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Strategies for Challenging Police Drug Jargon Testimony

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Does your mother know the difference between crack and cocaine? Can you describe how they are packaged and sold? Many judges seem to believe that until "every person sworn on a federal jury understands the relationship between crack and powder cocaine, or the different methods employed by drug dealers operating at various levels of the distribution chain," courts should continue to allow prosecutors to rely on "drug jargon expert" testimony from police officers and federal agents. (United States v. Barrow, 400 F.3d 109, 124 (2d Cir. 2005).)

Since the United States embarked on its "war on drugs" in the 1980s, law enforcement officers have routinely been allowed to testify as expert and nonexpert witnesses as to their opinions on how drug dealers operate and how to translate drug jargon. From the government's perspective, this practice makes perfect sense. Opinion testimony by police and federal agents aligned with the prosecution can ensure that jurors draw inculpatory conclusions from a defendant's ambiguous behavior and communications. Faced with a choice, a prosecutor will always prefer the cop to cooperating witnesses, who probably participated in the underlying crime, cut a deal, and have their own criminal history. Even when cooperating witnesses appear credible, they will only be allowed to testify to events that they personally witnessed. Police officers have none of this baggage, and their opinions can exert a powerful influence on the jury.

When the court qualifies a detective or case agent as an expert, the prosecutor secures the added benefit of a judicial imprimatur of reliability and neutrality that enhances all of the officer's testimony. Prosecutors who elicit opinion testimony from police witnesses avoid the personal perception limits of Federal Rule of Evidence 701. And when the opinion testimony comes from a nonexpert police witness, prosecutors circumvent the discovery requirement that applies to all experts. (Fed. R. Crim. P. 16.) Given these strategic
advantages, it is no surprise that the most common prosecution expert witness in all state and federal narcotics trials is a law enforcement officer. (See Jennifer L. Groscup et al., The Effects of Daubert on the Admissibility of Expert Testimony in State and Federal Criminal Cases, 8 PSYCHOL. PUB. POL’Y & L. 339, 345 (2002).)

When prosecutors have unfettered access to police opinion testimony they gain an unfair advantage over the defense. Although, to date, the use of police experts is most common in narcotics cases, judicial laxity may have broader implications in the future. As prosecution efforts shift in response to new political and social pressures, judges may be equally inclined to defer to police experts in prosecutions for other crimes. This suggests that defense counsel will need to develop more aggressive strategies to challenge the admission of police witness opinion testimony.

Three basic assumptions

The drug jargon expert has become a courtroom regular because prosecutors, judges, and the public share three basic assumptions:

1. Drug dealers regularly use drug jargon.
2. Jurors cannot understand drug jargon without expert assistance.
3. Police officers can identify and accurately translate drug jargon.

First, we assumed that drug dealers speak in jargon—an assumption shared by the federal circuits, see United States v. Pinillos-Prieto et al., No. 03-1566, 2005 WL 1969977 (1st Cir. August 17, 2005) (“[D]rug dealers seldom negotiate the terms of their transactions with the same clarity as business persons”) and United States v. Garcia, 291 F.3d 127, 139 (2d Cir. 2002), and that prosecutors need “government agents to describe the characteristics and operating methods of narcotics dealers,” because they use “codes and jargon developed by the drug dealers to camouflage their activities.” (United States v. Boissonneault, 926 F.2d 230, 232 (2d Cir. 1991).) This view is also common in state narcotics prosecutions. (See, e.g., Commonwealth of Pennsylvania v. Vitale, 664 A.2d 999, 1001 (Penn. 1995).) In fact, this belief is so pervasive that a 2000 amendment to the Federal Rules of Evidence specifically contemplate the admission of expert evidence from the “law enforcement agent [who] testifies regarding the use of code words in a drug transaction” based on the “principle” that drug dealers “regularly use code words to conceal the nature of their activities.” (Fed. R. Evid. 702, advisory committee’s note.) Once federal and state trial judges routinely start from the premise that drug dealers use coded language, they must then decide whether jurors can understand drug jargon evidence. Most judges assume they cannot.

Under Rule 702 and the state code equivalents, proponents of expert evidence must convince the court that it will “assist the trier of fact to understand the evidence or determine a fact in issue.” Federal courts unanimously agree that “the jargon of the narcotics trade and the code that drug dealers often use . . . are certainly beyond the ken of the average juror.” (United States v. Coleman, No. 99-50018, 2001 U.S. App. LEXIS 18004, at *10 (9th Cir. Aug. 7, 2001), cert. denied, 534 U.S. 1147 (2002).) It is typical of state courts as well. (See, e.g., Thornton v. State, 570 So. 2d 762, 771 (Ala. 1990).) Without requiring any evidence from the prosecutor, judges seem to agree that drug jargon is always incompressible. Once judges presume that drug dealers speak in jargon and that the jargon is unintelligible, the prosecutor need only persuade the court to admit the opinion testimony of a police witness.

This leads to the third assumption—police officers can identify and accurately translate drug jargon. Judges have become such true believers in police jargon expertise that they will ridicule defense challenges based on a police officer’s or federal agent’s of lacks training or specific drug language education. Although judges would view these deficits as fatal to almost any other type of expert, when the expert is a cop, some judges have referred to defense concerns as “silly” and chided defense counsel for failing to realize that “on-the-job experience, [is] the best education there is for this type of thing.” (United States v. Delpit, 94 F.3d 1134, 1145 (8th Cir. 1996).) (Also see United States v. Hoffman, 832 F.2d 1299, 1310 (1st Cir. 1987) (“[H]ard core drug trafficking scarcely lends itself to ivied halls.”))

It is impossible to reconcile the post-Daubert regime of enhanced judicial scrutiny of expert testimony with judges who allow police witnesses to testify as if they were mind readers, as in these examples:

- A defendant who used the terms “pianos,” “boyfriends,” “briefs,” or “motions,” clearly meant “heroin.” (United States v. Griffin, 118 F.3d 318, 321 (5th Cir. 1997);
- A defendant who rolled up his pants leg was signaling that he had drugs for sale. (United States v. Harris, 192 F.3d 580, 584 (6th Cir. 1999).
- A defendant’s proximity to a loaded gun at the time of arrest was significant because “guns play a role in drug distribution, as dealers carry them for protection and intimidation purposes.” (United States v. Swafford, 385 F.3d 1026, 1028-29 (6th Cir. 2004).
- A defendant who said “I was on that last night, plus we’re going to be on that tonight,” really meant that he was planning to “locate or find some individual and hurt them.” (United States v. Gibbs, 190 F.3d 188, 210 (3d Cir. 1999).

The argument here is not intended to advocate a blanket exclusion of drug jargon testimony. When police witnesses are able to substantiate their claims of expertise
and, in cases where jurors need help understanding relevant facts, police experts should be permitted to provide carefully limited opinion testimony. But judges have become too reluctant to scrutinize the expertise if the witness who arrives in court has a badge and a gun. We need to do a better job of recognizing and challenging the three basic assumptions that have guided the courts. Given the existing case law, these challenges are most likely to be effective if they focus on efforts to bar (1) the nonexpert police witness from providing drug jargon testimony; (2) the case agent from also testifying as an expert witness; (3) propensity evidence; and (4) improper efforts to admit a defendant’s prior crimes and bad acts to establish a general familiarity with drug jargon.

Do drug dealers always use jargon?

There is no empirical evidence that can answer the question of whether drug dealers regularly use jargon because the identification of drug jargon is not a real field of study. There is no relevant social science or linguistic literature that reflects any effort to study or test the existence of drug jargon or the accuracy of its purported translations, although it is not an impossible task. Empirical research could ascertain whether drug jargon definitions offered by law enforcement are widely accepted, whether they are correct, and whether particular words have a covert, drug-related meaning limited to certain cultures, geographic regions, or languages. But the only research I found was a single study demonstrating that drug jargon has clear geographic boundaries. (See Lawrence J. Ouellet, Henry H. Cagle & Dennis G. Fisher, “Crack” versus “Rock” Cocaine: The Importance of Local Nomenclature in Drug Research and Education, 24 CONTEMP. DRUG PROBS. 219 (1997).)

Until we have better research, we should not confuse lists of drug terms with valid empirical data. These lists are easily accessible, and entertaining, though their origins make them highly suspect. For example, the President’s Office of National Drug Policy Web site (www.whitehousedrugpolicy.gov) offers the following definitions: an “amp head” takes LSD, a “beamer” smokes crack, and “cabbage head” is an omnivorous drug user. According to the list, if someone asks “Are you anywhere?” the individual is not lost but is asking if you have marijuana. The White House list contains many drug names that have become part of our common vernacular, such as “speed,” “blow,” “crank,” and “weed,” that jurors would need no assistance to understand. But the list goes far beyond these well-accepted terms and purports to translate more than 2,300 words into covert drug jargon. This boast cannot be substantiated. The list itself provides no information about how, when, or where these examples of street drug language are used. This particular list has not been updated in three years. Lists of this type, on their face, cannot reliably support the assumption that drug dealers regularly use drug jargon nor the accuracy of any of the collected terms.

I suspect that the primary reason that courts so readily assume that jargon is a common component of drug deals is that for decades police officers have been allowed to testify as drug jargon experts in narcotics cases. This conclusion is circular and unsound. That judges routinely allow police witnesses to translate drug jargon tells us nothing as to how common jargon is in drug deals but only that jargon translations are common in drug trials.

Defense against claim that jurors need translators

The Advisory Committee’s note to the Federal Rule of Evidence 702 states that expert opinions should be admitted only when “[a]n intelligent evaluation of the facts is . . . difficult or impossible without the application of some scientific, technical, or other specialized knowledge.” In the past, judges have simply accepted prosecutors’ arguments that drug jargon expert testimony was the type of specialized knowledge that all jurors would need to understand the evidence and facts. (See, e.g., United States v. Delpit, 94 F.3d 1134, 1145 (8th Cir. 1996) (“There is no more reason to expect unassisted jurors to understand drug dealers’ cryptic slang than antitrust theory or asbestosis.”)) Defense counsel should look to some recent cases from the Second Circuit to counteract this assumption.

In 2002, the Second Circuit developed a series of questions that judges can use to determine whether drug jargon testimony should be admitted and, when it is admitted, how to control its scope. (Garcia, 291 F.3d at 127.) Although Garcia involved nonexpert opinion testimony from a police officer, the guidelines should apply to both expert and nonexpert testimony. According to the Second Circuit, judges should exclude drug jargon testimony whenever the defendant’s conversation concerns “a legiti-
“Follow the money.” Following the money in the Watergate scandal of the 1970s was a key development in that investigation and underscored the essential role of money in the underlying criminal activity.

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About the Author

Dee R. Edgeworth has been the lead attorney of the Asset Forfeiture Unit of the San Bernardino County, California, District Attorney’s Office since 1990. A veteran prosecutor with over 20 years of service, he has extensive experience as a practitioner in asset forfeiture litigation. He is also co-author of the California District Attorneys Association Asset Seizure & Forfeiture Manual (2000) and has written numerous articles on asset forfeiture that have been published by national and state prosecution associations.

In addition, Mr. Edgeworth teaches for federal law enforcement agencies and state and local prosecution and law enforcement organizations, and he is the current chairman of the California District Attorneys Association Asset Forfeiture Training and Education Committee.

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mate topic”; is spoken “clearly and in full sentences”; uses “words that make sense contextually”; is “not confusing and disjointed”; and does not involve “unusually short or cryptic statements . . . sharp and abbreviated language, unfinished sentences, or ambiguous references.” (Id. at 142.)

These guidelines are consistent with the court’s finding that the prosecution can only rely on drug jargon translation evidence when the defendant’s language is patently unintelligible. Otherwise,

[in order to allow lay opinion testimony interpreting a facially coherent conversation such as this, the government would have to establish a foundation that called into question the apparent coherence of the conversation so that it no longer seemed clear, coherent, or legitimate. Without a foundation creating doubt about what seemed to be obvious, it is unlikely that opinion testimony would be helpful to the jury. (Id.)

According to the Second Circuit, judges who admit police opinion testimony, without requiring the prosecutor to prove that the defendant’s statements are incoherent, allow the government “to direct the jury what to conclude on a matter that it should decide in the first instance.” (Id.)

The Garcia decision also provides support for future defense challenges based on the lack of an explicit preexisting agreement by the defendant to speak in jargon. According to the court, “[w]hen a conversation has a legitimate purpose understandable to a lay person, testimony about a code without some evidence of prearrangement or some other foundation is inappropriate.” (Id. at 141.) In Garcia, the Second Circuit became the first federal appellate court to truly recognize the danger of uncontrolled drug jargon expertise. According to the court, “[u]nless courts require the proponents of such testimony to lay a proper foundation concerning personal knowledge, every conversation could be interpreted as coded.” (Id. at 141-42.)

The Second Circuit has continued to develop and refine its admissibility guidelines for drug jargon testimony in newer cases. Read together, they seem to embrace two fundamental organizing principles. First, drug jargon testimony is only admissible if the police witness is restricted to the translation of specific drug code that has a demonstrable and fixed meaning, either in the drug trade generally or in the transaction at issue. (United States v. Dukagjini, 326 F.3d 45, 50 (2d Cir. 2003)) (Drug jargon experts must be limited to interpreting “words of the trade, jargon, and the general practices of drug dealers.”) Second, the witness cannot opine about the meaning of the defendant’s conversations generally, about the defendant’s conduct, or translate ambiguous statements (or any other statements) that are not demonstrably drug code.

For example, according to the Second Circuit, a drug jargon expert should not translate the phrase “to watch someone’s back” to mean being a lookout for a narcotics transaction, United States v. Cruz, 363 F.3d 187, 193 (2d Cir. 2004), because the phrase is “neither coded nor esoteric.” (Id. at 193.) Nor is the expert allowed to tell a jury that the statement, “what’s left over there in that can,” probably referred to “bundles of heroin.” (Dukagjini, 326 F.3d at 55-56.) The court offered two reasons to exclude such testimony: (1) a witness cannot “essentially use[] his knowledge of the case file and witness interviews . . . to conclude that they were discussing heroin” (id. at 55); and (2) “[t]here was no evidence that these phrases were drug code with fixed meaning either within the narcotics world or within this particular conspiracy.” (Id. at 56.) In addition, drug jargon experts should not be allowed to offer “sweeping conclusions and interpretations about the general meaning of conversations.” (Id. at 50.) An expert cannot provide a summary of the defendant’s communications, even when it is presented at the beginning of trial as an overview of anticipated evidence, United States v. Garcia, 413 F.3d 201, 211 (2d Cir. 2005), because it provides the government with the opportunity to have “a case agent offer a summary opinion as to culpability before any evidence to support such a conclusion has been presented for jury review.” (Id. at 214; see also United States v. Grinage, 390 F.3d 746, 751 (2d Cir. 2004).) The court concluded that were such summary testimony allowed, “there would be no need for the trial jury to review personally any evidence at all” because the expert “could not only tell them what was in the evidence but tell them what inferences to draw from it.” (Grinage, 390 F.3d at 750.)

Defense counsel should rely on these new cases to argue that drug jargon testimony should only be admitted when the prosecution has established certain threshold criteria: 1) that the defendant’s communications are facially incoherent, 2) that the alleged drug jargon has a demonstrable and fixed meaning, 3) the existence of an explicit agreement by the defendant to use drug code, and 4) that the police witness will not summarize the defendant’s conversations or conduct. Only when the prosecutor has met this burden, and the court has ascertained that the proffered testimony will be reliable, should any drug jargon opinion testimony be admitted.

Are police reliable translators?

Judges may sometimes need to be reminded that unreliable evidence cannot be admitted, despite the seduction of its apparent relevance. Imagine that, based on a crystal ball reading, a fortuneteller is called to a murder trial to identify the defendant as the killer. Federal Rule of
Evidence 401 does not bar the fortuneteller’s testimony because it lacks “any tendency to make any fact that is of consequence to the determination of the action more probable or less probable.” The testimony is excluded because the fortuneteller’s methods—and thus the conclusions—lack the requisite reliability. Thus, the proponent of expert testimony need not prove that the opinions offered are correct, but that the opinion testimony will be reliable based on a preponderance of the evidence. The standards governing reliability have changed dramatically in the 12 years since Daubert was decided by the Supreme Court. (Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).) Under the current standard, federal judges, and judges from the 30-plus states that have adopted Daubert-equivalents, must conduct a scrupulous pretrial assessment of challenged expert testimony. For the past six years, this new gatekeeping requirement has specifically included nonscientific “specialized” evidence. (See Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).) These changes are also reflected in the 2000 amendments to Federal Rules of Evidence 701 and 702. Any reasonable reading of the Daubert/Kumho/Rule 702 reliability standards requires trial judges to independently assess the reliability of the “specialized knowledge” offered by drug jargon experts and not pass the buck to juries by labeling this a question of weight.

Unlike most scientific or technical expertise, which is often grounded in education and training, drug jargon expertise is experience-based. Although amended Rule 702 specifically contemplates the admission of experience-based expert testimony, such as “when a law enforcement agent testifies regarding the use of code words in a drug transaction,” the Advisory Committee’s note directs judges to subject experience-based expertise to heightened scrutiny. “[W]hen the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts.” (Kumho, 526 U.S. at 148.) This inquiry is essential because “[t]he trial court’s gatekeeping function requires more than simply taking the expert’s word for it.” (Id.) Third, judges could rely on some very recent federal appellate case law to help identify valid drug jargon testimony.

In United States v. Hermanek, 289 F.3d 1076 (9th Cir. 2002), the Ninth Circuit became the first federal appellate court to subject drug jargon expert testimony to a fairly rigorous analysis under amended Rule 702. The court explicitly condemned the case-specific drug jargon translations provided by the lead investigator, FBI Special Agent John Broderick, who opined on the modus operandi of cocaine enterprises and interpreted many of the words used in intercepted telephone conversations among the five codefendants. (Id. at 1083.) All of these words were translated as references either to cocaine or associated drug trafficking activities. (Id. at 1090-92.)

According to the Hermanek court, Agent Broderick’s testimony should never have been allowed because the alleged drug code was not commonly used drug terminology, but was unique to this conspiracy. (Id. at 1090-92.) The trial court made no effort to establish “the reliability of Broderick’s methods for interpreting new words as code for cocaine.” (Id. at 1090.) The court should have ascertained the validity of Broderick’s methodology, because this inquiry is “a prerequisite to making the Rule 702 determination that an expert’s methods are reliable.” (Id. at 1094.)

Defense counsel should urge judges to read Hermanek along with the Second Circuit’s finding that drug jargon
experts must be restricted to interpreting “words of the
trade, jargon, and the general practices of drug dealers.”
(Dukagjini, 326 F.3d at 50.)

Defense counsel must also be aware of the dichotomy
between general and specific reliability. Opinion testi-
mony that draws from an area of general reliability is
inadmissible if it involves the unreliable application of
reliable methodology. Consider that even a well-recog-
nized expert in a legitimate science, such as biochem-
istry, could offer unreliable testimony for a number of
reasons. Although some commentators persuasively
argue that general and specific reliability are inevitably
intertwined (see Ronald J. Allen, Expert Admissibility
Symposium: What Is the Question? What Is the Answer?
How Should the Court Frame a Question to Which
Standards of Reliability Are to Be Applied? 34 SETON
HALL L. REV. 1 (2003)), at least in Kumho, the Supreme
Court has focused attention on the question of specific
reliability by framing the pretrial inquiry as a “dec[ision]”
whether this particular expert had sufficient specialized
knowledge to assist the
jurors in deciding the partic-
ular issues in the case.”
(Kumho, 526 U.S. at 156.)
The emphasis on specific
reliability is echoed in the
Ninth Circuit’s requirement
that an expert “explain how
he used any of his knowl-
edge or experience with drug
trafficking or with these
defendants to interpret particular words and phrases used
in specific conversations.” (Hermanek, 289 F.3d at 1094.)
Unless the government can convince the court
that the testimony will be valid by presenting a satisfac-
tory “explanation of his general methods” and of how
the expert applied this methodology to “interpret particu-
lar words or phrases,” in this case, the opinion testimony
should be excluded. If judges fail to do their gatekeeping
jobs, they allow the police expert to run amok, “inter-
pret[ing] cryptic language as referring to cocaine simply
because he believed appellants to be cocaine traffickers.”
(Id. at 1096.) The Ninth Circuit has been quite clear that
this “circular, subjective reasoning does not satisfy the
Rule 702 reliability requirement.” (Id.)

Nonexpert testimony violates
the discovery rules.

Nonexpert opinion violates Rule 701

Prosecutors cannot have it both ways. In the past, pros-
cutors asked judges to treat drug jargon testimony as
“specialized knowledge” in an effort to attain the impr
imput of expertise for their police witness and to free the
witness’s testimony from the constraints of personal per-
ception. (See, e.g., United States v. Gibbs, 190 F.3d 188,
211 (3d Cir. 1999); United States v. Griffith, 118 F.3d 318,
321 (5th Cir. 1997).) At the same time, prosecutors fre-
quently took advantage of judicial laxity to elicit drug jar-
gon opinion testimony from nonexpert police witnesses.
Prior to Kumho and the December 2000 amendment to
Rule 701, appeals based on the admission of opinion testi-
mony from nonexpert police witnesses were generally
unsuccessful. (See, e.g., Griffith, 118 F.3d at 322-23)
drug jargon translation by DEA agent was admissible
although agent was never offered or qualified as an expert
witness); United States v. Ramirez, 796 F.2d 212, 216-17
(7th Cir. 1986) (drug jargon opinion testimony from
nonexpert federal agent was admissible and defendant
could not object because lack of qualification inured to
defendant’s benefit.)

The common practice of allowing nonexpert police
witnesses to provide opinion testimony is a clear violation
of Rule 701 and the discovery rules and it should end.
Rule 701, on its face, specifically bars all nonexperts
from providing testimony based on “specialized knowledge.”
The rule was amended in 2000 to “eliminate the risk that the
reliability requirements set forth in Rule 702 will be evaded
through the simple expedient of proffering an expert in lay wit-
ness clothing.” (FED. R. EVID. 701 advisory committee’s note.)
Recent federal appellate cases
(with one notable exception)
support this plain language interpretation of Rule 701. In
June 2005, the Second Circuit held “that the foundation
requirements of Rule 701 do not permit a law enforce-
ment agent to testify to an opinion . . . if the agent’s rea-
soning process depended, in whole or in part, on his spe-
cialized training and experience.” (Garcia, 413 F.3d at
216.) According to the court, nonexpert police testimony
of this type cannot be admitted because the witness “is not
presenting the jury with the unique insights of an eyewit-
ness’s personal perceptions.” (Id. at 212.) In a decision
that predates the amendment to Rule 701, the Ninth
Circuit anticipated that nonexpert police testimony (in
which the witness opined that the defendant behaved like
an “experienced drug trafficker”) should be barred
because admission of this testimony would “simply blur[ ]
the distinction between Federal Rules of Evidence 701
and 702.” (United States v. Figueroa-Lopez, 125 F.3d
1241, 1246 (9th Cir. 1997).) The court reasoned that the
“mere percipience of a witness to the facts on which he
wishes to tender an opinion does not trump Rule 702.”
(Id. at 1246.)

Defense counsel should also be aware of a very recent
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misconstrued interpretation of Rule 701 by the First Circuit. In United States v. Ayala-Pizarro, 407 F.3d 25 (1st Cir. 2005), the First Circuit reasoned that police non-expert opinion testimony describing the operation of drug distribution points and how heroin is normally packaged was admissible because it could be linked to the witness’s “experience in prior drug arrests.” (Id. at 29.) This misconstrued interpretation of Rule 701 would expand the scope of the rule to allow any witness to provide opinion testimony as long as the opinion was somehow derived from the witness’s life experience. This decision is illogical and directly contradicted by the text of Rule 701, the Advisory Committee’s note, and better-reasoned case law. If Ayala-Pizarro had been properly decided, the court would have limited the nonexpert’s testimony to his personal perceptions.

**Nonexpert opinion violates the discovery rules**

Judges who allow prosecutors to elicit drug jargon opinion testimony from nonexpert police witnesses implicitly condone the government’s violation of the discovery requirements of Federal Rule of Criminal Procedure 16(a)(1)(G), which demands that the prosecution provide broader discovery about expert witness testimony than is required for any other type of witness. Upon request, the defense is entitled to receive a written summary of the expected expert testimony that “must describe the witness’s opinions, the bases and reasons for those opinions, and the witness’s qualifications.” Rule 16 is generally intended to “minimize the surprise that often results from unexpected expert testimony, reduce the need for continuances, and to provide the opponent with a fair opportunity to test the merits of the expert’s testimony.” (FED. R. CRIM. P. 16, Advisory Committee’s note.) When the defense is deprived of proper discovery, counsel has been effectively prevented from questioning the expert’s authority, attacking the reliability of the expert’s evidence, and preparing any other necessary challenges. Although the text of Rule 16(a)(1)(G) is quite clear, defense counsel should note that, once again, the case law is not uniform.

The most useful case law comes from the Second Circuit. That court has specifically recognized that Rule 16 is violated when law enforcement officers are allowed to testify based on their expertise, “despite the government’s failure to indicate prior to trial that the prosecution would call him to testify in such capacity.” (Cruz, 363 F.3d at 196, n.2.) According to the Second Circuit, when this occurs the government has “blindsided defense counsel with this testimony and undermined the goals of the . . . disclosure requirement.” (Id.) However, the First Circuit recently concluded that a trial court did not err by allowing nonexpert police witness testimony regarding drug jargon, despite the lack of compliance with Rule 16(a)(1)(G). (Ayala-Pizarro, 407 F.3d at 29.)

**Investigator should not be expert witness**

When the prosecution relies on the expert opinion testimony of the detective or case agent, admission of this may violate Federal Rule of Evidence 403. Whenever the investigator and expert are one and the same, the possibility of juror confusion increases because jurors will find it difficult to discern whether the testimony is based on the witness’s general experience (and presumptively reliable methodology) or on information that the witness garnered from this case. (Ayala-Pizarro, 407 F.3d at 54; see also United States v. Garcia Parra, 402 F.3d 752, 759 (7th Cir. 2005).) In these situations, jurors may infer that the agent’s opinion about the criminal nature of the defendant’s activities is based on knowledge that is beyond the evidence presented at trial, Cruz, 363 F.3d at 193. Unfair prejudice is likely whenever an expert strays from applying reliable methodology and, instead, offers sweeping conclusions regarding this defendant’s activities. When this occurs, jurors may accept opinions based on the specifics of one case, rather than the witness’s general expertise, in violation of Rules 403 and 702 and the state counterparts. (Id. at 50 and 54.) This is also true when the investigating officer, who is intimately familiar with the details of the case, discloses otherwise inadmissible testimony in violation of Rule 703.

Juror confusion is exacerbated when a prosecutor attempts but fails to impeach the witness as an expert, thereby enhancing “his credibility as a fact witness” (id.), or when the witness, who knows that the weight of his or her opinions depends on the reliability of the underlying facts deliberately or inadvertently mixes facts and opinions.

If these risks are highlighted, perhaps judges will be more responsive to future defense challenges based on Rule 403. (See, e.g., United States v. Mansoori, 304 F.3d 635, 654-55 (7th Cir. 2002) (there was “no real possibility that the jury may have been led to mistakenly credit [Officer] Cronin’s opinions as facts”); United States v. Rivera-Rosario, 300 F.3d 1, 17 (1st Cir. 2002) (rejecting the defense argument that the dual role prejudiced the
defendant by creating “the false impression that the agent’s opinion regarding the criminal nature of the defendants’ coded language was based on his investigation of the defendants, rather than on generalizations from other experiences”.

**Jargon evidence violates propensity ban**

Even helpful and reliable drug jargon expert testimony must be excluded if it violates the ban on propensity evidence. (Fed. R. Evid. Rule 404(a).) Such evidence arguably violates Rule 404(a) if jurors infer that, because defendants must have learned drug jargon while committing prior crimes or bad acts, they have a propensity to commit drug crimes. This type of “bad character” evidence encourages jurors to convict defendants simply because they assumed that the defendants are criminals—regardless of whether or not the prosecutor has met the burden of proof. The risk of a propensity assumption increases when the charged crime and the alleged prior crimes and bad acts are all drug offenses.

Defense lawyers should consider the possible strategic benefits of a propensity challenge. Should the prosecutor respond with the argument that jurors will not necessarily make the propensity assumption that the defendant must have learned drug jargon by committing drug crimes, by inference the government has explicitly conceded that drug language is accessible to those outside the drug-trafficking community. This opens the door to the defense argument that, if drug terminology has entered the vernacular and can be understood by those not in the drug trade, expert testimony is not necessary, especially when balanced against the substantial risk of unfair prejudice to the defendant. In addition, in the close case where the court may be dubious of the reliability of proffered drug jargon expertise, propensity concerns may tip the balance in the defendant’s favor. Finally, even if the propensity argument is not persuasive, the defense has laid the groundwork for clear limiting instructions.

**Prior crimes, bad acts should be inadmissible**

Defense counsel should also be prepared to challenge a related government argument that a defendant’s objection to drug jargon expertise opens the door to admission of the defendant’s prior convictions under Federal Rule of Evidence 404(b). This question was recently addressed for the first time by the Second Circuit. (Garcia, 291 F.3d at 127.) In Garcia, the government’s evidence included a taped conversation between the defendant and a cooperating witness. (Id. at 132-34.) At the time of the conversation the defendant was an asbestos supervisor, the witness worked in the asbestos industry, and the conversation appeared to relate to an upcoming asbestos project. Yet the prosecutor persuaded the court that the defendant and witness were discussing a coded drug deal. Although the defendant did not testify at trial, the judge allowed the prosecutor to introduce Garcia’s 12-year-old conviction for cocaine possession under Rule 404(b), over defense objection. (Id. at 135.) The trial court reasoned that “the prior conviction was admissible as a similar act to show knowledge and intent of the allegedly coded language Garcia used to negotiate the instant drug deal.” (Id.) The Second Circuit did not agree. (Id. at 137.) The appellate court held that “[t]he government may not invoke Rule 404(b) and proceed to offer, carte blanche, any prior act of the defendant in the same category of crime.” (Id.) According to the Second Circuit, prior crimes are not relevant for the purpose of establishing knowledge or intent under 404(b) when the earlier crime: (1) was a long time ago; (2) involved different quantities of drugs; (3) involved different people; and (4) did not clearly involve the use of drug jargon. (Id. at 138-39.) Thus, Garcia provides direct support for future defense challenges whenever these factual predicates have not been satisfied.

**Conclusion**

Judges should be especially wary when any witness bases opinion testimony “on his own subjective observations over the course of his experience, available only to him and in their individual form now almost certainly only imperfectly recalled, if at all.” (Mark P. Denbeaux & D. Michael Risinger, Kumho Tire and Expert Reliability: How the Question You Ask Gives You the Answer You Get, 34 SETON HALL L. REV. 15, 52 (2003).) Personal opinions should always be excluded when they are self-validating. Judges who correctly apply the Daubert/Kumho/Rule 702 standard (or its state equivalent) should exclude experience-based expertise, such as law enforcement drug jargon testimony, unless the expert can “explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts.” (Fed. R. Evid. 702, Advisory Committee’s note.) Currently, judges are allowing prosecutors to present conjecture and speculation disguised as expertise, while denying the defense access to information necessary for effective cross-examination. Defense lawyers should be prepared to attack the three basic assumptions that underlie general judicial acceptance of drug jargon evidence and demonstrate that this evidence is often unhelpful and/or unreliable. Drug jargon evidence should always be challenged whenever it violates Rule 701, Rule 702, the discovery rules, Rule 403, or the ban on propensity evidence. If we continue to allow police witnesses to enjoy unfettered autonomy in narcotics cases, how can we hope to rein them in when the government decides to wage “war” on the next type of crime?