mar. 2005, at 53, 57.

56. *Id.*

or credibility assessments in the overview but not in evidence.”⁵⁷ More importantly, overview testimony by a government agent is of special concern “because *juries may place greater weight on evidence perceived to have the imprimatur of the government.*”⁵⁸ Furthermore, “by appearing to put the expert’s stamp of approval on the government’s theory, such testimony might *unduly influence* the jury’s own assessment of the inference that is being urged.”⁵⁹

The imprimatur problem threatens the role of the jury by increasing the likelihood that the jury will substitute the credibility of the expert witness for the credibility of the evidence.⁶⁰ Additionally, when a law enforcement official involved in the investigation testifies as both a fact and expert witness in the course of the trial, the “jury may *unduly credit* the opinion testimony of an investigating officer based on a perception that the expert was privy to facts about the defendant not presented at trial.”⁶¹ When a government agent testifies as an expert, there exists a substantial risk of the jury placing greater weight on the testimony because it not only bears the imprimatur of the government, but is provided by an individual upon whom “the government confers . . . the aura of special reliability and trustworthiness.”⁶²

57. *Casas*, 356 F.3d at 119. A substantial risk of presenting an overview witness is the possibility that the overview witness may refer to evidence of which the witness has no personal knowledge. BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT § 10:34 (2d ed. 2009). See 3 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 7:9 (3d ed. 2007) for a discussion of the same risks with respect to summary witnesses.

58. *Casas*, 356 F.3d at 120 (emphasis added). Overview testimony unjustifiably exposes the jury to statements of fact or credibility assessments that are not contained in the evidence. GERSHMAN, *supra* note 57.

59. *Casas*, 356 F.3d at 120 (emphasis added) (quoting *United States v. Montas*, 41 F.3d 775, 784 (1st Cir. 1994)).

60. See *Flores-De-Jesus*, 569 F.3d at 18 (citing *United States v. Fullwood*, 342 F.3d 409, 413-14 (5th Cir. 2003)).

61. *Id.* at 21 (emphasis added); see also *United States v. Young*, 745 F.2d 733, 766 (2d Cir. 1984) (Newman, J., concurring).

62. *Flores-De-Jesus*, 569 F.3d at 21 (quoting *United States v. Dukagjini*, 326 F.3d 45, 53 (2d Cir. 2003)); see also *United States v. Brown*, 776 F.2d 397, 401 n.6 (2d Cir. 1985).

B. *Transmit Inadmissible Hearsay to the Jury*

The courts have uniformly banned government agents acting as experts from transmitting inadmissible hearsay⁶³ to the jury.⁶⁴ Inadmissible hearsay testimony often arises in trials against a defendant accused of involvement in a criminal enterprise. In these cases, agents usually offer information obtained from other members of the criminal enterprise that implicates the defendant.⁶⁵ A reading of the Federal Rules of Evidence, however, indicates there is a method by which this type of evidence may be permissibly admitted.⁶⁶ The justification for permitting such testimony is that the expert may not simply repeat inadmissible information. Instead, the expert must use reliable methods and experience to form his or her own opinion, which is simply based upon the inadmissible evidence.⁶⁷

C. *Bolster the Credibility of a Witness*

Courts have also held that a government agent acting as an expert cannot offer testimony to bolster the credibility of a fact witness.⁶⁸ The prosecution may not offer the expert's testimony to bolster the fact witness's credibility by showing that the fact witness's version of events is consistent with an expert's testimony.⁶⁹ This type

63. "Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FED. R. EVID. 801(c).

64. *Flores-De-Jesus*, 569 F.3d at 24 (case agent's testimony included identification of individuals involved in the conspiracy, and that information was based on inadmissible hearsay); *United States v. Mejia*, 545 F.3d 179, 197 (2d Cir. 2008) (case agent's testimony involved information he had obtained from other witnesses through "custodial interrogations, newspaper articles, police reports, and tape recordings"); *Dukagjini*, 326 F.3d at 59 (case agent repeated hearsay obtained from co-defendants and non-testifying witnesses).

65. *See, e.g.*, *United States v. Hinson*, 585 F.3d 1328, 1336 (10th Cir. 2009).

66. *See* FED. R. EVID. 703.

67. *Mejia*, 545 F.3d at 197 (citing *Dukagjini*, 326 F.3d at 54); FED. R. EVID. 703 ("If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted.").

68. *See, e.g.*, *United States v. Cruz*, 981 F.2d 659, 663 (2d Cir. 1992).

69. *Id.*; *Dukagjini*, 326 F.3d at 55.

of impermissible testimony adds to the imprimatur problem because it directly places the government's seal of approval on the fact witness's testimony, thereby increasing that witness's veracity in the eyes of jurors. Similarly, expert opinion testimony that is used to bolster the credibility of a fact witness encourages jurors to place greater weight on the fact witness's testimony simply because the government agrees with it.

However, while the courts note that an expert is not permitted to bolster a *different* fact witness's testimony, they have failed to consider that an expert who is also a fact witness often bolsters his *own* fact-based testimony. With this type of witness, the fact witness is the expert, and his or her version of the events is necessarily consistent with the expert's. Furthermore, by establishing that a fact witness is an expert, his or her credibility is inherently bolstered. Thus, the same concerns that have led courts to disallow an expert to bolster a fact witness exist when a witness serves the dual role of expert and fact witness.

D. Legal Conclusions

Generally, courts exclude testimony that entails a legal conclusion.⁷⁰ Courts have failed to reach unanimous agreement,⁷¹

70. See, e.g., *United States v. Duncan*, 42 F.3d 97, 101 (2d Cir. 1994) ("In evaluating the admissibility of expert testimony, this Court requires the exclusion of testimony which states a legal conclusion." (citing *Hygh v. Jacobs*, 961 F.2d 359, 363 (2d Cir. 1992))); *United States v. Scop*, 846 F.2d 135, 140 (2d Cir. 1988) ("[The agent] made no attempt to couch the opinion testimony at issue in even conclusory factual statements but drew directly upon the language of the statute and accompany regulations concerning 'manipulation' and 'fraud.' In essence, his opinions were legal conclusions that were highly prejudicial and went well beyond his province as an expert in securities trading." (citation omitted)); *Torres v. Cnty. of Oakland*, 758 F.2d 147, 150 (6th Cir. 1985) ("The problem with testimony containing a legal conclusion is in conveying the witness' unexpressed, and perhaps erroneous, legal standards to the jury. This 'invade[s] the province of the court to determine the applicable law and to instruct the jury as to that law.'" (quoting *F.A.A. v. Landy*, 705 F.2d 624, 632 (2d Cir. 1983))). *But cf.* *Stoler v. Penn Cent. Transp. Co.*, 583 F.2d 896, 899 (6th Cir. 1978) (recognizing that trial judges have "wide discretion" to exclude expert testimony amounting to a legal opinion).

71. Compare *United States v. Barber*, 80 F.3d 964, 970-71 (4th Cir. 1996) (case agent permitted to testify that the defendant's activities constituted concealment, which was an element of the crime), and *United States v. Bosch*, 914

however, on exactly when testimony constitutes a legal conclusion.⁷² Courts have recognized that a question entails a legal conclusion when the question “tracks almost verbatim the language of the applicable statute,” and when the “terms used by the [expert] witness have a separate, distinct and specialized meaning in the law different from that present in the vernacular.”⁷³

The justification for admitting such testimony is that, according to the Federal Rules of Evidence, such testimony is not prohibited: “[T]estimony 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.”⁷⁴ Cases that permit an expert to testify to a legal conclusion often mask the testimony as being an opinion on an ultimate issue of fact, and therefore permissible according to Rule 704(a) of the Federal Rules of Evidence.⁷⁵

In *United States v. Boissoneault*,⁷⁶ the defendant was charged with possession of cocaine with intent to distribute.⁷⁷ The prosecutor

F.2d 1239, 1242-43 (9th Cir. 1990) (IRS agent permitted to testify that defendant’s activities “aided and abetted the distribution of cocaine,” when defendant was facing charges of conspiracy to aid and abet, possession with intent to distribute, and distribution of cocaine), *and* *United States v. Kinsey*, 843 F.2d 383, 387-89 (9th Cir. 1988) (detective permissibly testified that the defendant was “involved in the distribution of that cocaine,” whereby defendant was charged with conspiracy to distribute and possession with intent to distribute cocaine), *with* *United States v. Scop*, 846 F.2d 135, 140 (2d Cir. 1988) (securities exchange expert used statutory language such as “manipulation” and “fraud” which amounted to impermissible legal conclusions), *and* *United States v. Feliciano*, 223 F.3d 102, 121 (2d Cir. 2000) (“In evaluating the admissibility of expert testimony, this Court requires the exclusion of testimony [that] states a legal conclusion.” (quoting *United States v. Duncan*, 42 F.3d 97, 101 (2d Cir. 1994))).

72. *See generally* *Torres*, 758 F.2d at 150-51 (“Although trial judges are accorded a relatively wide degree of discretion in admitting or excluding testimony which arguably contains a legal conclusion, that discretion is not unlimited. This discretion is appropriate because it is often difficult to determine whether a legal conclusion is implicated in the testimony.”).

73. *Id.* at 151.

74. FED. R. EVID. 704(a).

75. *See, e.g.*, *United States v. McSwain*, 197 F.3d 472, 482-83 (10th Cir. 1999) (agent testified that the defendant and his wife were responsible for drug sales, which the court held was permissible under Rule 704).

76. 926 F.2d 230 (2d Cir. 1991).

77. *Id.* at 231.

provided a Drug Enforcement Administration agent, who testified that certain numbers and initials found on a piece of paper indicated the defendant was engaged in “street level distribution of cocaine.”⁷⁸ The Second Circuit expressed its concern over the testimony, stating, “We have repeatedly expressed our discomfort with expert testimony in narcotics cases that not only describes the significance of certain conduct or physical evidence in general, but also draws conclusions as to the significance of that conduct or evidence in the particular case.”⁷⁹ The court continued, “Once Agent Sullivan had testified as to the likely drug transaction-related significance of each piece of physical evidence, the jury was competent to draw its own conclusion as to Boissoneault’s involvement in the distribution of cocaine.”⁸⁰

The Ninth Circuit was faced with similar facts in *United States v. Bosch*.⁸¹ In *Bosch*, the defendant was convicted of conspiracy to aid and abet possession with intent to distribute and distribution of cocaine.⁸² Garry Newbrough, a special agent with the Internal Revenue Service, opined that the defendant’s activities, which consisted of renting houses in selected neighborhoods, having false identification, multiple vehicles, and so on, “would, and did, in fact, aid and abet the distribution of cocaine.”⁸³ Rather than express concern that the jury was competent to draw its own conclusion as to whether or not the defendant was involved in aiding and abetting the distribution of cocaine, the court justified admittance of the testimony.⁸⁴ The court expressed that the defendant’s role in the offense is an ultimate issue of fact, and that the agent’s testimony regarding the issue was permissible under Rule 704 of the Federal Rules of Evidence.⁸⁵

78. *Id.* at 231-32.

79. *Id.* at 233.

80. *Id.* The Second Circuit applied Federal Rule of Evidence 702 to the agent’s testimony, maintaining that “a conclusion that the jury could just as easily have drawn for itself based on its own knowledge or experience is subject to exclusion.” *Id.*; accord *MUELLER & KIRKPATRICK, supra* note 57.

81. 914 F.2d 1239 (9th Cir. 1990).

82. *Id.* at 1240.

83. *Id.* at 1243.

84. *Id.*

85. *Id.* (citing *United States v. Espinosa*, 827 F.2d 604, 612 (9th Cir. 1987)); see also *United States v. Gastiaburo*, 16 F.3d 582, 587 (4th Cir. 1994) (finding that it

The conflicting decisions of *Boissoneault* and *Bosch* reveal a discrepancy in how courts rule on admitting testimony that embraces a legal conclusion. In *Boissoneault*, the court scrupulously reasoned that the testimony embraced a conclusion that the jury could clearly reach on its own.⁸⁶ Whether or not the defendant was engaged in activities that amounted to an offense of a criminal statute was for the jury to decide. However, in *Bosch*, the court must have either neglected to apply Rule 702 or decided that whether or not the defendant's activities constituted aiding and abetting the distribution of cocaine was not something the jury could clearly reach on its own. This implied conclusion is necessary, because if the court had determined that the jury could decide that issue absent the assistance of an expert, then permitting the expert's testimony would have violated the helpfulness requirement Federal Rule 702 imposes.⁸⁷

The language used in Federal Rule of Evidence 702 reveals that an expert's opinion is conditional and limited. The rule begins with "[i]f," suggesting that a certain condition must be met.⁸⁸ The rule goes on to state that the expert "may testify," subject to more conditions imposed by another "if" statement.⁸⁹ Therefore, a witness is excluded from offering his or her expert opinion testimony, unless he or she meets the minimum threshold requirements imposed by Rule 702. Rule 702 requires the following:

- (1) The witness's knowledge is scientific, technical, or specialized;

was not plain error for officer to testify that the crack-cocaine and ziplock baggies found in the defendant's car were possessed with the intent to distribute). Federal Rule of Evidence 704 states the following:

- (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.

FED. R. EVID. 704.

86. See *United States v. Boissoneault*, 926 F.3d 230, 233 (2d Cir. 1991).

87. FED. R. EVID. 702.

88. *Id.*

89. *Id.*

- (2) The witness's knowledge will assist the trier of fact to either: (a) understand the evidence, or (b) determine a fact in issue;
- (3) The witness is "qualified as an expert by knowledge, skill, experience, training, or education";
- (4) The expert's "testimony is based upon sufficient facts or data";
- (5) The expert's "testimony is the product of reliable principles and methods"; and
- (6) The expert "has applied the principles and methods reliably to the facts of the case."⁹⁰

Rule 704 of the Federal Rules of Evidence does not expressly impose any conditions or limitations as does Rule 702. However, Rule 704's reach is limited to "testimony in the form of an opinion or inference *otherwise admissible*," suggesting that the testimony must meet the admissibility requirements imposed by Rule 702.

In *Boissoneault*, the court held that when an expert's testimony encompasses conclusions that can just as easily be drawn by a jury, the expert ceases to meet the requirements of Rule 702.⁹¹ Specifically, the expert's testimony fails to assist the jury in either understanding the evidence or determining a fact in issue.⁹² Although an argument can be made that the expert's testimony helps the jury in determining a fact in issue, the expert's opinion simply preempts the jury's determination, which does not equate to helping the jury make the determination.⁹³

Comparatively, in *Bosch*, the court seemed to apply the permissible scope of Rule 704 of the Federal Rules of Evidence without subjecting it to the condition the rule imposes. For an expert's testimony to entail an ultimate issue, that expert's testimony must first

90. *Id.*

91. *Boissoneault*, 926 F.3d at 233.

92. *See* FED. R. EVID. 702.

93. "Under Rule 702, a conclusion that the jury could just as easily have drawn for itself based on its own knowledge or experience is subject to exclusion." *Boissoneault*, 926 F.3d at 233 (citing *Salem v. U.S. Lines Co.*, 370 U.S. 31, 35 (1962)).

satisfy the admissibility requirements.⁹⁴ In relation to Rule 702, the court must find that the expert's opinion will assist the jury.⁹⁵ The *Bosch* court seemed to rely on the fact that Agent Newbrough's testimony was admissible, although it contained an ultimate issue of fact, because Rule 704 expressly states that such testimony is not absolutely barred.⁹⁶ While the court may have tacitly assumed Rule 702 was satisfied, the court's opinion failed to analyze and consider whether Agent Newbrough's testimony met the threshold requirements Rule 702 imposes.

IV. THE CONFRONTATION CLAUSE

The court must also take into consideration any Sixth Amendment Confrontation Clause concerns whenever the prosecution calls an expert to offer his or her opinion. The Sixth Amendment states, "In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him."⁹⁷

The Sixth Amendment guarantees a criminal defendant the right to confront any and all witnesses against him.⁹⁸ The Supreme Court refined the scope of the "right to confront" in the 2004 case of *Crawford v. Washington*.⁹⁹ In *Crawford*, the Supreme Court held that "where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination."¹⁰⁰ In *Crawford*, the Supreme Court honed in on the ultimate goal of the Confrontation Clause—that

94. See FED. R. EVID. 702. An expert may not testify unless that expert's testimony is helpful to the jury. *Id.* Therefore, in order for an expert to offer any testimony, the court must first make a determination that the jury will find the expert's testimony helpful.

95. See FED. R. EVID. 702 advisory committee's note ("Whether the situation is a proper one for the use of expert testimony is to be determined on the basis of assisting the trier.").

96. *United States v. Bosch*, 914 F.2d 1239, 1243 (9th Cir. 1990) (citing *United States v. Espinosa*, 827 F.2d 604, 612 (9th Cir. 1987)). Admissible testimony does not become objectionable solely because it entails opinion on an ultimate issue. FED. R. EVID. 704(a).

97. U.S. CONST. amend. VI (emphasis added).

98. *Id.*

99. 541 U.S. 36 (2004).

100. *Id.* at 68.

the reliability of evidence introduced against a criminal defendant be assessed through the particular mechanism of cross-examination.¹⁰¹

The applicability of the Confrontation Clause, according to *Crawford*, is limited to witnesses¹⁰² providing testimonial statements.¹⁰³ Justice Scalia did not provide an absolute definition of “testimonial,”¹⁰⁴ but articulated that testimonial statements are “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.”¹⁰⁵ Furthermore, the Supreme Court provided useful examples of testimonial statements: statements taken by police officers in the course of interrogations and prior testimony given at a court proceeding.¹⁰⁶ The Court held that where a testimonial hearsay statement is offered against a criminal defendant, it is not admissible unless either (1) the prosecution makes the witness who made the statement available, or (2) if the witness is unavailable, the defendant had a prior opportunity to cross-examine him or her.¹⁰⁷

The Confrontation Clause is critically implicated when case agents fulfill the dual role of fact and expert witness; this concern was elaborated in *United States v. Dukagjini*:

[E]xpert testimony by a fact witness or case agent can inhibit cross-examination, thereby impairing the trial’s truth-seeking function. In

101. *Id.* at 61 (“[T]he [Confrontation] Clause’s ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”).

102. The Court defined “witnesses” as “those who ‘bear testimony.’” *Id.* at 51 (quoting 2 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).

103. *Id.*

104. *Id.* at 68 (“We leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’”).

105. *Id.* at 52 (quoting Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiae Supporting Petitioner, *Crawford v. Washington*, 541 U.S. 36 (2004) (No. 02-9410)); *Melendez-Diaz v. Mass.*, 129 S. Ct. 2527, 2529 (2009).

106. *Crawford*, 541 U.S. at 52. In a subsequent case, the Supreme Court also held that sworn affidavits fell within the category of testimonial statements. *Melendez-Diaz*, 129 S. Ct. at 2532.

107. *Crawford*, 541 U.S. at 68.

general, impeaching an expert is difficult. The expert usually has impressive credentials, and he is providing an opinion that, unlike a factual matter, is not easily contradicted. Challenges to the expert are often risky because they can backfire and end up bolstering the credibility of the witness. Normally, this is an acceptable risk for the defense, because only the witness's expertise is at stake. However, when the expert is also a fact witness, the risks are greater. A failed effort to impeach the witness as expert may effectively enhance his credibility as a fact witness. Because of this problem, a defendant may have to make the strategic choice of declining to cross-examine the witness at all.¹⁰⁸

In other words, when an expert who is also a fact witness takes the stand, impeaching the expert's credibility on cross-examination is an unacceptable option for the defense counsel. Any attempt to impeach the expert's credibility will almost inevitably end in failure, and such failure will make the expert's testimony on factual issues appear much more believable. Defense attorneys will often be forced to make the decision not to cross-examine experts. Thus, the reliability of evidence will not be tested by the method the Sixth Amendment demands—cross-examination.

Sixth Amendment concerns also arise when alleged co-conspirators make statements to the case agent, who, in turn, offers those statements in the course of the trial, disguised as the agent's "expert opinion."¹⁰⁹ For example, in *United States v. Mejia*, the case agent testified that the gang the defendant was allegedly involved in taxed narcotic sales in certain bars.¹¹⁰ The agent further testified that a gang member told him this in the course of a custodial interrogation.¹¹¹ This testimony is precisely what the Confrontation Clause guards against. Statements taken by police officers made in the course of an interrogation clearly fall in the class of testimonial

108. *United States v. Dukagjini*, 326 F.3d 45, 53-54 (2d Cir. 2003).

109. *See United States v. Casas*, 356 F.3d 104, 120 (1st Cir. 2004) (case agent testified that the defendants were members of a drug organization, which was based on information gathered from the investigation); *Dukagjini*, 326 F.3d at 59 (case agent impermissibly repeated hearsay obtained from co-defendants and non-testifying witnesses to prove "the truth of the matter asserted").

110. *United States v. Mejia*, 545 F.3d 179, 187-88 & n.3 (2d Cir. 2008).

111. *Id.* at 188 n.3.

statements according to *Crawford*.¹¹² Furthermore, to allow the expert to disguise such statements as part of his opinion would result in grave injustice due to the inability of the defendant to cross-examine the declarant.¹¹³ Testimony of this kind is especially problematic in light of the agent's credibility in the eyes of the jurors.

Although such testimony is grounds for objecting, there are substantial problems with identifying when the agent is testifying permissibly and when the agent is simply transmitting inadmissible hearsay to the jury.¹¹⁴ The Federal Rules of Evidence permit an expert to base his or her opinion on facts or data that are not admissible in evidence.¹¹⁵ However, to distinguish between when an expert is properly basing his or her opinion on inadmissible data and when an expert is simply transmitting inadmissible testimonial evidence in the form of his or her opinion is an impossible task. When does permissibly basing an opinion on inadmissible evidence cross the line into impermissibly disguising inadmissible testimonial evidence as an expert's opinion? Although the task of discerning between the two seems impossible, the Federal Rules of Evidence require the opponents of such statements to do precisely that.

The Federal Rules of Evidence do not prohibit the opponent of the statement from inquiring into the basis of the expert's testimony.¹¹⁶ Therefore, the defendant is faced with two options:

[H]e can either leave the basis of the expert's opinion unchallenged, or he can risk having otherwise inadmissible, potentially prejudicial evidence disclosed to the jury. If he chooses not to inquire as to the basis of the expert's opinion, there is no hearsay ground upon which to object to the admission of the hearsay statements Therefore the statements have contributed, and perhaps substantially so, to the evidence upon which the jury bases its guilty

112. See *supra* notes 105-06 and accompanying text.

113. "A 'declarant' is a person who makes a statement." FED. R. EVID. 801(b).

114. See, e.g., *Mejia*, 545 F.3d at 187 (When expert was asked to distinguish the portion of his testimony learned through the course of custodial interrogations from the portion learned elsewhere, the expert responded that his testimony entailed information learned from both.).

115. See FED. R. EVID. 703.

116. See *id.*

verdict.¹¹⁷

In an effort to admit the statements and avoid any Confrontation Clause concerns, courts have held that the statements are not being offered for the truth of what they assert, so hearsay is not an issue.¹¹⁸ Rather, the court admits the otherwise non-admissible statements on the theory that they are offered to help the jury evaluate the expert's credibility by determining whether the basis of the expert's opinion is a worthy one.¹¹⁹ For example, in *People v. Thomas* a gang expert testified that the defendant was a member of a gang, which he concluded based on conversations he had with other gang members.¹²⁰ The court held that the expert was permitted to reveal the sources upon which he based his opinion because they were elicited to assess the weight of the expert's opinion rather than for the truth of the matter asserted.¹²¹

In *United States v. Dukagjini*, the court addressed several troubling issues that arise when case agents act in a dual capacity as

117. Julie A. Seaman, *Triangulating Testimonial Hearsay: The Constitutional Boundaries of Expert Opinion Testimony*, 96 GEO. L.J. 827, 836 (2008).

118. See *United States v. Ginsberg*, 758 F.2d 823, 830 (2d. Cir. 1985); *People v. Thomas*, 30 Cal. Rptr. 3d 582, 587 (Cal. Ct. App. 2005). *But see* *United States v. Cruz-Diaz*, 550 F.3d 169, 177 (1st Cir. 2008) (“[W]hen an out-of-court statement is purportedly offered into evidence as non-hearsay . . . we are concerned about whether the stated purpose for introducing the evidence masks an attempt to evade *Crawford* and the normal restrictions on hearsay.” (citing *United States v. Maher*, 454 F.3d 13, 22-23 (1st Cir. 2006))); *Maher*, 454 F.3d at 23 (“The dividing line often will not be clear between what is true background to explain police conduct (and thus an exception to the hearsay rule and thus an exception to *Crawford*) and what is an attempt to evade *Crawford* and the normal restrictions on hearsay.”).

119. Jennifer L. Mnookin, *Expert Evidence and the Confrontation Clause After Crawford v. Washington*, 15 J.L. & POL’Y 791, 815-16 (2007). Professor Mnookin expresses doubt about the viability of this justification, stating that the jury should first assess the reliability of the basis of the expert's opinion prior to determining how credible the expert is. *Id.* at 816. However, to assess the reliability of the hearsay requires the jury to determine the likely truth of their contents. *Id.* Therefore, to use the otherwise inadmissible hearsay to evaluate the expert requires that the jury make a determination about the truth of the information. *Id.*

120. *Thomas*, 30 Cal. Rptr. 3d at 584.

121. *Id.* at 587; see also *State v. Delaney*, 613 S.E.2d 699 (N.C. Ct. App. 2005).

expert and fact witness.¹²² The court “agree[d] that the use of the case agent as an expert increases the likelihood that inadmissible and prejudicial testimony will be proffered.”¹²³ There are several reasons for this increased likelihood. First, a qualified “expert” who is also a case agent is given “unmerited credibility” in the eyes of jurors because of his first-hand knowledge.¹²⁴ Second, because the expert has remarkable credentials and his testimony entails opinion rather than fact, effective cross-examination is nearly impossible.¹²⁵ Finally, when a case agent acts as an expert there “is an increased danger that the expert testimony will stray from applying reliable methodology and convey to the jury the witness’s ‘sweeping conclusions.’”¹²⁶

V. THE SOLUTION

A. Prevent Agent-Expert Testimony on Ultimate Issues

The imprimatur problem discussed above is exacerbated by the ability of experts to state their opinion on ultimate issues and by their ability to disguise inadmissible hearsay in the form of an opinion, permissibly “based” on hearsay. Furthermore, this roundabout way of bringing testimonial hearsay before the jury clearly violates the Sixth Amendment’s Confrontation Clause because the defendant does not have an opportunity to cross-examine the declarant.¹²⁷ To permit an

122. *United States v. Dukagjini*, 326 F.3d 45, 53 (2d Cir. 2003).

123. *Id.*

124. *Id.*

125. *Id.* The court expressed concern that challenges made in the course of cross-examination may even backfire and bolster the expert’s credibility. *Id.*

126. *Id.* at 54 (quoting *United States v. Simmons*, 923 F.2d 934, 946-47 (2d Cir. 1991)).

127. *See supra* text accompanying notes 109-13. Generally, courts have held that if the expert is available for cross-examination, then the Confrontation Clause of the Sixth Amendment is satisfied. WEINSTEIN & BERGER, *supra* note 3, § 13.03[4]. The Confrontation Clause issues are minimal because the expert is not offering the inadmissible hearsay for the truth of the matter asserted, but to provide the jury with knowledge of the basis of the expert’s opinion. *Id.* However, Weinstein holds the view that even if the inadmissible hearsay statements were offered for the truth of what they assert, if the trial court determined that this type of evidence is reasonably relied on pursuant to Federal Rule of Evidence 702, then “the underlying facts or data will have passed a trustworthiness scrutiny similar to, and perhaps equal to, that

expert to provide testimony that entails conclusions on ultimate issues is equivalent to adding fuel to a fire with respect to the imprimatur problem—not only do jurors give substantial weight to the expert’s testimony, they are also more likely to agree with it and adopt it as their own.¹²⁸ A number of courts have recognized and expressed this concern in preventing an expert’s testimony from including legal conclusions. For instance, in *United States v. Duncan*, the court cautioned against experts transgressing their proper role:

When an expert undertakes to tell the jury what result to reach, this does not *aid* the jury in making a decision, but rather attempts to substitute the expert’s judgment for the jury’s. When this occurs, the expert acts outside of his limited role of providing the groundwork in the form of an opinion to enable the jury to make its own informed determination. In evaluating the admissibility of expert testimony, this Court requires the exclusion of testimony which states a legal conclusion.¹²⁹

Allowing an expert to inform the jury of his or her opinion that the defendant was or was not engaging in illegal conduct would usurp the role of not only the jury,¹³⁰ but of the judge as well. Furthermore, the expert is *required* to use his or her “scientific, technical, or other specialized knowledge” in forming his or her opinion.¹³¹ To permit an expert to offer testimony that entails legal conclusions would severely exceed the scope of the expert’s proper function.¹³² Testimony that

required for admissibility under the residual hearsay exception.” *Id.* Therefore, the statement can be used for any purpose without necessarily violating the Confrontation Clause. *Id.*

128. Deon J. Nossel, Note, *The Admissibility of Ultimate Issue Expert Testimony by Law Enforcement Officers in Criminal Trials*, 93 COLUM. L. REV. 231, 240 (1993) (“[T]he concern is that the jury will lose the capacity to come to its own conclusions, and unquestioningly adopt those of the expert.”).

129. *United States v. Duncan*, 42 F.3d 97, 101 (2d Cir. 1994).

130. Ric Simmons, *Conquering the Province of the Jury: Expert Testimony and the Professionalization of Fact-Finding*, 74 U. CIN. L. REV. 1013, 1027 (2006).

131. FED. R. EVID. 702.

132. When the Advisory Committee abolished the rule against testimony entailing ultimate issues, it did not intend to allow experts to testify to ultimate issues the jury is capable of determining. The note stated that an expert’s opinion as to whether a person has capacity, which is an ultimate issue the jury is capable of determining, would not be admissible. However, an expert’s opinion as to the

contains conclusions disguised as an expert's opinion should not be permitted under any circumstance because of the concerns the court expressed in *Dukagjini*—namely, that “the witness attains unmerited credibility when testifying about factual matters from first-hand knowledge.”¹³³ First-hand knowledge, however, combined with the ability to testify to legal conclusions, seems to pose even more danger because the jury is no longer forced to discern the facts of the case for themselves; the conclusion is already given to them.¹³⁴ This type of testimony bears striking similarity to the type of testimony the Second Circuit sought to exclude in *United States v. Castillo*:

It follows that expert testimony . . . is unnecessary and properly excludable where “all the primary facts can be accurately and intelligibly described to the jury, and if they, as [persons] of common understanding, are as capable of comprehending the primary facts and of drawing correct conclusions from them as are witnesses possessed of special or peculiar training, experience or observation in respect of the subject under investigation.”¹³⁵

Although courts have held that factual conclusions are admissible, the courts exacerbate the imprimatur problem by permitting such testimony when it encompasses an ultimate issue. The concerns expressed over experts' ultimate-issue testimony apply with equal force to both “factual” and “legal” conclusions. When an expert offers his or her opinion on an ultimate issue, the jurors are unduly influenced and tend to adopt the expert's conclusions as their own.¹³⁶ This problem is aggravated by situations in which the reliability of the bases underlying his or her expert opinion is questionable. By permitting experts to testify to ultimate factual conclusions, the courts are ignoring the probability that jurors give the testimony more

conditions of capacity would be admissible. Thus, it did not intend to make legal conclusions admissible. FED. R. EVID. 704 advisory committee's note. The note further cautions against “opinions which would merely tell the jury what result to reach,” because such opinions fail to meet the helpfulness requirement of Rule 702. *Id.*

133. *United States v. Dukagjini*, 326 F.3d 45, 53 (2d Cir. 2003).

134. *See supra* note 128.

135. *United States v. Castillo*, 924 F.2d 1227, 1232 (2d Cir. 1991) (quoting *Salem v. United States Lines Co.*, 370 U.S. 31, 35 (1962)).

136. *See supra* note 128.

credence than the testimony offers, as well as the jury's tendency to use the testimony as *substantive evidence* indicating the defendant's guilt.¹³⁷ Moreover, jurors are capable of drawing inferences from the evidence and reaching conclusions on their own, without the assistance of an expert. To give an expert leeway to make inferences where the jury is just as capable of doing so without the expert's assistance violates Rule 702.¹³⁸ If experts are permitted to testify to the basis of their factual and/or legal conclusions, another danger arises by exposing the jurors to testimony that would otherwise be non-admissible hearsay because experts are permitted to rely on inadmissible hearsay in forming their opinions.¹³⁹

Federal Rule of Evidence 703 may operate at times to bar inadmissible information that forms the basis of the expert's opinion.¹⁴⁰ Rule 703 places the burden on the proponent of the statement to prove that the probative value of the statement substantially outweighs its prejudicial effect.¹⁴¹ Unfortunately, there is a fine line between when the expert uses inadmissible information to form the basis of his or her opinion and when the expert simply transmits inadmissible hearsay masked as his or her own opinion. In *United States v. Mejia*, Hector Alicea, an investigator with the New York State Police, "was unable to separate the sources of his information, stating that his opinion was based on 'a combination of both' custodial interrogations and other sources."¹⁴² Alicea identified hearsay as the source of the majority of his statements and, although he did not identify the source of his other statements, the court speculated, "We cannot imagine any source for that information other than hearsay."¹⁴³ Alicea did not analyze the sources to reach a studied conclusion; he repeated their contents, which violated Rule 703.¹⁴⁴

137. Patrick Mark Mahoney, Note, *Houses Built on Sand: Police Expert Testimony in California Gang Prosecutions; Did Gardeley Go Too Far?*, 31 HASTINGS CONST. L.Q. 385, 408 (2004) (citing Nossel, *supra* note 128, at 247).

138. *United States v. Boissoneault*, 926 F.3d 230, 233 (2d Cir. 1991) (citing *Salem*, 370 U.S. at 35).

139. *See* FED. R. EVID. 703.

140. *Id.*

141. *Id.*

142. *United States v. Mejia*, 545 F.3d 179, 197 (2d Cir. 2008).

143. *Id.*

144. *Id.* at 197-98. The court vacated the appellant's conviction on grounds of

Mejia also operates as an example of the dangers that arise when an expert's testimony contains conclusory statements regarding the significance of a particular defendant's behavior. Alicea testified that the MS-13 gang traveled by bus or car to transport narcotics or weapons, used treasury money to buy guns or narcotics, needed guns to shoot at rival gang members, and taxed "non-gang drug dealers who wished to deal drugs in bars controlled by MS-13."¹⁴⁵ The court expressed concern over the particularized assessments:

If the officer expert strays beyond the bounds of appropriately "expert" matters, that officer becomes, rather than a sociologist describing the inner workings of a closed community, a chronicler of the recent past whose pronouncements on elements of the charged offense serve as shortcuts to proving guilt. As the officer's purported expertise narrows from "organized crime" to "this particular gang," from the meaning of "capo" to the criminality of the defendant, the officer's testimony becomes more central to the case, more corroborative of the fact witnesses, and thus more like a summary of the facts than an aide in understanding them. The 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 [T]hey are instructing the jury on the existence of the facts needed to satisfy the elements of the charged offense.¹⁴⁶

B. Reduction of Inadmissible Hearsay Transmission & Confrontation Clause Concerns

An analysis of *Mejia* shows that the danger of transmitting testimonial hearsay and the danger of ultimate issue testimony are interrelated. An expert is capable of testifying to an ultimate issue regardless of whether inadmissible hearsay forms the basis of his or her opinion. However, when an expert utilizes inadmissible hearsay to form the basis of his or her opinion, his or her testimony will more likely embrace ultimate issues. Furthermore, the risk that the

erroneously admitted expert testimony, which violated both the Federal Rules of Evidence and the Sixth Amendment's Confrontation Clause. *Id.* at 208.

145. *Id.* at 187.

146. *Id.* at 190-91.

testimonial hearsay itself is divulged drastically increases. The risk then becomes two-fold: the likelihood that jurors will adopt the expert's opinion as their own and the likelihood that the expert will divulge inadmissible hearsay both increase radically.

The Sixth Amendment of the United States Constitution guarantees a criminal defendant "the right to a speedy and public trial, by an impartial jury."¹⁴⁷ The Supreme Court has emphasized the importance of a trial by jury, holding it to be "fundamental to the American scheme of justice."¹⁴⁸ Equally as important as a jury itself is the function and role of the jury in the course of a criminal trial. It is the province and duty of a jury to determine the facts of the case from the evidence presented.¹⁴⁹ When reasonably minded people may draw more than one inference from the facts presented, then the jury may decide which inference to make.¹⁵⁰ If the evidence, however, only supports one logical conclusion, then the court is to decide the issue as a matter of law.¹⁵¹

When an agent acting as an expert offers his or her testimony on ultimate issues, it essentially invades the province, function, and role of the jury. The agent uses his or her personal knowledge about the facts of the case, synthesizes them and makes logical, albeit unnecessary, conclusions in the form of expert testimony to the jurors.¹⁵² Furthermore, whether the expert has formed an opinion or simply transmitted inadmissible hearsay is unknown. The jurors are given a dangerous option of accepting the expert witness's conclusion as their own rather than examining it critically and determining its weight and credibility.¹⁵³ The risk posed substantially outweighs any benefit the expert's opinion provides because it strips the jury of its duty to find questions of fact, thereby replacing a jury of the defendant's peers with a single-person jury composed of the prosecution's star witness. This concern is aggravated when one

147. U.S. CONST. amend. VI.

148. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

149. 75A AM. JUR. 2d *Trial* § 596 (2009).

150. *Id.* § 612.

151. *Id.*

152. *United States v. Boissoneault*, 926 F.3d 230, 233 (2d Cir. 1991) (citing *Salem v. United States Lines Co.*, 370 U.S. 31, 35 (1962)).

153. *Simmons*, *supra* note 130, at 1060.

considers the qualification the court has conferred upon the witness (by deeming him or her an “expert”),¹⁵⁴ and the fact that the witness functions as an expert for the government.¹⁵⁵ Furthermore, jurors “are likely . . . to make ‘personal judgments about the experts and *not* about the information relayed.’”¹⁵⁶ It is likely that when a decorated law enforcement official acts as an expert and offers testimony which entails conclusions on ultimate issues, this will unduly, impermissibly, and unjustifiably lead the jurors to a belief that the expert’s conclusions are valid, true, and worthy of belief. Another risk is that the jury may become complacent, withdrawn, and inhibited in evaluating the facts for themselves and adopt the expert’s conclusion in an effort to do less.¹⁵⁷

The high probability of jurors uncritically adopting the expert’s opinion as their own becomes even more conspicuous when considering how members of a jury perceive the expert. A survey asked an assortment of jurors from fifty trials to rate the various types of witnesses, which included expert witnesses.¹⁵⁸ The study showed that, “[o]verall, police officers and experts were rated as the least dishonest and were rated as the most likeable, understandable, believable, and confident.”¹⁵⁹ A different survey asked jurors to rate the following types of witnesses: doctors, chemical/drug analysts, appraisers, psychiatrists, firearms experts, psychologists, handwriting analysts, police, polygraph technicians, and eyewitnesses.¹⁶⁰ Police officers were rated as the second highest in agreeability, honesty, and competence.¹⁶¹ It is evident that the trust that jurors place in law

154. *See supra* text accompanying note 62.

155. *United States v. Dukagjini*, 326 F.3d 45, 53 (2d Cir. 2003).

156. Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1186-87 (quoting Jane Goodman et al., *What Confuses Jurors in Complex Cases*, TRIAL, Nov. 1985, at 68 (1985)).

157. Simmons, *supra* note 130, at 1060.

158. Groscup & Penrod, *supra* note 6, at 1148 n.32.

159. *Id.* (citation omitted).

160. *Id.* (citation omitted).

161. *Id.* Jurors believed that doctors, chemists, and firearm experts were the most agreeable, honest, and competent. *Id.* Along with police officers, jurors rated accountants, eyewitnesses, psychologists and psychiatrists as the second most agreeable, honest, and competent. *Id.* The study revealed that jurors were most skeptical of polygraph technicians and handwriting analysts. *Id.*

enforcement officials warrants a hard look at the substance of experts' testimony, and a method to prevent improper testimony from reaching the jury.

C. *Inadequacy of Current Safeguards*

The current safeguards that limit an agent-expert from simply telling the jury what conclusion to reach are Federal Rules of Evidence 701, 702, and 403.¹⁶² Under these protections, the opinion must be helpful¹⁶³ and is subject to exclusion if the opinion wastes time.¹⁶⁴ However, in order for testimony to be excluded, the helpfulness safeguard requires that an expert giving his or her opinion on an ultimate issue does not help the jury because if it did, it would not be excluded on such grounds. Contrary to the assumption that such a safeguard is effective, an opinion that tells the jury precisely what result to reach is inherently and extremely helpful. Furthermore, an expert opining on a single ultimate issue would only be barred by a Rule 403 objection if the probative value is *substantially outweighed* by waste of time.¹⁶⁵ The probative value of the agent-expert's testimony on an ultimate issue is simply immeasurable for the purpose of conducting a Rule 403 analysis, and therefore, it will always outweigh the danger of wasting time. Thus, the likelihood that either of these safeguards adequately guards against the expert's ultimate-issue testimony is minimal.

In response to the argument based on the dangers posed by ultimate-issue testimony, a prosecutor may validly argue that an objection based on unfair prejudice of Rule 403 could also be made. The classic argument a defendant will make is that the expert's opinion is substantially outweighed by the danger of unfair prejudice, which arises because the expert's opinion suggests an improper basis for a decision. As the court expressed in *United States v. Flores-De-*

162. *United States v. Barile*, 286 F.3d 749, 759-60 (4th Cir. 2002) (quoting FED. R. EVID. 704 advisory committee's note).

163. FED. R. EVID. 702.

164. FED. R. EVID. 403.

165. *Id.* ("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.").

Jesus, “the jury may unduly credit the opinion testimony of an investigating officer based on a perception that the expert was privy to facts about the defendant not presented at trial.”¹⁶⁶ However, courts are capable of deflecting such objections based on Rule 704, which permits an expert’s testimony to entail an ultimate issue,¹⁶⁷ thus eliminating any argument that the testimony is unduly prejudicial.

VI. AN ILLUSTRATION

It would be useful to show an illustration of the hypothesis that prohibiting experts from testifying to ultimate issues will in turn reduce the transmission of inadmissible hearsay. In an effort to do so, the recommendations made in the previous section will be applied to the facts of *United States v. Mansoori*.¹⁶⁸

In *Mansoori*, Kenneth Choice (“Choice”), Mark Cox (“Cox”), Bahman Mansoori (“Bahman”), Mohammad Mansoori (“Mohammad”), and Terry Young (“Young”) were convicted of conspiracy to possess with intent to distribute cocaine, cocaine base and heroin; Young was convicted of money laundering and possession of cocaine with the intent to distribute; Cox was convicted of possession of cocaine with the intent to distribute; and Mohammad was convicted of engaging in monetary transactions involving funds derived from criminal activity.¹⁶⁹

The facts of *Mansoori* revolve around the operation of a criminal street gang, engaged in narcotics trafficking.¹⁷⁰ Young, the leader of the Traveling Vice Lords (“TVL”), had arranged for the purchase of a kilogram of cocaine.¹⁷¹ The police began to follow the TVL member transporting the cocaine when a chase ensued, which led to the arrest of the individuals involved.¹⁷²

166. *United States v. Flores-De-Jesus*, 569 F.3d 8, 21 (1st Cir. 2009) (quoting *United States v. Upton*, 512 F.3d 394, 401 (7th Cir. 2008)).

167. FED. R. EVID. 704.

168. 304 F.3d 635 (7th Cir. 2002).

169. *Id.* at 642.

170. *Id.*

171. *Id.*

172. *Id.* at 642-43.

Through the course of investigating the case, the Government intercepted more than 3,500 telephone conversations.¹⁷³ Of these conversations, 300 of them were introduced into evidence because their contents contained discussions related to narcotics transactions.¹⁷⁴ The Government also offered the expert testimony of Chicago Police Officer Michael Cronin, a gang specialist.¹⁷⁵ Officer Cronin was permitted to give his opinion concerning the “history, leadership, and operations” of the TVL:

Cronin testified that the TVLs controlled narcotics distribution on the west side of Chicago by means of a series of distribution loci known as “drug spots.” Cronin went on to identify a number of locations that were, in his opinion, controlled by the TVLs, to describe how a “drug spot” operates, and to recount disputes between various factions of the Vice Lords over drug turf. Cronin was also involved in the investigation that culminated in this prosecution; and he testified as a fact witness regarding surveillance in which he had participated, arrests he had made, various items of evidence that had been recovered, and to a statement that Cox made following his arrest.¹⁷⁶

Officer Cronin identified a drug spot as “a certain area, usually a street corner, in the middle of the block where [gang members involved in narcotics trafficking] control the street operation . . . where individual packets [of drugs] are sold.”¹⁷⁷ The Government theorized that the defendants were involved in a conspiracy that distributed cocaine and heroin through the TVL organization.¹⁷⁸

The court found that the district court did not abuse its discretion when it permitted Officer Cronin to testify as an expert because the operations of narcotics traffickers are unlikely to be within the knowledge of the average juror.¹⁷⁹ The court reasoned Officer Cronin’s testimony did not encourage the jury to deduce that if

173. *Id.* at 645.

174. *Id.*

175. *Id.* at 652-53.

176. *Id.* at 653 (citations omitted).

177. *Id.* at 653 n.7

178. *Id.*

179. *Id.* at 654.

one was a member of TVL, then they were also a member of the charged conspiracy.¹⁸⁰

Officer Cronin's testimony encompassed his opinion on ultimate issues, which is apparent from his testimony "that the TVLs controlled narcotics distribution."¹⁸¹ Furthermore, his definition of "drug spots" equated to telling the jury that the defendants sold drugs. Although not apparent from the opinion, Officer Cronin quite likely gleaned and/or repeated such information from inadmissible hearsay—an unobvious, albeit logical conclusion considering Officer Cronin's immense involvement in the investigation of the defendants.¹⁸² Unfortunately, there is no telling whether Officer Cronin used inadmissible hearsay to form the basis of his opinion or simply transmitted inadmissible hearsay in the guise of his opinion. Regardless, applying the recommendations entailed in this Comment to this case, Officer Cronin's ultimate-issue testimony should have been excluded. In excluding Cronin's testimony, the court would also have excluded his likely inadmissible hearsay transmissions.

VII. CONCLUSION

The only feasible way of eradicating the dangers that surround the use of agent-expert testimony is to prohibit an agent-expert's testimony if it entails an opinion on an ultimate issue to be decided by the trier of fact. When an agent-expert's testimony encompasses conclusions on ultimate issues, there exists a substantial likelihood that the expert will divulge inadmissible hearsay because some of the conclusions the expert will testify to may entail inadmissible hearsay. Furthermore, because the expert was involved in investigating the case, the likelihood of inadmissible hearsay transmission is even greater. Excluding ultimate issue testimony will likely result in substantially less inadmissible hearsay disguised in the form of the expert's opinion. In addition, the imprimatur problem discussed in Part III, subsection A, will be considerably minimized because the expert will not be permitted to tell the jury what result to reach. Although the expert's testimony will be given substantial weight due

180. *Id.*

181. *Id.* at 653.

182. *See id.*

to his credentials, the jury will not be faced with the expert's thoughts on ultimate issues, and therefore, the jury can only take the expert's testimony into consideration when deciding ultimate issues for themselves.

Consider again the example with Special Agent A, X, and Y, posed at the beginning of this Comment. Special Agent A is now more limited in what he can testify to in the course of the trial against defendants X and Y. Special Agent A can testify to the nature, structure and organization of the criminal enterprise that X and Y are allegedly involved in. Special Agent A can also testify to the meaning of coded words if they are used in the recorded conversations. However, Special Agent A can not state his opinion on ultimate issues to be decided by the trier of fact, whether he formed that opinion on his own or on the basis of Z's out of court assertions. In this scenario, these ultimate issues include, but are not limited to: the role of X and/or Y, whether X and Y were in fact engaged in an illegal activity, and whether the activities of X and Y indicate they were violating RICO laws. By limiting Special Agent A's testimony, the possibility that Special Agent A's testimony will include statements he obtained from Z will likely be reduced, and therefore, any Confrontation Clause concerns will be minimized. This is the only way to preserve the equality of the justice system and ensure that every defendant receives a fair trial as required by the Sixth Amendment of the United States Constitution.

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