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What Happens When Dirty Harry Becomes an (Expert) Witness for the Prosecution?

Joëlle Anne Moreno*

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In the aftermath of September 11, "Americans have apparently heeded the U.S. government's advice to prepare for terror attacks, emptying hardware store shelves of duct tape." Before rushing out to buy duct tape, you should be forewarned that according to the United States Court of Appeals for the District of Columbia, duct tape is a "tool of the narcotics trade." This means that a police officer expert testifying for the prosecution may properly tell the jury that duct tape "is often used 'by people in the drug world to bind hands, legs, and mouths of people who are either being robbed in the drug world or who need to be maintained.'"

Judges routinely admit expert testimony offered by prosecutors, but frequently exclude expert testimony offered by the defense. A review of federal criminal court cases reveals that 92% of prosecution experts survive defense challenges, while only 33% of defense experts survive challenges by federal prosecutors. A recent study of federal appellate criminal cases found that more than 95% of prosecutors' experts are admitted at trial, while fewer than 8% of defense experts are allowed to testify.

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2. United States v. Moore, 104 F.3d 377, 384 (D.C. Cir. 1997) (finding that this opinion testimony was properly admitted because "[t]he fact that duct tape is a tool of the narcotics trade is likely beyond the knowledge of the average juror but is relevant to the issue of Moore's intent to distribute the drugs found in his possession").
3. Id.
5. See Risinger, supra note 4, at 109-10 (noting that his data reveal that "rarely has a federal prosecutor had proffered expertise excluded on dependability grounds").
6. This recent study reviewed approximately 700 federal and state appellate criminal court cases. 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, 344 (2002).

At both adjudicative levels, experts proffered by the prosecution were more likely to be admitted than experts proffered by defendants. At the trial court level,
Why do judges consistently fail to scrutinize prosecution experts? Maybe it is the uniform. The most common prosecution expert witness is a police officer or a federal agent. In state and federal criminal trials, law enforcement experts are routinely permitted to testify to opinions and conclusions derived from their on-the-job experience and personal observations. Prosecutors rely on police officer experts most frequently in narcotics cases. In drug cases, law enforcement experts are often asked to interpret ambiguous words or phrases used by the defendant and/or his coconspirators. The purpose of, and problem with, this expert testimony is that it tells jurors precisely which incriminatory inferences they should draw from the factual evidence.

Cases from all of the federal circuits reveal that judges readily accept prosecutors' empirically unsupported assumption that jurors need police experts "to explain both the operations of drug dealers and the meaning of coded conversations about drugs." Defense attorneys

prosecution experts were admitted 95.8% ... of the time, and defendant-appellant experts were admitted only 7.8% ... of the total number of times they were offered. This pattern was slightly less pronounced at the appellate level, with prosecution experts admitted 85.1% ... of the time and defense experts admitted 18.8% ... of the total number of times they were offered.

Id. at 369-70. However, data drawn from appellate cases should not be misconstrued. The fact that the overwhelming number of criminal appeals are filed by defendants cautions against drawing too many general conclusions about what happens at trial from empirical research that is limited to the appellate courts.

7. Professors David L. Faigman and James E. Starrs have repeatedly criticized courts for the lax standards they apply to prosecutors’ law enforcement experts. See, e.g., Mark Hansen, Dr. Cop on the Stand: Judges Accept Police Officers as Experts Too Quickly, Critics Say, A.B.A. J., May 2002, at 31-32, 34. In this article, Professor Faigman describes his disappointment at the fact that courts are generally willing to admit police officer expert testimony despite the fact that they “have little research or data to support their opinions.” Id. at 34. Professor Starrs expresses a similar view, observing that although judges are required to exclude unreliable testimony, when police officers testify, unreliable evidence "kind of slips in under the gatekeeper's door." Id.

8. See Groscup et al., supra note 6, at 345.

9. See id.

10. See id.

11. See id.

12. See United States v. Garcia, 291 F.3d 127, 142 (2d Cir. 2002) (noting that the problem with opinion testimony explaining drug jargon is that it “direct[s] the jury what to conclude on a matter that it should decide in the first instance”).

13. United States v. Dukagjini, 326 F.3d 45, 52 (2d Cir. 2003), cert. denied, 124 S. Ct. 2832 (2004); see, e.g., United States v. Delpit, 94 F.3d 1134, 1145 (8th Cir. 1996) ("It is well established that experts may help the jury with the meaning of jargon and codewords."); United States v. Theodoropoulos, 866 F.2d 587, 591 (3d Cir. 1989) (identifying law enforcement expert testimony interpreting drug jargon as "the paradigm situation for expert testimony under Rule 702"); overruled on other grounds by United States v. Price, 76 F.3d 526, 528 (3d Cir. 1996).
who seek exclusion based on a more critical judicial analysis—arguing that jurors can understand drug-related words without assistance, that jurors should be permitted to draw their own inferences, or that any arguable relevance is "substantially outweighed by the danger of unfair prejudice" to the defendant—invariably fail.¹⁴

Why should we be concerned that police experts often play a crucial role in obtaining convictions? At a minimum, this fact demonstrates that the Daubert revolution, aimed at upgrading the quality of expert evidence, has had surprisingly little impact in the criminal courts. Eleven years after Daubert and four years after Federal Rule of Evidence 702 was amended to include a more explicit reliability requirement, the most common type of prosecution expert testimony continues to escape judicial scrutiny.¹⁵ A review of the relevant case law demonstrates that Daubert and Rule 702 have failed in their promise to create consistent and equitable admission standards in the criminal courts.¹⁶

¹⁴. FED. R. EVID. 403 ("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."); see, e.g., Dukagjini, 326 F.3d at 52 ("Turning to appellants' first argument, we reject the contention that, because the conversations were readily understandable, the expert testimony should have been excluded altogether. The Rules of Evidence provide a liberal standard for the admissibility of expert testimony. Frequently, some of the details of drug operations, as they emerge in intercepted conversations, are quite opaque." (citations omitted)); United States v. Castiello, 915 F.2d 1, 3 (1st Cir. 1990) ("The vocabulary [sic] form the defendant employed with Desmond was not so readily comprehensible to the layman that it could not bear elucidation by a law enforcement agent knowledgeable in the ways of the drug world. The admission was phrased in drug world jargon."); United States v. Rollins, 862 F.2d 1282, 1292 (7th Cir. 1988) (rejecting defendant's argument that jurors could understand the meaning of the telephone conversations without assistance from the FBI expert). But see United States v. Gonzalez-Maldonado, 115 F.3d 9, 17 (1st Cir. 1997) (noting that "[e]xpert testimony on a subject that is well within the bound of a jury's ordinary experience generally has little probative value").

¹¹⁵. Federal Rule of Evidence 702 now reads:

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. 702 (italics indicate December 1, 2000, amendments to the previous rule).

¹¹⁶. See Lloyd Dixon & Brian Gill, Changes in the Standards for Admitting Expert Evidence in Federal Civil Cases Since the Daubert Decision, 8 PSYCHOL. PUB. POLY & LAW 251, 252 (2002) ("Before Daubert, there was no universally followed standard for determining the admissibility of expert evidence in the federal courts.").
Judges abjure their gatekeeping responsibilities when they fail to scrutinize an expert's qualifications, methodology, and application of these methods to the facts. But more careful pretrial screening is only a partial solution. Once the police expert takes the stand, the court must control the scope of her testimony. Currently, judicial control of prosecution experts is so lax that "hardly a day goes by when some beat cop or narcotics detective somewhere isn't testifying as an expert about one thing or another, from the intent of a defendant caught with drugs to the organizational structure and hierarchy of street gangs." This can include highly speculative testimony, such as telling the jury that the "fact" that a defendant had rolled up his pants leg meant that he was selling drugs. It can also include expert inferences and conclusions about a defendant's purpose or intent, such as telling the jury that a defendant's statement "I was on that last night, plus we're going to be on that tonight," means that he was planning to "locate or find some individual and hurt them." This type of testimony, grounded only in an expert's subjective on-the-job experience, continues unabated as courts consistently reject defense challenges based on Federal Rules of Evidence 702, 704(b), or 403.

17. See FED. R. EVID. 702; Kumho Tire Co. v. Carmichael, 526 U.S. 137, 153 (1999) (emphasizing that admissibility is often determined by the application of an expert's methodology to the facts at issue); Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 592-95 (1993) (providing four objective, but flexible, admissibility criteria for future courts: (1) testability, (2) peer review and publication, (3) error rate, and (4) general acceptance).
18. Hansen, supra note 7, at 32.
19. United States v. Harris, 192 F.3d 580, 584 (6th Cir. 1999).
20. United States v. Gibbs, 190 F.3d 188, 210 (3d Cir. 1999) (internal quotations omitted); id. at 211 (holding that while this statement was unhelpful, it was harmless error and did not violate Rule 704(b) because the expert's testimony never crossed into interpreting the defendant's intent or mental state).
21. FED. R. EVID. 702.
22. Federal Rule of Evidence 704(b) reads:
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(b); see United States v. Dukagiini, 326 F.3d 45, 53 (2d Cir. 2002) ("Rule 704(b) ... does not restrict conclusions about facts, such as opinion evidence identifying subjects of a conversation. In Simmons [923 F.2d 934, 942 (2d Cir. 1991)], we concluded that the witness's interpretation of drug terminology, including specification of certain drugs, did not violate 704(b) because it left to the jury the task of determining whether the decoded terms demonstrated the necessary criminal intent." (internal quotations omitted)), cert. denied, 124 S. Ct. 2832 (2004); United States v. Theodoropoulos, 866 F.2d 587, 591 (3d Cir. 1989) (finding that FBI expert's opinions about the structure of the drug trafficking operation
Problems of prejudice and confusion also arise when, as is often the case, the law enforcement expert is the investigating officer. The circuits are in significant disagreement about whether police expert testimony should be limited to the officer’s general knowledge or whether it may properly include specific inferences drawn from facts developed during the investigation of the defendant’s case. Problems abound when experts make inferences and draw conclusions that rely on factual evidence derived from their own investigations. The dual role of fact and expert witness contains a built-in incentive for the witness to shape the facts to fit the opinion or the opinion to fit the facts. Witnesses can also deliberately or unintentionally blur the distinction between fact and opinion misleading or confusing jurors in violation of Rule 403. Whenever an expert draws from personal knowledge gained during an investigation from sources that have unestablished reliability, it also increases the likelihood that her testimony will contain otherwise inadmissible evidence. Finally,
judicial qualification of a police officer as an “expert” can imbue all of her testimony, including her fact testimony, with an aura of neutrality or expertise that can artificially enhance her credibility.

We have a problem when twenty-first-century criminal courts seem like the Wild West to the expert who carries a gun and a badge. Recent empirical data and a review of relevant cases reveal that law enforcement experts who serve as members of the prosecution team have essentially unfettered access to juries. It is inarguable that jurors may require expert assistance analyzing foreign or unfamiliar evidence in some cases. When police officers have necessary expertise and can demonstrate the reliability of their methods and the proper application of these methods to the appropriate facts, they should be permitted to testify. However, there is no excuse for failing to subject expert opinions to the more rigorous scrutiny required by any reasonable reading of *Daubert*, *General Electric Co. v. Joiner*, *Kumho Tire Co. v. Carmichael*, and the new Rule 702. The complex problems endemic to law enforcement expert testimony have been ignored for too long by judges easily satisfied with a cursory review of expert qualifications and perfunctory acceptance of a panoply of a police opinions and conclusions.

There is no quick fix that will stem the tide of judicial permissiveness, but there are six sources of hope. First, the beefed-up reliability requirement added to Rule 702 provides new arguments for rigorous judicial scrutiny of all expert evidence. Second, the United States Court of Appeals for the Ninth Circuit recently became the first federal appellate court to use Rule 702 to assess the reliability of drug jargon expert testimony. Third, *Kumho Tire* requires that an expert “employs in the courtroom the same level of intellectual rigor” as in her chosen field. This is impossible because drug jargon is not a legitimate field of study. Fourth, even when judges opt to admit expert

that drug jargon expert evidence should be excluded if the court determines that the prosecutor seeks to use the expert as a “mouthpiece” for a cooperating witness who would not be as credible).

31. FED. R. EVID. 702.
32. See Hansen, supra note 7, at 34 (“[T]rial courts hardly ever hold police officers to the same admissibility standards that apply to other types of expert testimony, some law scholars charge.”).
33. See infra Part II.B.1 (discussing *United States v. Hermanek*, 289 F.3d 1076 (9th Cir. 2002), cert. denied, 537 U.S. 1223 (2003)).
34. *Kumho Tire Co.*, 526 U.S. at 152.
testimony, a series of recent circuit court cases suggest that judges must still limit experts’ testimony at trial.\textsuperscript{35} Fifth, the previously unexplored relationship between drug jargon testimony and propensity evidence may be an untapped source of effective defense arguments. Finally, this exploration of how prosecutors use police experts raises serious questions about how to best ensure that evidentiary standards do not prejudice criminal defendants.

It is worth mentioning from the start that police officers will sometimes accurately opine that “pianos,” “boyfriends,” “briefs,” and “motions” are code words for heroin.\textsuperscript{36} But dispensing with judicial scrutiny because expert testimony is potentially reliable is akin to dispensing with suppression hearings because they involve potentially reliable and inevitably inculpatory evidence. The post-September 11 future enhances the dangers of judicial deference to police experts as law enforcement and prosecutors become endowed with even greater actual and perceived authority. It is time for criminal courts to recognize that conscientious judicial oversight is critical in all prosecutions that rely on police officer expertise.

I. BACKGROUND AND CONTEXT: THE FAILURE OF GOOD INTENTIONS

A. The Promise of a Daubert Revolution

The United States Supreme Court’s decision in \textit{Daubert v. Merrell Dow Pharmaceuticals, Inc.}\textsuperscript{37} was provoked by the growing concern that jurors were basing legal decisions on unreliable expert testimony. The underlying rationale of \textit{Daubert} was that “lay jurors should not be exposed to unfiltered scientific or technical testimony that may adversely influence their findings of fact.”\textsuperscript{38} This concern lead the Court to craft a new judicial gatekeeping role. After \textit{Daubert}, judges would be required to engage in a more scrupulous assessment of proffered scientific expert testimony. The need for enhanced preadmission gatekeeping was based “on two underlying assumptions: (1) that the trial judge is more knowledgeable in assessing complex scientific testimony than is the . . . lay juror and (2) that each judge brings to the specific task of gatekeeping a general attitude or
philosophy concerning the level of scrutiny appropriate for scientific gatekeepers.” To assist judges who would now need to locate proffered evidence on the continuum between reliable and unreliable, Justice Blackmun, writing for the majority, outlined four objective, but flexible, admissibility criteria: (1) testability, (2) peer review and publication, (3) error rate, and (4) general acceptance.

In the six years after Daubert, the Supreme Court decided two more “science and law” cases. In General Electric Co. v. Joiner, Chief Justice Rehnquist, writing for the majority, effectively insulated gatekeeping from appellate review by applying an abuse of discretion standard to all evidentiary rulings, including the exclusion of scientific expert testimony. The Joiner Court also expanded and refined the Court’s evolving expert admissibility doctrine, suggesting that judges must avoid simplistic line-drawing. According to the Joiner Court,

39. Id.
40. See Daubert, 509 U.S. at 592-95.
41. 522 U.S. 136, 142-43 (1997). The Supreme Court granted certiorari in Joiner to resolve the question left open by Daubert of the appropriate standard for appellate review of a trial court’s decision to admit or exclude scientific evidence. Id. at 138-39. In Joiner, the plaintiff claimed the exposure to polychlorinated biphenyls (PCBs) had caused his lung cancer. Joiner v. Gen. Elec. Co., 864 F. Supp. 1310, 1314 (N.D. Ga. 1994), rev’d, 78 F.3d 524 (11th Cir. 1996), rev’d, 522 U.S. 136 (1997). To support his claim, the plaintiff offered four epidemiological studies that purportedly established a causal link between defendant’s PCBs and plaintiff’s cancer. Joiner, 522 U.S. at 145. The district court reviewed the plaintiff’s four studies and found that: (1) the first study did not conclude that PCB had caused lung cancer among the workers they examined; (2) the second study found that there was a slightly increased incidence of lung cancer among workers at a PCB plant, but that the increase was not statistically significant; (3) the third study did not mention PCBs; and (4) the fourth study’s subjects “had been exposed to numerous potential carcinogens.” Id. at 145-46. After excluding all of the plaintiff’s scientific expert testimony, the district court granted summary judgment for the defendant. Id. at 140. The United States Court of Appeals for the Eleventh Circuit used a “stringent standard of review” to reverse the district court. Id. at 141-43. The Supreme Court concluded that the appropriate standard was “abuse of discretion.” Id. at 143. For examples of cases where errors were deemed harmless, see United States v. Dukagjini, 326 F.3d 45, 54 (2d Cir. 2003) (finding harmless error despite the court’s finding that government police experts should be barred from making “sweeping conclusions” that cannot be grounded in the application of a reliable methodology and that permitting a case agent to summarize her beliefs creates unfair prejudice to the defendant by, in effect, allowing the prosecutor to make two summations), cert. denied, 124 S. Ct. 2832 (2004); United States v. Gibbs, 190 F.3d 188, 213 (3d Cir. 1999) (finding that the admission of law enforcement expert testimony interpreting the defendant’s statements was harmless error despite the court’s conclusion that it “was not helpful to the jury” and that “the only purpose of that testimony was to bolster the government’s allegations”); United States v. Nersesian, 824 F.2d 1294, 1308 (2d Cir. 1987) (finding harmless error despite the court’s explicit concern that if police officer expert interpretation of drug jargon is “uncontrolled” this “use of expert testimony may have the effect of providing the government with an additional summation by having the expert interpret the evidence”).
42. See Joiner, 522 U.S. at 146.
judges should recognize that scientific "conclusions and methodology are not entirely distinct from one another." Justice Rehnquist also specifically reminded judges that they must take their gatekeeping roles seriously, noting that "nothing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert." Two years later, the Court offered a significant clarification of the gatekeeping role in Kumho Tire Co. v. Carmichael. Kumho Tire made two explicit additions to the Daubert requirements: (1) Kumho Tire expanded the scope of the Daubert gatekeeping role to include testimony by experts with technical or other specialized, nonempirical knowledge, and (2) Kumho Tire added the requirement that experts employ "the same level of intellectual rigor" in the courtroom as in their fields of research.

It should be clear, even from this brief discussion, that Daubert explicitly requires that trial judges independently assess the reliability of expert evidence as a threshold question of admissibility and not pass the buck to the jury by labeling this a question of weight. With a limited number of exceptions, that is how Daubert and its progeny have been understood. The problem, as the empirical evidence

43. Id.
44. Id.
46. See id. at 147-48; see also Edward K. Imwinkelried, The Taxonomy of Testimony Post-Kumho: Refocusing on the Bottomlines of Reliability and Necessity, 30 CUMB. L. REV. 185, 209 (2000) (noting that prior to Kumho Tire, "[t]he objective validity of a non-scientific expert's premises was essentially exempt from any scrutiny").
47. Kumho Tire Co., 526 U.S. at 152.
48. One recent case from the Eleventh Circuit illustrates how courts can misconstrue their Daubert gatekeeping obligations, effectively abnegating responsibility for reliability decisions. In Quiet Technology DC-8, Inc. v. Hurel-Dubois UK Ltd., the appellant challenged the admission of defense expert trial testimony, arguing that the expert had "misused a method that, in the abstract, is reliable." 326 F.3d 1333, 1345 (11th Cir. 2003). The appellate court recast the question, finding that "although [r]ulings on admissibility under Daubert inherently require the trial court to conduct an exacting analysis of the proffered expert's methodology, it is not the role of the district court to make ultimate conclusions as to the persuasiveness of the proffered evidence." Id. at 1341 (internal quotations and citations omitted). By redefining the reliability of an expert's application of his methods to the facts, which should fall squarely within the judge's purview, as a question of "persuasiveness," the court was able to conclude that "the alleged flaws in Frank's analysis are of a character that impugn the accuracy of his results, not the general scientific validity of his methods." Id. at 1345. When the Eleventh Circuit concluded that this finding meant that the appellant had failed to raise an argument relating to admissibility, the court completely misconstrued its Daubert obligations. The Eleventh Circuit's mistake was to define this as a question of weight, leading the court to conclude that "the identification of such flaws in generally reliable scientific evidence is precisely the role of cross-examination." Id.
demonstrates, is not with the interpretation of the doctrine, but with the application of the standard in real criminal cases.

B. The Promise of a New Rule 702

Just four years ago, Rule 702 of the Federal Rules of Evidence was significantly expanded. The new rule codifies the judicial "gatekeeping" role created in *Daubert* and refined in *Joiner* and *Kumho Tire*. Rule 702 now governs the admission of expert testimony as follows:

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

The revised rule was a direct response to developing Supreme Court doctrine on science and law and an attempt to circumvent judicial efforts to avoid gatekeeping "through the simple expedient of proffering an expert in lay witness clothing."

The amendments to Rule 702 reflect the fact that pretrial admissibility decisions now require an independent judicial reliability assessment. In fact, the Advisory Committee's Note specifically explains that, like *Daubert*, "[t]he amendment affirms the trial court's role as gatekeeper and provides some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony." The Supreme Court's decision in *Joiner* is the

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49. *FED. R. EVID.* 702.
52. 526 U.S. at 147-48, 152.
53. *FED. R. EVID.* 702 (italics indicate December 1, 2000, amendments to the previous rule).
54. *FED. R. EVID.* 702 advisory committee's note (noting that some courts have become too lenient in the admission of lay witness testimony on subjects that are appropriate for expert testimony).
55. *FED. R. EVID.* 702 advisory committee's note. However, the Advisory Committee also warns that the new rule should not be interpreted as requiring satisfaction of all of the *Daubert* guidelines as a prerequisite to the admission of expert evidence. According to the Advisory Committee, "[n]o attempt has been made to 'codify' these specific [*Daubert*] factors. *Daubert* itself emphasized that the factors were neither exclusive nor dispositive. Other cases have recognized that not all of the specific *Daubert* factors can apply to every type of expert testimony." *Id.* To highlight the fact that the *Daubert* guidelines are neither
source of the new Rule 702 requirement that judges scrutinize the expert’s application of principles and methods to the specific facts of the case, rather than simply the expert’s conclusions. The new rule also incorporates the Kumho Tire holding that gatekeeping requirements must now be applied to the broad range of experts who have “scientific, technical, or other specialized knowledge.”

The Advisory Committee also clarified the relationship between Federal Rules of Evidence 702 and 703.

There has been some confusion over the relationship between Rules 702 and 703. The amendment makes clear that the sufficiency of the basis of an expert’s testimony is to be decided under Rule 702. Rule 702 sets forth the overarching requirement of reliability, and an analysis of the sufficiency of the expert’s basis cannot be divorced from the ultimate reliability of the expert’s opinion. In contrast, the “reasonable reliance” requirement of Rule 703 is a relatively narrow inquiry. When an expert relies on inadmissible information, Rule 703 requires the trial exclusive nor dispositive, the Advisory Committee listed several other factors that judges should consider relevant to determining the validity and admissibility of proffered expert testimony. These include “[w]hether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion,” “[w]hether the expert has adequately accounted for obvious alternative explanations,” and “[w]hether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.” Id. (citing Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999); Moore v. Ashland Chem., Inc., 151 F.3d 269 (5th Cir. 1998); Sterling v. Velsicol Chem. Corp., 855 F.2d 1188 (6th Cir. 1988)).

56. 522 U.S. at 146 (noting that there must be sufficient correlation between the specific data and the expert’s conclusions for the evidence to be admissible). As courts begin to apply the amended rule, some have explicitly recognized the broader scope and more detailed fact-intensive inquiry. For example, in Rudd v. General Motors Corp., the court noted that “[w]hile Kumho affirmed the potential applicability of the Daubert factors to testimony that is technical-, engineering-, or experienced-based, the Kumho court also made it clear that a trial court should tailor its Rule 702 evaluation to the particular circumstances before it.” 127 F. Supp. 2d 1330, 1336 (M.D. Ala. 2001). This same court also recognized that the new Rule 702 appears to require a trial judge to make an evaluation that delves more into the facts than was recommended in Daubert, including as the rule does an inquiry into the sufficiency of the testimony’s basis (“the testimony is based upon sufficient facts or data”) and an inquiry into the application of a methodology to the facts (“the witness has applied the principles and methods reliably to the facts of the case”).

Id.

57. See FED. R. EVID. 702 advisory committee’s note (“Consistently with Kumho, the rule as amended provides that all types of expert testimony present questions of admissibility for the trial court in deciding whether the evidence is reliable or helpful.”); Kumho Tire Co., 526 U.S. at 147-48.
court to determine whether that information is of a type reasonably relied on by other experts in the field.\textsuperscript{58}

It is now clear that 702 regulates the flow of information to the jury and Rule 703, which has a more limited role,

governs only the disclosure to the jury of information that is reasonably relied on by an expert, when that information is not admissible for substantive purposes. It is not intended to affect the admissibility of an expert's testimony. Nor does the amendment prevent an expert from relying on information that is inadmissible for substantive purposes.\textsuperscript{59}

In practice, this clarification should preclude proponents of expert testimony from arguing that Rule 703 operates independently to admit evidence, if it is of a type "reasonably relied upon by experts in the particular field,"\textsuperscript{60} despite the fact that it does not satisfy Rule 702.

C. Recent Empirical Evidence Shows that Daubert and the New Rule 702 Have Failed to Transform the Criminal Courts

\textit{Daubert} requires an extraordinary exercise of judgment on matters of considerable intellectual complexity if the evidentiary landscape of the courtroom is to match that of the laboratory—rather, say, than that of the \textit{National Enquirer}.\textsuperscript{61}

Given the importance of \textit{Daubert} and its explicit directive to future judges that they change their behavior, it would be reasonable to assume that \textit{Daubert} would have had a dramatic effect on the criminal courts over the past decade.\textsuperscript{62} Recently psychologists and lawyers have joined forces to map \textit{Daubert}'s effect on federal and state appellate courts.\textsuperscript{63} This comprehensive new study was motivated both by curiosity about the real-world implications of \textit{Daubert} and a nagging concern that courts and commentators have been too focused on \textit{Daubert}'s civil implications.\textsuperscript{64} To these researchers, and others, this disparity seemed counterintuitive given the fact that \textit{Daubert}'s

\begin{footnotes}
\item[58.] FED. R. EVID. 702 advisory committee's note.
\item[59.] FED. R. EVID. 703 advisory committee's note.
\item[60.] FED. R. EVID. 703.
\item[62.] See Groscup et al., supra note 6, at 353 ("Given the importance of the \textit{Daubert} decision and the attention paid to it, a dramatic increase in the courts' attention to the four \textit{Daubert} criteria would be expected.").
\item[63.] See \textit{id.} at 342-43.
\item[64.] See \textit{id.} at 341-42.
\end{footnotes}
influence on criminal cases "is especially important because of the significance of a potentially unfavorable outcome for the defendant."65

Before beginning this project, the authors predicted that they would find that judges were actively applying Rule 702 of the Federal Rules of Evidence (or the state equivalent) and using Daubert's four admissibility criteria to screen expert evidence proffered by both prosecutors and defendants.66 To test this hypothesis, researchers

65.  Id. at 342 ("In a criminal case, the outcome of the decision to admit or exclude expert testimony could affect the defendant's freedom, liberty, and life."); see also Paul C. Giannelli, The Supreme Court's "Criminal" Daubert Cases, 33 SETON HALL L. REV. 1071, 1072-76 (2003). Giannelli argues that this outcome is not only counterintuitive, but unfair: "The notion that expert testimony in criminal and civil cases should be treated differently does not seem, at least to me, to be a remarkable proposition. The issues are very different. Instead of worrying about the "hired gun" phenomenon as in civil litigation, the criminal defense lawyer often lacks money for any 'gun.'" Id. at 1072.

examined 693 appellate court decisions.\textsuperscript{67} These were evenly divided between federal and state cases.\textsuperscript{68} Data were gathered using two methods. The first method was an attempt to measure \textit{Daubert's} impact by calculating the length of each portion of the text of the opinion devoted to each of the admissibility criteria.\textsuperscript{69} The second

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\textsuperscript{67} Groscup et al., \textit{supra} note 6, at 344.

\textsuperscript{68} \textit{Id.} Researchers reviewed and coded 372 criminal appellate cases from the federal courts and 321 from state appellate courts. \textit{Id.}

\textsuperscript{69} \textit{See id.} at 348 (including as admission criteria Rule 702, \textit{Frye}, and each of the four \textit{Daubert} factors (peer review and publication, error rate, falsifiability, and general acceptance)). The initial measurement involved counting the number of words addressing each criterion. \textit{Id.} Researchers found that the average length of a federal/state criminal
method involved a more detailed assessment of the degree of influence each of the *Daubert* factors exerted on the appellate court's decision.\(^7\) The data do not support their initial hypothesis.\(^7\) In fact, the data supports the opposite conclusion; that "the most mysterious impact of the *Daubert* decision [on the criminal courts] is the lack of discussion devoted to the four *Daubert* criteria themselves."\(^7\)

This study provides the first empirical evidence that despite all of the academic time and attention paid to *Daubert*, it has had little or no impact in real criminal cases. In addition, the study offers unique insight into the profile of a typical criminal case appealed, at least in part, because of the trial judge's decision to admit or exclude expert evidence. Although it is not surprising to learn that 97.4% of criminal appeals were filed by criminal defendants, we now know that in 76.1% of these cases the appeal focused on prosecution expert testimony admitted by the trial court.\(^7\) It is also interesting to note that in 66% of these cases no experts testified at trial for the defense.\(^7\)

This study also presents a global picture of the different types of expert testimony generally offered by both sides in a criminal case. Although researchers classified more than seventy different "expert domains," they organized their data into four categories of expert testimony: (1) technical-engineering, (2) medical-mental health, (3) scientific, and (4) business.\(^7\) Using these categories, they found that prosecutors were most likely to rely on testimony from "technical experts."\(^7\) They also discovered that the most common prosecution technical expert is a law enforcement officer.\(^7\) Law enforcement experts are most commonly called to testify to police procedures, which "typically concerned officers' observations of drug dealing activities and the procedures used by the police in apprehending this

appellate opinion is 5257 words. *Id.* at 350. The average length of the judge's discussion of expert testimony is 968 words. *Id.* Judges devoted the most attention to the application of Rule 702 (an average of 228 words). *Id.* Frye received an average of seventy-nine words, while *Daubert* received an average of sixty-one words. *Id.* The four *Daubert* reliability criteria, in descending order of importance were: general acceptance (an average of 22.73 words); falsifiability (an average of 4.69 words); error rate (an average of 2.35 words); and peer review and publication (an average of .7 words). *Id.*

70. *Id.* at 343.
71. *Id.* at 353.
72. *Id.*
73. *Id.* at 344.
74. *Id.* at 344-45.
75. *Id.* at 345.
76. *Id.* (following technical experts were medical-mental health experts, scientific experts, and business experts, the least common type of expert).
77. *Id.*
type of perpetrator.”78 In fact, more than 34% of all experts proffered by prosecutors were experts in “police procedures.”79

Finally, the study provides deeply disturbing empirical support for what the cases tell us anecdotally: that, despite Daubert, judges remain remarkably willing to admit prosecution experts but reluctant to admit experts testifying for the defense. Judicial behavior might be explained by the fact that “[p]rosecution experts are frequently employees of the state and are crucial to the adjudication of criminals ... [so] they could be perceived as inherently reliable.”80 It might also be explained by the fact that “prosecutors and defense attorneys need different types of experts to make their cases-in-chief.”81 Whatever the explanation, Daubert appears to have had little impact on the overwhelming inclination of judges to admit prosecution experts in police procedures. Before Daubert, judges admitted 90.3% of these experts, after Daubert, 89.9%.82

II. WITNESS FOR THE PROSECUTION: THE EXPERT POLICE OFFICER

A. The Federal Courts Assume that Drug Jargon Expertise Is Helpful and Reliable

“I think the courts tend to roll over when police officers are proffered as experts.”83

How do judges decide whether jurors can understand expert evidence without assistance? The Advisory Committee’s Note to Rule 702 suggests that expert opinions are warranted only when “[a]n intelligent evaluation of the facts is ... difficult or impossible without the application of some scientific, technical, or other specialized knowledge.”84 In practice, it appears that whenever the expert is a police officer, this threshold requirement disappears. Judges are satisfied with nothing more than the prosecutor’s assertion that law enforcement expertise is required.85

78. Id.
79. Id. at 346.
80. Id. at 342.
81. See Slobogin, supra note 4, at 109 (noting that prosecutors generally use experts to explain physical facts while defense attorneys use experts to describe the defendant’s mental state).
82. Groscup et al., supra note 6, at 347.
83. Hansen, supra note 7, at 34 (quoting Professor David L. Faigman).
84. FED. R. EVID. 702 advisory committee’s note.
85. See Hansen, supra note 7, at 32, 34.
The problem with allowing police officers to testify as experts is that courts rarely require that police meet the standards of relevancy and reliability, standards which are required of experts in other fields. Thus, while most states would require scientific, technological, or other specialized experts to present reliable statistical proof supporting their opinions, "when it comes to police, . . . '[the testimony] kind of slips in under the gatekeeper's door.'" Inevitably, in certain cases, police officers will have a more sophisticated or comprehensive understanding of the language or behavior of those who sell drugs than the average juror. When appropriate and in a limited fashion, judges should allow prosecutors to present this evidence to the jury. Problems arise when claims of expertise are not evaluated, when experts are allowed to instruct the jury that factual evidence should lead them to draw specific inculpatory inferences, and when the boundaries of expert testimony are vague or nonexistent.

Numerous federal circuit courts have simply assumed, without explanation or support, "that narcotics code words and the operations of drug dealers are generally an appropriate subject for expert testimony." The United States Court of Appeals for the Second Circuit, for example, has "repeatedly upheld the use of expert testimony by government agents to describe the characteristics and operating methods of narcotics dealers." It has also found that "experienced narcotics agents may explain the use and meaning of codes and jargon developed by drug dealers to camouflage their activities." Similarly, the Tenth Circuit "has repeatedly held that in

87. United States v. Rollins, 862 F.2d 1282, 1292 (7th Cir. 1988); see also United States v. Garcia, 291 F.3d 127, 139 (2d Cir. 2002) ("We long have recognized that drug dealers seldom negotiate the terms of their transactions with the same clarity as business persons engaged in legitimate transactions.").
88. United States v. Boissoneault, 926 F.2d 230, 232 (2d Cir. 1991) (citations omitted). The court noted, however, that the defense did not challenge the expert's qualifications at trial. Id. at 231 n.1.
89. Id. at 232; see also United States v. Campino, 890 F.2d 588, 592-93 (2d Cir. 1989) (holding that a case agent's testimony about drug operations was properly admitted and did not violate Rule 704); United States v. Tutino, 883 F.2d 1125, 1133-34 (2d Cir. 1989) (rejecting defendants' contention that admission of a DEA agent's testimony deprived them of a fair trial and noting that the operations of narcotics dealers are a proper subject for expert testimony under Rule 702); United States v. Garcia, 848 F.2d 1324, 1335 (2d Cir. 1988) (holding that a DEA agent's testimony interpreting drug jargon was properly admitted), rev'd on other grounds sub nom. Gomez v. United States, 490 U.S. 858 (1989); United States v. Kusek, 844 F.2d 942, 949 (2d Cir. 1988) (holding that a DEA agent's testimony interpreting
narcotics cases, expert testimony can assist the jury in understanding transactions and terminology.\textsuperscript{90} In a very recent decision, the Sixth Circuit extended this reasoning to approve expert testimony, opining that loaded guns found within a defendant's reach "play a role in drug distribution, as dealers carry them for protection and intimidation purposes.\textsuperscript{91}

In some cases, judges attempt to ground their conclusions in the "specialized knowledge" language of Rule 702 and \textit{Kumho Tire}.\textsuperscript{92} This approach was adopted by the Third Circuit in a decision concluding, without scrutiny, that "drug traffickers' jargon is a specialized body of knowledge and thus an appropriate subject for expert testimony."\textsuperscript{93} A similar approach was used by the Fifth Circuit in a case finding that "[i]t is implausible to think that jurors can understand such arcane allusions without expert assistance [because d]rug traffickers' jargon is a specialized body of knowledge, familiar only to those wise in the ways of the drug trade, and therefore a fit subject for expert testimony."\textsuperscript{94} The Ninth Circuit has found that "the jargon of the narcotics trade and the codes that drug dealers often use constitute specialized bodies of knowledge—certainly beyond the ken of the average juror—and are therefore proper subjects of expert opinion."\textsuperscript{95} The D.C. Circuit has also applied the "specialized knowledge" label to drug jargon expertise, noting that "agents' specialized knowledge would assist the trier of fact to understand the evidence is beyond doubt."\textsuperscript{96}

The remaining circuits simply assume that drug-related language is so complex or foreign that it simply cannot be understood by the lay juror. According to the Eighth Circuit, "[t]here is no more reason to expect unassisted jurors to understand drug dealers' cryptic slang than antitrust theory or asbestosis."\textsuperscript{97} This finding is sometimes premised

coded conversations about drugs was properly admitted and that interpretation of drug jargon is a proper subject for expert testimony).

90. United States v. Quintana, 70 F.3d 1167, 1171 (10th Cir. 1995).
92. See FED. R. EVID. 702; Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147 (1999) (finding that the language of Rule 702 "makes no relevant distinction between 'scientific' knowledge and 'technical' or 'other specialized' knowledge").
94. United States v. Griffith, 118 F.3d 318, 321 (5th Cir. 1997).
96. United States v. Walls, 70 F.3d 1323, 1326 (D.C. Cir. 1995) (internal quotations and citations omitted).
97. United States v. Delpit, 94 F.3d 1134, 1145 (8th Cir. 1996).
on the bald assertion that jurors cannot understand drug jargon because they are unfamiliar with drug culture. For example, the First Circuit has held that jurors cannot be "expected to be familiar with the idiom and workings of the heroin community" and that "[l]ay jurors cannot be expected to be familiar with the lexicon of the cocaine community." According to the Sixth Circuit, jurors' difficulties are compounded when they must understand the meaning of words used "by Hispanic drug traffickers," which require more than mere translation services from a Spanish-speaking police officers. These decisions make it abundantly clear that despite superficial differences in reasoning, the prosecutor's argument that jurors need drug jargon expertise is accepted without judicial scrutiny in the federal courts.

B. Drug Jargon Expertise Is Not Reliable

After Daubert, Kumho Tire, and the new Rule 702, there can be no doubt that trial judges must prevent the introduction of purported expert testimony that lacks adequate reliability. Although a proponent of expert opinion testimony need not prove that her opinions are correct, she must prove, by a preponderance of the evidence, that her testimony is relevant and reliable.

The drafters of the recent amendment to Rule 702 specifically contemplated that judges would need to screen the reliability of law enforcement expert testimony interpreting drug jargon. According to the Advisory Committee's Note:

The amendment requires that the testimony must be the product of reliable principles and methods that are reliably applied to the facts of the case. While the terms "principles" and "methods" may convey a certain impression when applied to scientific knowledge, they remain

98. United States v. Ladd, 885 F.2d 954, 960 (1st Cir. 1989) (noting that because of jurors' lack of familiarity, "[e]xpert interpretation of drug jargon and practices, supplied by one versed in the business, has often been admitted to assist the trier of fact in drug-trafficking cases").


101. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 141 (1999). I have previously addressed the relationship between reliability and validity as legal and scientific terms of art. Although the courts invariably refer to evidentiary reliability, it would be more accurate to refer to validity, because judges are concerned not only with the reproducibility of results, but with their broader implications. I have also suggested that validity should properly be viewed as a continuum, rather than as a binary choice. See Joëlle Anne Moreno, Beyond the Polemic Against Junk Science: Navigating the Oceans that Divide Science and Law with Justice Breyer at the Helm, 81 B.U. L. REV. 1033, 1065-70 (2001).

relevant when applied to testimony based on technical or other specialized knowledge. For example, when a law enforcement agent testifies regarding the use of code words in a drug transaction, the principle used by the agent is that participants in such transactions regularly use code words to conceal the nature of their activities. The method used by the agent is the application of extensive experience to analyze the meaning of the conversations. So long as the principles and methods are reliable and applied reliably to the facts of the case, this type of testimony should be admitted. 103

This section of the Advisory Committee’s Note is interesting for three reasons. The drafters start with two unusual and unsupported factual findings that provide unwarranted support for prosecutors seeking to admit drug jargon experts. 104 First, they assume that “participants in such [drug] transactions regularly use code words to conceal the nature of their activities.” 105 This assumption provides blanket support for the prosecution’s argument that jurors need help understanding the “regularly use[d] code words” of those accused of drug crimes. Second, the drafters suggest that all law enforcement experts use the same presumptively reliable methodology, which involves applying their “extensive experience to analyze the meaning of the conversations.” 106 This implies that all police officers have extensive experience and that they have a common method of analyzing ambiguous language used by defendants accused of narcotics crimes.

The third reason that the Advisory Committee’s Note is interesting is that it also provides language that is potentially useful to the defense. The drafters state unequivocally that Rule 702 requires that judges scrutinize drug jargon experts’ “principles” and “methods” to determine if they are “reliable” and ascertain whether they have been “applied reliably to the facts of the case.” 107 The potential of Rule

103. FED. R. EVID. 702 advisory committee note. The Advisory Committee’s Note states that

[t]here is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute.

Id. (internal quotations omitted).

104. “[T]he courts continue to allow police officers to testify as experts with hardly a glance at the scientific methods or techniques underlying their testimony.” Hansen, supra note 7, at 34 (quoting Professor David L. Faigman).

105. FED. R. EVID. 702 advisory committee’s note.

106. Id.

107. Id.
702 to exclude drug jargon expertise is not evident in the recent empirical data because these questions have only just begun to reach the federal courts.

1. Testing the Power of New Rule 702

Less than two years ago, in United States v. Hermanek, the Ninth Circuit became the first federal appellate court to subject drug jargon expert testimony to a fairly rigorous reliability analysis under Rule 702.\textsuperscript{108} This case involved a four month long prosecution of six defendants for conspiring to distribute cocaine, possession of cocaine with intent to distribute, and related drug offenses.\textsuperscript{109} The prosecution relied heavily on more than 200 wiretapped cellular telephone conversations in which defendants allegedly used coded language to discuss cocaine transactions.\textsuperscript{110}

At trial, prosecutors presented expert testimony from FBI Special Agent John Broderick, which was admitted over defense objections.\textsuperscript{111} FBI Agent Broderick was the lead investigator in the case, and his testimony lasted for fourteen days.\textsuperscript{112} He was permitted to provide his expert opinion on the \textit{modus operandi} of cocaine enterprises and to interpret many of the intercepted telephone conversations.\textsuperscript{113} It should come as no surprise that all of the coded words and phrases interpreted by Agent Broderick were defined as references either to cocaine or to associated drug trafficking activities.\textsuperscript{114}

The defendants did not challenge Agent Broderick's definitions of words generally accepted in the narcotics trade, such as "boy" for heroin, or common methods of changing words, such as "pig Latin" (adding "izn" to the middle of a word).\textsuperscript{115} Instead, the defense argued that Rule 702 was violated when the trial court permitted Agent Broderick to interpret the meaning of coded language that the FBI agent encountered \textit{for the first time} in this case.\textsuperscript{116} The defendants' argument was that this testimony was unreliable because Agent Broderick had conceded during cross examination that he had never heard these coded words before and that none of the words were

\textsuperscript{108} 289 F.3d 1076 (9th Cir. 2002), \textit{cert. denied}, 537 U.S. 1223 (2003).
\textsuperscript{109} \textit{Id.} at 1082-83.
\textsuperscript{110} \textit{Id.} at 1083, 1090.
\textsuperscript{111} \textit{Id.} at 1090-92.
\textsuperscript{112} \textit{Id.} at 1090.
\textsuperscript{113} \textit{Id.}
\textsuperscript{114} \textit{See id.} at 1090-92.
\textsuperscript{115} \textit{Id.} at 1090.
\textsuperscript{116} \textit{Id.}
commonly used drug terminology.\textsuperscript{117} Apparently, this argument failed to impress the district court.

According to the district court, under Rule 702 an expert "need not state that the exact word is clearly established in the drug world to mean a specific drug term."\textsuperscript{118} Apparently the requirement of "reliable principles and methods . . . applied . . . reliably to the facts"\textsuperscript{119} could be satisfied by the expert’s own subjective conclusion "that words such as this are commonly used in the drug trafficking world."\textsuperscript{120} Thus Agent Broderick’s assertions were enough to satisfy the district court that his opinions were reliable.\textsuperscript{121}

The Ninth Circuit saw it differently,\textsuperscript{122} finding that the district court had failed, under Rule 702, \textit{Daubert}, and \textit{Kumho Tire}, to establish "the reliability of Broderick’s methods for interpreting new words as code for cocaine."\textsuperscript{123} As a preliminary matter, the trial court was faulted for not even asking Agent Broderick to identify or explain his methodology.\textsuperscript{124} According to the Ninth Circuit, this created a problem because "[a]s a prerequisite to making the Rule 702 determination that an expert’s methods are reliable, the court must assure that the methods are adequately explained."\textsuperscript{125} According to the court:

Under Rule 702, the proffered expert must establish that reliable principles and methods underlie the particular conclusions offered—here, the interpretation of particular words as referring to cocaine. As

\textsuperscript{117.} \textit{Id.} at 1090-92.  
\textsuperscript{118.} \textit{Id.} at 1091.  
\textsuperscript{119.} \textit{FED. R. EVID.} 702.  
\textsuperscript{120.} \textit{Hermanek}, 289 F.3d at 1091 (internal quotations omitted).  
\textsuperscript{121.} \textit{See id.}  
\textsuperscript{122.} Before \textit{Kumho Tire}, the Ninth Circuit had maintained that judges were not required to perform a \textit{Daubert} reliability inquiry when confronted with prosecutors’ drug jargon experts. \textit{United States v. Plunk} involved a Rule 702 challenge to expert testimony from New York City Police Detective Jerry Speziale, who had been qualified as an expert “in the field of narcotics trafficking, including wiretapping investigations, analysis of codes, words, and reference[s] used by narcotics traffickers.” 153 F.3d 1011, 1016 (9th Cir. 1998) (internal quotations omitted). The defendant challenged the admission of Detective Speziale’s interpretations under Rule 702 and \textit{Daubert} arguing that this testimony lacked a scientific basis. \textit{Id.} The Ninth Circuit held that \textit{Daubert} did not apply to nonscientific evidence. \textit{Id.} at 1017. The court also adopted a very narrow view of the preamendment version of Rule 702, finding that the rule governed only the decision to qualify a witness as an expert and had no bearing on the question of whether specific expert testimony was reliable. \textit{Id.}  
\textsuperscript{123.} \textit{Hermanek}, 289 F.3d at 1090. This error was deemed harmless, however, in light of the incriminating nature of the other evidence offered against the defendants. \textit{Id.} at 1096.  
\textsuperscript{124.} \textit{Id.} at 1094.  
\textsuperscript{125.} \textit{Id.}
the Supreme Court stated in *Kumho*, the expert must establish the reliability of the principles and methods employed "to draw a conclusion regarding the particular matter to which the expert testimony was directly relevant."^{126}

In addition to the lack of an explanation of his general methods, Agent Broderick also failed to explain how he used any of his knowledge or experience with drug trafficking or with these defendants to interpret particular words and phrases used in specific conversations.^{127} This lead the Ninth Circuit to conclude that "[f]rom our review of the record, [Agent] Broderick appears at times to have interpreted cryptic language as referring to cocaine simply because he believed appellants to be cocaine traffickers. Such circular, subjective reasoning does not satisfy the Rule 702 reliability requirement."^{128}

Perhaps *Hermanek* presages enhanced judicial skepticism of drug jargon expertise. Only time will tell. In the interim, we should operate with the assumption that the reliability bar may be low, and that defense attorneys must seek other means of exclusion.

C. *Even Reliable Expert Testimony Should Be Excluded if It Is Not Helpful*

Not all reliable expert testimony should be admitted. In fact, expert interpretation of allusions to drugs or drug transactions should be excluded unless "[a]n intelligent evaluation of the facts is ... difficult or impossible without the application of ... specialized knowledge."^{129} This means that law enforcement experts cannot properly testify if the conversations can be comprehended without assistance. In *United States v. Gonzalez-Maldonado*, the First Circuit concluded that the trial court erred by allowing the federal agent to comment on the defendant's statements on a tape that needed no interpretation.^{130}

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126. *Id.* (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 154 (1999)).
127. *Id.* However, the Ninth Circuit was careful to limit its ruling, noting that "[w]e do not hold that a government expert, including [Agent] Broderick, can never be qualified to interpret coded drug conversations using words and phrases experienced for the first time in the prosecution at issue." *Id.* at 1096.
128. *Id.* at 1096.
130. 115 F.3d 9, 17-18 (1st Cir. 1997) (noting that the error was harmless in light of the other evidence presented by the prosecution at trial). This case might indicate an increased willingness to recognize the validity of this type of objection. In an earlier decision, *United States v. Castiello*, 915 F.2d 1 (1st Cir. 1990), the First Circuit had reached a very different conclusion. In this case the prosecutor's DEA Agent had been permitted to interpret the following taped statement by the defendant: "[I u]sed to buy stuff off him seven
The problem of deciding when expert assistance is required was also recently addressed by the Second Circuit. In United States v. Garcia, the court developed detailed guidelines for assessing when drug jargon testimony should be admitted.\(^{131}\) Although this case involved opinion testimony from a lay witness, the criteria is equally useful in cases involving experts. According to the court, opinion testimony regarding a defendant's conversation would not be helpful and should not be admitted when the conversation: (1) "concern[s] a legitimate topic";\(^{132}\) (2) is spoken "clearly and in full sentences";\(^{133}\) (3) "use[s] words that make sense contextually";\(^{134}\) (4) "is not confusing and disjointed";\(^{135}\) (5) and "does not involve unusually short or cryptic statements[,] ... sharp and abbreviated language, unfinished sentences, or ambiguous references."\(^{136}\) The Second Circuit also concluded:

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. Rather, the testimony then would serve to direct the jury what to conclude on a matter that it should decide in the first instance.\(^ {137}\)

Finally, the Garcia court suggested that prosecutors should be required to prove an explicit preexisting agreement by the defendant to speak in code. This is because "[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."\(^{138}\) The problem, according to the court, is that "[u]nless courts require the proponents of such testimony to lay a proper
foundation concerning personal knowledge, every conversation could be interpreted as coded.”

The Garcia case is rich with unexplored potential. It provides powerful support for the argument that unless prosecutors lay a proper foundation for expert drug jargon testimony based on reliable evidence of an agreement to communicate in code and evidence that the defendant’s language is otherwise unintelligible, judges cannot simply assume that jurors will benefit from police expert opinions.

III. WHAT IS DIRTY HARRY’S FIELD OF EXPERTISE?

A. The Federal Courts Assume that Police Officers Are Experts in Drug Jargon

When the expert is a police officer testifying for the prosecutor, judges ignore, and even ridicule, the notion of scrutinizing her experiential expertise. For example, in United States v. Delpit, the United States Court of Appeals for the Eighth Circuit permitted the police officer expert to testify that, in his opinion, “Monster [the defendant] was in town to shoot some Vice Lords.” Although the appellate court conceded that “Sergeant Murphy appears on occasion to have gone beyond merely translating straightforward terms,” the court found the defense challenge to this expert’s qualifications absurd. According to the court, “[t]he argument that Murphy was unqualified because he lacks degrees or advanced training in the field is silly. Sergeant Murphy has learned drug dealers’ jargon through nearly thirty years of on-the-job experience, the best education there is for this type of thing.”

Two recent cases from the First Circuit further illustrate this hands-off approach to assessing law enforcement experience-based expert qualifications. In United States v. Hoffman, the court found that the Drug Enforcement Agency (DEA) agent expert was a “street-wise savant” who had been properly permitted to decode “cryptic allusions—largely in the idiom of the vineyard—which the government maintained were coded negotiations for the purchase and sale of cocaine.” In a description of the DEA agent’s expertise that practically drips with sarcasm, the court found that “[e]xpertise is not

139. Id. at 141-42.
140. 94 F.3d 1134, 1145 (8th Cir. 1996) (internal quotations omitted).
141. Id.
142. Id.
143. 832 F.2d 1299, 1310 (1st Cir. 1987).
144. Id. at 1309.
necessarily synonymous with a string of academic degrees or multiple memberships in learned societies . . . [and] hard-core drug trafficking scarcely lends itself to ivied halls.''

More recently, United States v. Rivera-Rosario was a bizarre case that, according to the First Circuit, ‘could originate only in the District of Puerto Rico.’ At trial against five co-defendants on charges of conspiracy to possess (marijuana, cocaine, and heroin) with intent to distribute, the government was allowed to present extensive evidence in Spanish, without an English translation. The alleged Spanish drug jargon was translated into English by DEA Agent Cases. This evidence included 180 audio tapes in Spanish that were played for the jury over the course of four days. Despite the district court’s clear violation of the English language requirement embodied in the Jones Act, the First Circuit opted to ignore the 180 audio tapes and review only the drug jargon evidence that had been presented in English. According to the court, this decision was justified because ‘both parties are prejudiced by the fact that the appellate court cannot review the non-English language evidence.’ The reviewing court found that the Spanish tapes had been the ‘gravamen’ of the prosecutor’s case and vacated the convictions of two of the five codefendants. Despite the fact that the appellate court could not even understand the content of the untranslated evidence which formed the ‘gravamen’ of the prosecution, the First Circuit did not hesitate to conclude that the DEA agent had been properly qualified as an expert witness. The court also held that the trial court properly allowed Agent Cases to interpret coded conversations for the jury and to testify to his opinion that the defendant was actively involved in the sale or purchase of illegal narcotics.

145. Id. at 1310.
146. 300 F.3d 1, 4 (1st Cir. 2002) (emphasis added).
147. Id. at 4-5.
148. Id. at 5.
149. Id.
151. Rivera-Rosario, 300 F.3d at 10.
152. Id.
153. Id. at 11, 13-14 (reasoning that, for two of the defendants, the untranslated evidence ‘has the potential to affect our conclusion that there is sufficient evidence to support . . . [their] conviction[s]’).
154. Id. at 17 (noting that the agent had conducted approximately twenty-five investigations).
155. Id.
Finally, the federal courts have consistently rejected defense objections based on the fact that law enforcement witnesses are permitted to offer opinion testimony even when they have not been qualified as experts. For example, in United States v. Griffith, the prosecution relied on opinion testimony interpreting drug jargon from a DEA agent who was never offered or qualified as an expert witness.\textsuperscript{156} The Fifth Circuit concluded that the expert would have been qualified and therefore had been implicitly qualified at trial.\textsuperscript{157} In a similar decision from the Seventh Circuit, the court rejected the defendant's argument that the prosecution's law enforcement witness had offered opinion testimony despite the fact that the court had not qualified him as an expert.\textsuperscript{158} The appellate court found that the record demonstrated that the expert was effectively qualified.\textsuperscript{159} The court also noted that the defendants were not entitled to object to the fact that the DEA agent was not explicitly identified as an expert in court because according to the court, this was actually helpful to the defendant, as the jury was not able to attach excessive weight to the agent's testimony.\textsuperscript{160}

\textbf{B. The Problems of Experience-Based Expertise}

Unlike most scientific or technical expertise, which is often grounded in education and training, drug jargon expertise is always experience-based. Rule 702 specifically contemplates the admission of testimony from experts who develop expertise through experience.\textsuperscript{161} However, the Advisory Committee Note suggests that experience-based expertise should be subjected to heightened scrutiny:

\begin{quote}
[When] 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. The trial court's
\end{quote}

\begin{footnotes}
\footnotetext{156}{118 F.3d 318, 322-23 (5th Cir. 1997); see also United States v. Coleman, No. 99-50018, 2001 U.S. App. LEXIS 18004, at *11 (9th Cir. Aug. 7, 2001) (finding that the trial court's failure to qualify an FBI agent who testified to the meaning of drug jargon was harmless error), cert. denied, 534 U.S. 1147 (2002).}
\footnotetext{157}{See Griffith, 118 F.3d at 322-23.}
\footnotetext{158}{United States v. Ramirez, 796 F.2d 212, 216-17 (7th Cir. 1986).}
\footnotetext{159}{Id. at 216.}
\footnotetext{160}{Id.}
\footnotetext{161}{See Fed. R. Evid. 702 advisory committee's note ("Nothing in this amendment is intended to suggest that experience alone—or experience in conjunction with other knowledge, skill, training or education—may not provide a sufficient foundation for expert testimony. To the contrary, the text of Rule 702 expressly contemplates that an expert may be qualified on the basis of experience.").}
\end{footnotes}
gatekeeping function requires more than simply taking the expert's word for it. \(^{162}\)

This heightened scrutiny makes sense because there are problems endemic to experience-based expertise. \(^{163}\) When law enforcement experts testify to their opinions, this "nonscientific testimony may be based on experience and observation that cannot be objectively tested." \(^{164}\)

In court, "some experts exploit situations where intuition or mere suspicions can be voiced under the guise of experience." \(^{165}\) When an expert opinion is based on personal experience, opinions and conclusions derived from this experience are often personal, idiosyncratic, and subjective. There is no objectively ascertainable or empirically supportable measure of personal experience. \(^{166}\) "[T]he practical result is that the [experience-based expert] witness is immunized against effective cross-examination." \(^{167}\) The problem of experiential expertise is further compounded when the entire field is suspect.

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162. *Id.* (quotations omitted).

163. *Id.* A recent article exploring the use of police officer experts to explain the behavior of street gang members noted that although "the testimony of experts testifying about nonscientific matters must be both relevant and reliable ... [n]onscientific expert testimony presents trial courts with special concerns." Plácido G. Gómez, *It Is Not So Simply Because an Expert Says It Is So: The Reliability of Gang Expert Testimony Regarding Membership in Criminal Street Gangs: Pushing the Limits of Texas Rule of Evidence 702*, 34 ST. MARY'S L.J. 581, 599 (2003) (footnote omitted). "[T]here is less assurance of the accuracy and truthfulness of nonscientific expert testimony." *Id.* at 600 (internal quotations omitted).

164. *Id.* at 599-600.


166. Various commentators have tackled the problem of reconciling the Supreme Court's obvious focus on empirical science in *Daubert* with the *Kumho Tire* Court's decision that the same reliability criteria may apply to nonscientific expertise. If the *Kumho Tire* Court had adopted a different view, we might have different standards for assessing experiential expertise.

The *Kumho Tire* Court could have taken a different route, one more consistent with *Daubert's* holding that scientific evidence is distinguishable. It could have held that non-scientific experts are not subject to the four-part *Daubert* factors. It could have recognized that what it called "experience based" experts derive and express their opinions in a manner quite different from scientific reasoning. ... In assessing the credibility of such an expert, the jury [would be] in approximately the position it occupies when judging the testimony of any witness who has observed a detail through one of the five senses.


C. Can Anyone Be an Expert in Drug Jargon?

1. The *Kumho Tire* “Intellectual Rigor” Requirement

   In *Kumho Tire*, the Supreme Court said that following *Daubert* the court must exclude unreliable testimony.168 According to Justice Breyer, writing for the majority, judges must ensure that the expert “employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.”169 This means that expert testimony must be supported by “[m]ore than bald assertions of opinion without any support . . . [because] this is no more than any rational person would require.”170 In subsequent cases, the *Kumho Tire* requirement has been defined by analogy. Just as “[i]t would be unacceptable to cite no sources for statistical evidence in a scholarly work, . . . it is likewise unacceptable in an expert disclosure.”171

   The “intellectual rigor” requirement also means that even “[s]terling credentials are not enough . . . [A]n expert’s outstanding qualifications will not make the expert’s opinion admissible unless the expert has a valid basis for how and why a conclusion was reached.”172 This is simply a fleshed out reiteration of the *Joiner* Court’s direction that judges exclude evidence if it is connected to existing data only by the “*ipse dixit* of the expert.”173 Thus, after *Kumho Tire*, “[e]xperts must be prepared to establish that their conclusions were reached by methods that are consistent with how their colleagues in the relevant field or discipline would proceed to establish a proposition if they were presented with the same facts and issues.”174 But what happens when there is no relevant field or discipline outside the courtroom?175

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169. *Id.*
Professor Edward J. Imwinkelried has argued persuasively that, thus far, the "intellectual rigor" requirement has malfunctioned, acting merely as "a version of the traditional Frye general acceptance standard—the standard which Daubert overturned."  

The rub is that this factor is nonresponsive to the reliability problem that the Kumho Tire majority itself highlighted—namely, the self-validating discipline. A practitioner of such a discipline may very well "employ[] in the courtroom the same level of intellectual rigor that characterizes the practice" of his or her field outside the courtroom; but as the Kumho Tire majority observed, "the discipline itself" might "lack[] reliability."  

Professor Imwinkelried suggests that a showing that the expert used "the same level of intellectual rigor that characterizes the practice of an expert in the relevant field" should be viewed (in conjunction with the other reliability criteria) as a necessary, but insufficient, condition of admission. Using this approach, if an opponent of self-validating evidence could establish that the field of expertise itself lacks adequate indicia of reliability (e.g., norms, standards, data collection, testing mechanisms), an expert's adherence to the rigor of an inherently unreliable discipline would be an insufficient foundation for admission. This argument can be explored in the context of drug jargon expertise.

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177. Id. (footnotes omitted); see also Dale A. Nance, Reliability and the Admissibility of Experts, 34 Seton Hall L. Rev. 191, 207 (2003) ("To defer to the normative standards of reliability in such disciplines would be to abdicate the basic gatekeeping function."); 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, 55-56 (2003) (stating that a belief warrant for experience-based methodology or skill must pass the "astrology test" and cannot be premised on proof of mutual self-belief, conformity with group practices and norms, general acceptance by the group, or peer-review and publication).

178. Imwinkelried, supra note 176, at 29-30 (internal quotations omitted).

179. Kumho Tire itself implicitly recognizes the problem of self-validation within an inherently unreliable discipline in Justice Breyer's colorful assertion that "the presence of Daubert's general acceptance factor [does not] help show that an expert's testimony is reliable where the discipline itself lacks reliability, as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy." Kumho Tire Co. v. Carmichael, 526 U.S. 137, 151 (1999).
2. Drug Jargon Expertise Lacks "Intellectual Rigor"

How do we know that an "amp head" is a person who uses LSD, a "beamer" is a person who smokes crack, and a "cabbage head" is a person who uses a wide variety of drugs? The President’s Office of National Drug Policy provides definitions of these terms on its website. Simply logging on to www.whitehousedrugpolicy.gov enables you to access an ever-expanding list of over 2300 "street terms that refer to specific drug types or drug activity." The website also promises that source information will be provided upon request. However, my recent attempts to obtain source information for review were wholly unsuccessful.

I initially followed the instructions on the website and placed a telephone call to the administrative offices of the President’s Office of National Drug Policy requesting information that might shed some light on the reliability of the thousands of purported drug terms listed on the website. I spoke with Ms. Jennifer Lloyd, who initially told me that source information could not be provided to outsiders because it was too voluminous. Moments later, she informed me that source information was simply not available because it was not retained. My follow-up email request received the following response, which I quote in full:

Joëlle Moreno,

As we use many different resources to compile street terms for our database: http://www.whitehousedrugpolicy.gov/streetterms/default.asp, we are not able to provide you with a listing of all of our sources. Included below are reports and resources which we often gather street terms from. Please let us know if you have any other questions. Community Epidemiology Work Group (CEWG) reports, National Institute on Drug Abuse: http://www.nida.nih.gov/about/organization/CEWG/reports.html Pulse Check reports, Office of National Drug Control Policy: http://www.whitehousedrugpolicy.gov/drugfact/pulsecheck.html National Drug Intelligence Center: http://www.usdoj.gov/ndic/ Drug Enforcement Administration: http://www.usdoj.gov/dea/

Information is also gathered from State and local police and health departments.

Thank you,

181. See id.
182. Telephone Interview with Jennifer Lloyd, President’s Office of National Drug Policy (Feb. 9, 2004).
183. Id.
Although each of these links offers drug-related information, none of the referenced websites provide any information about any source of the 2300 listed drug jargon definitions. Thus, what purports to be a definitive dictionary promulgated by the Executive Office of the President of the United States is likely nothing more than a constantly expanding list of otherwise common words and slang that, one can only presume, at least once, some unidentified individual decided had an independent drug-related meaning.

Assessing expertise is especially difficult because drug jargon identification is not a real field of study. It does not have any identifiable methods or standards and lacks any objective criteria that might be characterized as "intellectual rigor." There is no indication in any related literature that there has ever been a real effort to study or test the reliability of any drug jargon definitions. This would not be impossible. For example, empirical research could be used to ascertain whether drug jargon definitions are accurate and current. Research could shed light on whether words have a drug-related meaning only within certain cultures or among people who speak a particular language. In fact, the only research of drug jargon that I was able to discover was a single study demonstrating that drug jargon has clear geographic boundaries. Obviously, there is no incentive for law

184. E-mail from Jennifer Lloyd, President's Office of National Drug Policy, to Joëlle Anne Moreno, Associate Professor of Law, New England School of Law (copy on file with author).

185. The Office of National Drug Control Policy website specifically states that, with respect to their lists of definitions, "[n]o attempt was made to determine which usage is most frequent or widespread.” Street Terms, supra note 180.

186. The Fifth Circuit recently recognized this ever-expanding list, finding that "[j]ust as the Eskimos reputedly have 22 different words for snow, we now have, by one count, 223 terms for marijuana." United States v. Griffith, 118 F.3d 318, 321 (5th Cir. 1997) (citations omitted).

187. In this way drug jargon expertise is similar to other suspect types of forensic evidence. “[N]early all the forensic identification ‘sciences’ based on subjective human evaluation, such as bitemark, toolmark, and handwriting identification analysis” lack a clear objective index of mistaken results. Denbeaux & Risinger, supra note 177, at 57. The problem is that fields that lack an “objective index of mistakes” cannot engage in testing that is "properly designed and administered according to the normal standards of science.” Id. at 58.

enforcement to participate in any empirical research that would establish standards enabling defense attorneys to limit prosecutors' access to drug jargon expertise.

The problem with the lack of objective data is that it prevents judges from measuring the reliability of this evidence pretrial and, once admitted, prevents jurors from gauging its weight. As Professor Dale A. Nance has suggested, when data regarding reliability does not exist, it precludes the judge from requiring an expert, whenever practicable, to frame testimony in a way that effectively communicates a likelihood ratio for the case-specific facts to which the expert's explanatory theory applies. If the data are not available that would allow quantitative or even qualitative measures of the likelihood ratio, then the expert, again to the extent practicable, should be limited to providing specialized information that the jury can use to reach its own, typically intuitive sense of the likelihood ratio. In the context of drug jargon interpretation, judges and juries cannot measure the probability that expert testimony is reliable by comparison to a professional standard or empirical evidence. The judge or jury is barred by the lack of data from even these intuitive assessments of reliability. This can be further complicated when the opinion and the underlying data come from the same source.

D. Problems Created When the Investigating Officer Testifies as an Expert

Various problems arise when the prosecution's expert is also the investigating officer and testifies as both an expert and a witness of fact. While it is not improper for the government to elicit expert witness opinion testimony from law enforcement officers who also testified as fact witnesses because they were the arresting or investigating officer, it is preferable to garner the expert testimony from an officer who is removed from direct involvement with the facts of the case. This preference maintains the fiction that the expert's testimony is that of a neutral observer who is not commenting on the behavior of any particular individual, specifically this defendant, but is simply

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189. Nance, supra note 177, at 243 (footnote omitted).
190. It is generally considered to be acceptable to use the same witness as an expert and a witness of fact. See, e.g., United States v. Matos, 905 F.2d 30, 34 (2d Cir. 1990) (noting that in a narcotics prosecution where the case agent interpreted the meaning of records seized from the defendant, it is not "improper to elicit expert testimony from an officer who is a fact witness").
describing what her years of experience have led her to believe to be true of certain observed behaviors.191

The problem with having police officers and federal agents serve this dual function is that it becomes difficult for jurors to keep the roles separate. There is a built-in incentive for experts to conform facts to opinions and opinions to facts. There is also a danger that the imprimatur of expertise accorded the opinion testimony can unfairly prejudice the defendant by adding an unwarranted patina of reliability to the witness's fact testimony. The jury may also be misled or confused.192 Some of these problems have been specifically discussed by reviewing courts.

1. Unfair Prejudice

The problem of unfair prejudice was recently addressed by the Seventh Circuit in United States v. Mansoori.193 The defense had objected at trial to the prosecution's gang expert's testimony opining that defendants were involved in a unitary conspiracy to distribute cocaine and heroin.194 The defendants argued that because of Officer Cronin's "dual role as both a fact and an opinion witness[,]... the jury may have failed to appreciate when Cronin was testifying to facts based on his personal knowledge and when he was merely offering his opinion, and consequently may have given his opinions undue weight."195 The appellate court specifically acknowledged that "there is a greater danger of undue prejudice to the defendants when a witness testifies as both an expert and a fact witness."196 However, in this case the court found "no real possibility that the jury may have been led to mistakenly credit Cronin's opinions as facts."197

191. Hassin, supra note 22, at 673-74 (footnote omitted).
192. This could violate Federal Rule of Evidence 403, which excludes relevant evidence when "its probative value is substantially outweighed by the danger of... confusion of the issues, or misleading the jury." FED. R. EVID. 403; FAIGMAN, KAYE, SAKS & SANDERS, supra note 165, at 59-60 (noting that judges might find expert evidence to be "not valid enough" as compared to the dangers created by its use); see Hassin, supra, note 22, at 674-75 (observing that the problem is that "the jury, as the trier of fact, must discern between the officer's dual roles, as fact witness and as expert witness, in determining how much weight to accord to her testimony, needlessly adding a layer of potential confusion to the process").
194. Id. at 653.
195. Id.
196. Id. at 654.
197. Id. at 654-55.
In a very recent case, *United States v. Rivera-Rosario*, the defendant challenged the admission of fact and expert testimony from a DEA agent who was the case agent in charge of the defendants’ investigation.\(^{198}\) The defense argued that the witness’s dual role necessarily prejudiced the defendants 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.”\(^{199}\) This argument was rejected by the First Circuit, which held that allowing the agent to testify as both fact witness and expert was not error.\(^{200}\) According to the court, the jury should have understood that the expert interpretation of coded language was based on the DEA agent’s previous experience.\(^{201}\)

As these cases illustrate, the federal courts consistently reject defense challenges based on the inherent prejudice or confusion that arises when jurors hear fact and opinion testimony from the same witness.\(^{202}\) Outside the federal courts, the only jurisdiction to adopt a per se ban on allowing law enforcement witnesses to testify as both expert and lay witnesses was the District of Columbia.\(^{203}\) However, the D.C. courts abandoned this position seven years ago in favor of a more flexible rule allowing trial courts to decide whether “the danger of jury confusion can be neutralized by lesser measures than exclusion of dual testimony altogether.”\(^{204}\)

Only if the defense can construct a fact-specific argument that the police officer is acting as Christian de Neuville in place of a much less

\(^{198}\) 300 F.3d 1, 16-17 (1st Cir. 2002).

\(^{199}\) Id. at 17.

\(^{200}\) Id. at 17-18.

\(^{201}\) Id.

\(^{202}\) See, e.g., *United States v. Liddell*, No. 01-2310, 2003 U.S. App. LEXIS 10433, at *11 (6th Cir. May 22, 2003) (holding that there is no per se rule against police officer testifying as both witness of fact and expert), *cert. denied sub nom. Thompson v. United States*, 124 S. Ct. 414 (2003); *United States v. Tocco*, 200 F.3d 401, 418-19 (6th Cir. 2000) (finding no abuse of discretion when a case agent testified as both fact witness and organized crime expert), *cert. denied*, 539 U.S. 926 (2003); *United States v. Lightfoot*, 224 F.3d 586, 588-89 (7th Cir. 2000) (finding no error when the trial court allowed a police officer to testify as a fact and an expert witness); *United States v. Young*, 745 F.2d 733, 760 (2d Cir. 1984) (finding no error when federal agents were permitted to testify as witnesses of fact and to opine that intercepted telephone conversations contained coded plans for drug transactions).

\(^{203}\) *Beach v. United States*, 466 A.2d 862, 864-65 (D.C. 1983) (holding that the same witness could not testify to both the factual circumstances surrounding the defendant’s arrest and then opine about what would constitute a “useable” amount of narcotics).

\(^{204}\) *Eason v. United States*, 704 A.2d 284, 285 (D.C. 1997). The court held that a detective could testify to matters he observed as an eyewitness at the scene of the shooting and also provide expert testimony interpreting blood spatter evidence. See *id.* at 284 n.2.
appealing Cyrano de Bergerac, would expert testimony be rejected because it is unfairly prejudicial. In *United States v. Rollins*, the Seventh Circuit noted that if the defense could establish that the prosecutor sought to use an FBI agent drug jargon expert as a "mouthpiece" for a cooperating witness who would have provided the same evidence (but would not have been perceived as credible), the law enforcement expert testimony should be excluded.205

2. Juror Confusion

The problem of juror confusion was discussed by the Seventh Circuit in *United States v. de Soto*. The court noted that when a police officer is called to testify both as an eyewitness and an expert in drug dealer methodology, it creates a situation where "these two roles are intertwined, [and] the possibility of juror confusion is increased."207 The court cautioned that "the district court must be especially vigilant in ensuring that a law enforcement expert's testimony does not unfairly prejudice the defendant or usurp the jury's function."208 According to the Seventh Circuit, the risk of juror confusion requires that courts ensure that "the expert must not base his opinion on mere speculation; nor can he speak, as an expert, to matters that the jury can evaluate for itself."209

IV. DIRTY HARRY ON THE STAND: JUDICIAL OVERSIGHT OF THE EXPERT AT TRIAL

Federal Rule of Evidence 702 and the relevant cases are clear that the obligations of judicial oversight of expert testimony do not end with the decision to allow the expert to testify. Simply because an expert has been qualified does not mean that her testimony should be unconstrained. A brief review of recent police expert cases serves two purposes. First, these cases may indicate incipient judicial discomfort with boundless opinions and speculations from law enforcement experts. This can be inferred from the fact that in each of these cases, despite a finding of harmless error, the appellate court reached out to

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205. 862 F.2d 1282, 1293 (7th Cir. 1988) (concluding that this was not the government's intent in this case).
206. 885 F.2d 354, 359-62 (7th Cir. 1989).
207. *Id.* at 360.
208. *Id.* at 361.
209. *Id.* at 361-62. Despite this strong cautionary language, the DeSoto court found that admission of both eyewitness fact testimony and expert testimony on drug dealer methodology from the same police witness was not error by the trial court. *Id.*
specifically criticize the admission of improper expert testimony. Second, these cases could be used prospectively by litigants or commentators to anticipate and advocate appropriate limits on expert testimony based on both relevance and reliability concerns.

A. Creating Limits Based on the Speculative Nature of the Opinion

*United States v. Williams* deserves serious attention because it presents a rare example of thoughtful appellate review of appropriate limits on the scope of police expert testimony.  Williams was convicted of possession of a firearm and ammunition, based in part on the trial testimony of Officers Duncan and Reid of the District of Columbia Metropolitan Police Department.  According to the police officers, on August 1, 1998, at approximately 1:30 am, they stopped the car in which Williams was a passenger for a minor traffic violation.  The officers testified that Williams got out of the car, reached for his waistband, and was holding something that they believed might have been a weapon.  When Williams began to run, Officer Duncan chased him, while Officer Reid remained with the driver.  Officer Duncan never saw Williams holding a gun or discarding a gun, and when Williams was apprehended shortly thereafter, no gun was discovered.  However, a gun was discovered during a search of the area.  At trial, during a lengthy redirect examination of Officer Duncan, the prosecutor was permitted to ask the following question: “In your experience as a patrol officer, is it common for people who use drugs or sell drugs to carry weapons for protection?”  Officer Duncan responded affirmatively.  Despite the prosecutor’s elicitation of this unsupported opinion testimony, the judge denied defense counsel’s request to recross-examine the witness.

On appeal, the D.C. Circuit focused on the admission of Officer Duncan’s opinion testimony that *drug users* commonly “carry weapons (210) 212 F.3d 1305 (D.C. Cir. 2000).
211. *Id.* at 1306-07.
212. *Id.* at 1307.
213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.* at 1308.
218. *Id.*
219. *Id.*
for protection." Judge Henderson, writing for the majority, noted that while "the inquiry regarding Duncan's experience with drug dealers commonly carrying weapons for protection raises no eyebrows, we cannot say the same regarding drug users." Because the appellate court decided that the link between drug use and gun possession was "tenuous," further exploration of the foundation of Officer Duncan's testimony was required. Judge Henderson began by noting that Officer Duncan had very limited experience with arresting suspects who were in possession of firearms (fewer than one dozen arrests). In addition, there was no evidence offered to establish that any of these arrests involved drug users. According to the court, this would preclude qualification of Officer Duncan as an expert under Rule 702. In addition, even if this were viewed as lay opinion testimony under Rule 701, there was no evidence that Officer Duncan's opinion "was rationally based on his own perceptions" because the witness "did not establish a factual basis for credible opinion testimony regarding the likelihood of drug users being armed."

B. Creating Limits Based on Unwarranted Extrapolations

If law enforcement experts are barred from speculating, they should also be precluded from drawing inferences that are unwarranted by the evidence they have been asked to interpret. In United States v. Theodoropoulos, eight defendants were convicted of conspiracy to distribute cocaine. At trial, a prosecution expert FBI agent identified and translated coded language contained in numerous intercepted conversations. This expert testimony included informing the jury that defendants' conversational references to "clothes, steaks, televisions, furniture, cars, and statues" should be understood as references to narcotics. However, the FBI agent's testimony was not limited to providing drug jargon interpretations. Agent Eberhart was

220. Id. at 1309.
221. Id. (citation omitted).
222. Id.
223. Id.
224. Id.
225. Id.
226. Id. at 1309-10.
227. Id. at 1310. The error was deemed harmless. Id. at 1310-12.
228. 866 F.2d 587, 588 (3d Cir. 1989), overruled on other grounds by United States v. Price, 76 F.3d 526, 528 (3d Cir. 1996).
229. Id. at 589.
230. Id.
also permitted to testify, over defense objection, to the nature of defendants' drug trafficking business and the specific role of each defendant in the criminal enterprise. In reviewing the admission of this testimony, the court specifically recognized the risk that "permitting an expert to testify concerning a defendant's role in a drug operation may . . . be overly persuasive to the jury." This risk was created by the fact that there is an "aura of special reliability and trustworthiness surrounding expert testimony." Thus, according to the Third Circuit inferences and conclusions that are unwarranted by the factual evidence "should not be routinely admitted."

C. Creating Limits Based on Conclusions of Illegality

Judges should also carefully limit law enforcement expert opinions that contain conclusions about the illegality of the defendant's behavior. In United States v. Boissoneault, the prosecutor relied on testimony from a DEA agent concluding that certain numbers and initials found on a piece of paper seized from the defendant indicated "street level distribution of cocaine." In reviewing the admission of this opinion testimony, the Second Circuit noted that Rule 702 is "liberal" in that "a qualified expert may generally suggest inferences that should be drawn from the facts." However, the court found the opinion testimony in this case "troublesome." The appellate court was especially concerned about admission of "Agent Sullivan's three conclusory statements that the totality of the physical evidence in the case suggested 'street level distribution of cocaine.'" According to the Second Circuit, "[w]e 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...

231. Id.
232. Id. at 592.
233. Id. (quotations omitted).
234. Id.
235. The specific problems that arise when police officers testify to their opinion as to whether a driver is operating under the influence of narcotics is given thoughtful and extensive review in David Sandler, Expert and Opinion Testimony of Law Enforcement Officers Regarding Identification of Drug Impaired Drivers, 23 U. HAW. L. REV. 151 (2000). This article explains how DUI suspects whose alcohol readings are below the legal limit are now far more likely to be subjected to the assessment of a "drug recognition expert" police officer. Id. at 153.
236. 926 F.2d 230, 231-32 (2d Cir. 1991).
237. Id. at 232.
238. Id. at 233.
239. Id.
also draws conclusions as to the significance of that conduct or evidence in the particular case. Problems arise when "a Government expert’s personal opinion that ambiguous conduct constitutes criminal activity, given its inherently speculative nature, holds only slight probative value." According to the appellate court, the better solution would have been for the trial court to allow Agent Sullivan to testify only to the likely drug transaction-related significance of the physical evidence because "the jury was competent to draw its own conclusion as to Boissoneault’s involvement in the distribution of cocaine."

The Boissoneault case echoes an earlier decision by the Second Circuit. In United States v. Young, Judge Jon Newman, in a concurring opinion, expressed "caution concerning expert opinion offered to establish that ambiguous conduct constitutes criminal activity."

Whatever slight probative value arises from a narcotics expert’s personal opinion that an observed transaction involved a sale of drugs must be carefully weighed against the distinct risk of prejudice. The aura of special reliability and trustworthiness surrounding expert testimony which ought to caution its use, especially when offered by the prosecution in criminal cases, poses a special risk in a case of this sort. That risk arises because the jury may infer that the agent’s opinion about the criminal nature of the defendant’s activity is based on knowledge of the defendant beyond the evidence at trial.

According to Judge Newman, "[t]he risk [of prejudice] is increased when the opinion is given by ‘the very officers who were in charge of the investigation.’"

D. Creating Limits Based on the Relationship Between Drug Jargon Expert Testimony and Propensity Evidence

The potential connection between propensity evidence and drug jargon testimony raises two unexplored and interesting questions. First, does the routine admission of police expert testimony provide prosecutors with an end run around the general ban on propensity
evidence contained in Federal Rule of Evidence 404(a)? Second, if the prosecutor is permitted to introduce drug jargon expert testimony, and the defendant responds by arguing that he was not using drug jargon, can the government seek to introduce the defendant's otherwise inadmissible prior drug convictions under Federal Rule of Evidence 404(b) to rebut this defense?

1. Is Expert Testimony that the Defendant Understands and Uses Drug Jargon the Functional Equivalent of Propensity Evidence?

Drug jargon expert evidence arguably violates the general rule against propensity evidence if jurors conclude that the defendant must have learned drug jargon while committing prior crimes or bad acts. Judges should exclude this "bad character" evidence if it could lead a jury to convict the defendant either because jurors assume that defendant is a criminal or even if jurors fail to find that the prosecutor has met her burden of proof in this case. Because the nature of the current and prior crimes and bad acts is similar, the danger of unfair prejudice to the defendant is increased.

The problem with propensity evidence is not that the defendant's past is wholly irrelevant. It is "the remoteness and indeterminacy of the inference, the small weight to be assigned to it, its potential overvaluation, and in many instances, its potential for inflammation or inducement of practical reduction in the applied standard of proof." In 1997, in Old Chief v. United States, the Supreme Court reaffirmed the importance of the propensity evidence ban. According to the Court, "[t]he term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged."

The Court also focused on the dangers of jurors "generalizing a defendant's earlier bad act into bad character and taking that as raising the odds that he did the later bad act now charged (or, worse, as calling for preventive conviction even if

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246. "Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . . ." FED. R. EVID. 404(a).

247. The argument would most frequently be made based on the prosecutor's effort to establish the defendant's "knowledge" or "intent" under Rule 404(b) or the state equivalent.


249. 519 U.S. 172, 180 (1997).
he should happen to be innocent momentarily). Thus, according to the Court "[a]lthough . . . 'propensity evidence' is relevant, the risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment—creates a prejudicial effect that outweighs ordinary relevance."  

Defense attorneys who fail to raise propensity objections make a strategic mistake. There are at least two possible advantages to this argument. First, if the defense objects to drug jargon expert testimony as character evidence, the prosecutor may respond by arguing that jurors will not necessarily make the unfairly prejudicial inference that the defendant learned drug jargon while committing other prior crimes and bad acts. Implicit in this argument is the assumption that drug language is accessible to those outside the drug trafficking community. The defense can now turn the prosecutor's own argument against her. If drug terminology has entered the vernacular and can be understood by those not in the drug trade, there is little or no reason for expert drug jargon testimony, especially when balanced against the substantial risk of unfair prejudice to the defendant. Second, even if the propensity argument is not persuasive, the defense has laid the groundwork for clear limiting instructions.

2. Does a Defendant's Objection to Drug Jargon Expertise Open the Door to Admission of His Prior Convictions Under Rule 404(b)?

This bizarre twist on the propensity question was recently addressed for the first time by the Second Circuit in United States v. Garcia. In Garcia, the defendants were charged with possession with intent to distribute cocaine. The trial court permitted a cooperating witness to offer opinion testimony that a taped conversation that he had with one of the defendants was a coded arrangement for a drug sale.

250. Id. at 180-81.
251. Id. at 181 (internal quotations omitted).
252. I was unable to discover any reported cases where this argument has been advanced. It seems likely that defense attorneys hesitate to raise this objection either because the prosecutor has not sought to introduce specific evidence of prior crimes or bad acts or because they anticipate that the evidence will inevitably be admitted under one of the many exceptions contained in Rule 404(b). Under Rule 404(b), "Evidence of other crimes, wrongs, or acts ... may ... be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident ...." Fed. R. Evid. 404(b).
253. 291 F.3d 127 (2d Cir. 2002).
254. Id. at 130.
255. Id. at 132, 134.
Although Garcia did not testify, the prosecutor was also permitted to introduce, over defense objection, Garcia’s twelve-year-old conviction for cocaine possession under Rule 404(b). The district 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.” On appeal, the court explored whether the defense argument that Garcia had not used drug jargon should have opened the door to his otherwise inadmissible prior criminal history under Rule 404(b).

The Second Circuit refused to find that Rule 404(b) enables prosecutors to admit prior narcotics convictions against defendants who object to prosecution drug jargon experts. According to the court, only relevant past convictions could have been used to prove a defendant’s knowledge or intent in the current case. The prosecutor had failed to show that the defendant’s prior conviction was relevant to the question of defendant’s knowledge of drug jargon. According to the court:

The 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. The government must identify a similarity or connection between the two acts that makes the prior act relevant to establishing knowledge of the current act.

The court noted various factors that indicated that the prior conviction was not relevant, such as (1) the long period of time between the two crimes, (2) the very different quantity of drugs involved, (3) the different people involved, and (4) the lack of evidence that the earlier case involved the use of drug jargon made defendant’s prior conviction inadmissible. Although defense attorneys should anticipate that prosecutors will seek to take advantage of Rule 404(b) in this way, the Garcia case suggests that it should generally be excluded.

256. Id. at 134-35.
257. Id. at 135.
258. Id. at 135-39.
259. Id. at 137.
260. Id.
261. Id. at 138.
262. Id. at 137.
263. Id. at 138-39.
264. Id. (finding that “the risk of prejudice arising from the admission of the prior conviction clearly substantially outweigh[s] any marginal probative value of the evidence”).
V. CONCLUSION: DO WE NEED MULTIPLE STANDARDS, DIFFERENT STANDARDS, OR A BETTER APPLICATION OF THE EXISTING STANDARD?

Over the past few years we have learned a great deal about how expert witnesses are used in criminal cases. We know that prosecutors' experts are much more likely to be admitted than those offered by the defense. We know that law enforcement officers are the most common prosecution experts. We also know that police officers and federal agents are most frequently called to testify in narcotics cases where their testimony “typically concern[s] [the] officers’ observations of drug dealing activities.”

The cases supply the details that are missing from the empirical evidence. They show us how and why judges consistently fail to exclude or limit police officer expert testimony in narcotics cases, even when this testimony falls short of admissibility standards or conflicts with other rules. Given the current state of the law, we have two options for avoiding the mistakes of the past and crafting a better approach. We could speculate about multiple evidentiary standards that would vary depending on the nature of the case and the identity of the party. The alternative is to work to ensure that the current one-size-fits-all rules of evidence are equitably applied to all litigants in all cases.

A. Multiple Admissibility Standards

The possibility of alternative admissibility standards has been suggested in various forms. Professor Christopher Slobogin has argued that in criminal cases different standards should be applied to experts for the prosecution and defense. Professor Slobogin believes that Daubert created a “positivist” reliability standard that will inevitably be much more difficult for defense experts to satisfy. According to Professor Slobogin:

265. See supra Part I.C (discussing recent empirical evidence that details how expert testimony is used in state and federal criminal prosecutions).
266. See supra Part I.C.
267. Groscup et al., supra note 6, at 345; see supra Part I.C.
268. See, e.g., Crump, supra note 166, at 40-41 (referring to the standards created in Daubert and Kumho Tire as “illfitting and wrong” and suggesting that the Court should have limited itself to a “call for appropriate validation” instead of entering into “uncharted territory”).
269. See Slobogin, supra note 4, at 108-09.
In the long run, however, the likelihood is high that criminal defendants will suffer much more than the state if *Daubert* is taken seriously. That is because prosecutors and defense attorneys need different types of experts to make their cases-in-chief. The prosecution uses experts primarily to support assertions about physical facts. . . . In contrast, the defense’s affirmative case is most likely to involve claims about the defendant’s mental state at the time of the offense. . . .

The difference between experts for the different sides is significant, according to Professor Slobogin, because “assertions about physical facts are eminently more verifiable than assertions about past mental state.”

In response, Professor Slobogin offers a very specific solution.

As Professor Slobogin envisions the admissibility standard, “reliability is not necessarily sacrificed [in criminal cases] when the defense is permitted to use evidence that fails the positivist threshold dictated by *Daubert.*” This means that “concerns about process should trump concerns about reliability” and “very few limitations should be placed on defense expertise.” Professor Slobogin suggests that this standard would allow judges to admit a defense theory (even if it has not been verified) if it is “considered plausible among the relevant professionals.” Judges should also admit expert opinion about a defendant’s mental state as long as the expert used “accepted evaluation protocols.” This proposal raises questions about both the likelihood and feasibility of multiple admissibility standards.

1. The Creation of a Lower Admissibility Standard for Expert Evidence Offered by Criminal Defendants Is Unlikely

The Supreme Court has addressed the question of a more relaxed reliability standard for criminal defendants in the post-*Daubert* decade and answered it with a resounding “no.” *United States v. Scheffer* provides little hope for advocates of multiple admissibility standards. This case involved Edward

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270. *Id.*
271. *Id.* at 110.
272. *Id.* at 119.
273. *Id.*
274. *Id.* at 124.
275. *Id.*
276. *Id.*
277. 523 U.S. 303, 312 (1998) (advocating a per se rule excluding all polygraph evidence in military courts). Professor Paul C. Giannelli discusses *Scheffer,* but from a different perspective. See Giannelli, * supra* note 65, at 1092-96. Professor Giannelli contrasts the per se ban of polygraph evidence in military courts upheld by the *Scheffer* Court to the
Scheffer, who was working as an informant for the Air Force Office of Special Investigations (OSI). As a condition of his employment, Scheffer was required to provide urine samples and submit to polygraph examinations. In April 1992, the OSI requested a urine sample and a few days later Scheffer submitted to a polygraph examination. According to the polygraph examiner, "the test 'indicated no deception' when [Scheffer] denied using drugs since joining the Air Force." Scheffer was arrested on May 13, 1992, for being absent without leave. In April 1992, his urine sample tested positive for methamphetamine.

Scheffer was tried by general court martial. At this proceeding, he was barred from introducing the results of his polygraph examination by Military Rule of Evidence 707 (MRE 707), which contains a per se exclusion of polygraph evidence in military court martial proceedings. Basing his defense on a theory of innocent ingestion, Scheffer denied knowingly ingesting methamphetamine while working for the OSI. On cross-examination, the prosecutor impeached Scheffer with prior inconsistent statements. During closing argument, the prosecutor stated, "He lies. He is a liar. He lies at every opportunity he gets and he has no credibility." Scheffer was convicted and sentenced to thirty months of confinement, a bad-conduct discharge, total forfeiture of all pay and allowances, and reduction to the lowest enlisted grade. On appeal, the Court of

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type of reliability standard for polygraphs that currently exists in the federal courts, noting with irony that the military both sponsors research on polygraphs and regularly employs this technique. Id. at 1092-94. He also critiques the Supreme Court's concerns that expert polygraph evidence would either impair the jurors' abilities to assess the defendant's credibility or prolong the trial based on a collateral issue. Id. at 1094-95.

278. Scheffer, 523 U.S. at 305.
279. See id.
280. Id. at 306.
281. Id.
282. Id. at 321 (Stevens, J., dissenting).
283. Id. at 306.
284. See id. at 306-07.
285. Id (providing the relevant portion of MRE 707).
286. Id. at 306 n.1.
287. United States v. Scheffer, 44 M.J. 442, 443 (C.A.A.F. 1996), rev'd, 523 U.S. 303 (1998); see Scheffer, 523 U.S. at 306 (explaining that Scheffer sought to introduce the polygraph evidence to corroborate his belief that he had not ingested methamphetamine); see also Robin D. Barovick, Between Rock and a Hard Place: Polygraph Prejudice Persists After Scheffer, 47 BUFF. L. REV. 1533, 1547 n.66 (1999) (noting that the government called Scheffer a liar or stated that his credibility was lacking twenty-one times during closing argument).
Appeals for the Armed Forces found MRE 707 unconstitutional. The appellate court reasoned that a criminal defendant was uniquely harmed by a per se exclusion of polygraph evidence because it prevented him from exercising his Sixth Amendment right to respond to a direct attack on his credibility.

Justice Thomas drafted the plurality opinion for the Supreme Court. Not only was the Court reluctant to recognize that criminal defendants may be prejudiced by stringent admissibility standards, but the Court found that "Rule 707 does not implicate any significant interest of the accused." Justice Thomas reasoned that because Scheffer had not been prevented from testifying in his own defense, he was "barred merely from introducing expert opinion testimony to bolster his own credibility."

Justice Stevens directed his vigorous dissent at the dangers of excluding exculpatory expert evidence offered by a criminal defendant, providing a glimpse of how a different Supreme Court might respond. He began by admonishing the Court for "barely acknowledg[ing] that a person accused of a crime has a constitutional right to present a defense." According to Justice Stevens, "[s]tate evidentiary rules may so seriously impede the discovery of truth, as well as the doing of justice, that they preclude the meaningful opportunity to present a complete defense that is guaranteed by the Constitution." The problem was that the plurality "all but ignore[d] the strength of the defendant's interest in having polygraph evidence admitted." Justice Stevens asserted that the Court's assumption that the defendant is not significantly harmed by the exclusion of this expert testimony, because he is not barred from testifying himself, is the equivalent of stating that "a rule that excluded the testimony of alibi witnesses would not be significant as long as the defendant is free to testify himself." According to Justice Stevens, the majority had failed to recognize that a per se ban on a defendant's expert testimony

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289. Scheffer, 44 M.J. at 445 (holding that a per se exclusion of polygraph evidence violated the Sixth Amendment rights of an accused when the evidence was offered to rebut an attack on his credibility).
290. Id.
291. Scheffer, 523 U.S. at 305.
292. Id. at 316-17.
293. Id. at 317.
294. See id. at 320-39 (Stevens, J., dissenting).
295. Id. at 325-26 (Stevens, J., dissenting).
296. Id. at 329 (Stevens, J., dissenting) (internal quotations omitted).
297. Id. at 331 (Stevens, J., dissenting).
298. Id. (Stevens, J., dissenting).
has a potentially debilitating impact on his Sixth Amendment rights because it "unquestionably impairs any meaningful opportunity to present a complete defense." 299

2. Admissibility Standards that Vary Depending on the Case and Party Would Create New Problems for the Courts

*Scheffer* clearly suggests that the Supreme Court would reject a more permissive expert admissibility standard for criminal defendants based on the Sixth Amendment. 300 If the right to a lower standard cannot be rooted in the criminal defendant's trial rights, perhaps it can be derived from the nature of the defendant's evidence?

This is roughly the argument advanced by Professor Christopher M. Slobogin. He suggests that most prosecution expert testimony, but not defense expert testimony, relates to physical evidence. 301 This makes the prosecutor's expert evidence amenable to the more stringent *Daubert* reliability standard. Assuming that Professor Slobogin's statistical assumptions are empirically sound, linking the standard to the nature of the evidence raises more questions than it answers.

For example, what standard should apply when a prosecutor seeks to introduce expert evidence (such as drug jargon testimony) that relates not to physical evidence, but to a defendant's mental state? To be consistent with Professor Slobogin's premise, the nature of the evidence should be determinative. Because this evidence is more similar to other mental state evidence than to physical evidence, prosecutors should also be able to avail themselves of a lower admissibility standard. A similar problem would arise whenever defense attorneys sought to use experts to rebut or suggest inferences from any physical evidence. Under this system, different types of experts for both sides will be subject to different standards. This outcome seems both untenable and undesirable. 302

299. *Id.* (Stevens, J., dissenting) (internal quotations omitted).
300. *See id.* at 317.
301. *See* Slobogin, *supra* note 4, at 110 (suggesting that prosecutors rely primarily on expert testimony regarding physical evidence).
302. I am not suggesting that this outcome would be acceptable to Professor Slobogin. Although the article does not address the question of which test should be applied to mental state evidence offered by the prosecution, he does note that "it would not be inconsistent with this position to require that identification expertise offered by the prosecution satisfy the latter *Daubert* test." *Id.* at 125. It is not clear whether Professor Slobogin intends "identification expertise" to be limited to physical evidence or whether it might include testimony such as drug jargon expertise.
B. Different Admissibility Standards

1. Reliability Normed in Law, Not in the Expert's Discipline

A different, but equally problematic alternative would be to create reliability standards that are unhitched from the dictates of the relevant discipline. For example, the quest for a better reliability standards has lead Professor Dale A. Nance to suggest that the Supreme Court meant something very different by “reliability” in Daubert and Kumho Tire than we have always assumed. According to Professor Nance, Daubert initially left open the question of whether a finding of scientific reliability was intended to be determinative or simply useful to the reviewing court, but this ambiguity was resolved by the Kumho Tire Court.\(^\text{303}\)

Professor Nance posits that because Kumho Tire required only that judges “consider the specific factors identified in Daubert where they are reasonable measures of the reliability of the expert testimony,”\(^\text{304}\) this “frees Daubert to allow that there is an important analytical difference, even in the context of scientific evidence, between legal norms of reliability and norms of validity or reliability that inform the inference processes in any non-legal discipline that is invoked in testimony.”\(^\text{305}\) Professor Nance's fundamental thesis, that absolute deference to a concept of reliability grounded in a nonlegal discipline may be hard for judges to operate, is inarguable. However, his thesis is not well supported by his argument that Kumho Tire created a new reliability standard normed in law rather than the expert's own discipline.

The key, according to Professor Nance, is that the Kumho Tire Court said that “[a] trial court should consider the specific factors identified in Daubert where they are reasonable measures of the reliability of the expert testimony.”\(^\text{306}\) This seems to place far too much weight on Justice Breyer's use of the word “reasonable” in this context. The quoted sentence appears at the end of a lengthy discussion by Justice Breyer approving a Daubert-style reliability analysis rooted not in legal policy, but in the norms of the relevant science, technology, or other field of specialized knowledge. According to the Court,

The objective of [Daubert's gatekeeping requirement] \ldots is to ensure the reliability and relevancy of expert testimony. It is to make certain

\(^{303}\) See Nance, supra note 177, at 208.
\(^{304}\) Id. (quoting Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152 (1999)).
\(^{305}\) Id.
\(^{306}\) Id. (quoting Kumho Tire, 526 U.S. at 152).
that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field. Nor do we deny that, as stated in Daubert, the particular questions that it mentioned will often be appropriate for use in determining the reliability of challenged expert testimony. Rather, we conclude that the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable. That is to say, a trial court should consider the specific factors identified in Daubert where they are reasonable measures of the reliability of expert testimony.307

In context, it seems clear that Justice Breyer intends that future judges will gauge reliability by contrasting the reliability of the proffered testimony to the norms of reliability that govern practice in this expert’s field. This is the only reading consistent with Justice Breyer’s conclusion that

[Daubert] requires a valid ... connection to the pertinent inquiry as a precondition to admissibility ... [a]nd where such testimony's factual basis, data, principles, methods, or their application are called sufficiently into question, ... the trial judge must determine whether the testimony has a reliable basis in the knowledge and experience of the relevant discipline.308

Read this way, Kumho Tire supports only the limited conclusion that judges should be free to decide when and how the four flexible reliability criteria detailed in Daubert should be applied and does not convey blanket authority to substitute in legal norms.309 If the Kumho Tire Court’s discussion of judicial flexibility relates only to the means for testing whether the Daubert standard had been satisfied (not, as Professor Nance seems to argue, the content of the standard itself), Kumho Tire provides little support for a reliability standard gauged by legal reliability, rather than the reliability standards of the relevant discipline.

2. Reliability as Relevance

Professor David Crump argues that the Supreme Court has an “unduly cramped” philosophy of science.310 The problem with the

307. Kumho Tire, 526 U.S. at 152.
308. Id. at 149 (citations and internal quotations omitted).
309. See id. at 150-51 (“Daubert makes clear that the factors it mentions do not constitute a ‘definitive checklist or test.’”).
310. See Crump, supra note 166, at 2.
current standard, according to Professor Crump, is that it cannot accommodate the fact that "non-scientific expert evidence ... [is] different from scientific evidence in ways that would vary from case to case."\textsuperscript{311} The case law embodies this problematic philosophical view. \textit{Daubert} created a process that is "lengthy, technical and diffuse"\textsuperscript{312} and \textit{Kumho Tire} compounded the Court's original mistake by "exten[ding] ... [the \textit{Daubert} factors] to the extent that they conceivably might apply, leaving the law in an even more indeterminate state."\textsuperscript{313}

The result is analogous to telling a person unfamiliar with both[,] that a television set differs from an orange, but that unpredictable characteristics of one can appropriately be used in treating the other. The hypothetical listener should be forgiven if she attempts to eat the television set and watch the orange. That is what has happened in the cases that have followed \textit{Kumho}.\textsuperscript{314}

Professor Crump suggests that a better alternative would be "for the Supreme Court to overrule \textit{Daubert-Kumho} and return to the 'helpfulness' or 'assist' standard that is embodied in Rule 702."\textsuperscript{315} Professor Crump argues that returning to Rule 702 would transform the expert admissibility inquiry into a "relevance-based problem."\textsuperscript{316} Using this standard, courts would exclude or include expert evidence based on its probative value.\textsuperscript{317}

Professor Crump's argument ignores or discounts various critical facts. First, he fails to even mention the substantial amendments to Rule 702 that predate publication of his article by more than two years. Because amendments to Rule 702 are explicitly derived from \textit{Daubert} and \textit{Kumho Tire}, it is difficult to see how Rule 702 presents a unique alternative standard. Second, relevance is already a vital component of the admissibility standard. Expert evidence, like all evidence, must be relevant under Rule 401.\textsuperscript{318} The \textit{Daubert} Court also added its own independent relevance/fit requirement that must be satisfied.\textsuperscript{319} Finally, removing the reliability criteria from the admissibility standard would resurrect all of the arguments by scholars and litigants that originally gave rise to \textit{Daubert} a decade ago.

\textsuperscript{311} Id. at 41.
\textsuperscript{312} Id. at 1.
\textsuperscript{313} Id. at 2.
\textsuperscript{314} Id.
\textsuperscript{315} Id.
\textsuperscript{316} Id. at 41.
\textsuperscript{317} Id. at 2.
\textsuperscript{318} FED. R. EVID. 401.
C. Improving Operation of the Existing Admissibility Standard

If multiple or alternative admissibility standards are unlikely or untenable, that does not mean that the current system cannot be improved. Rule 702 was recently revamped to provide better guidance and new cases are decided every day. When experts seek to testify to matters, such as DNA evidence, that are derived from a scientific field of well-established validity, the judicial screen for relevance and reliability should be fairly straightforward. When judges “believe that information properly generated by the methods required of practitioners of science by the applicable practice norms of the area in which they operate has a high claim to reliability, ... [t]hen it is appropriate to look to that science practice itself for the proper variables affecting warranted belief for such a claimed product.” The more compelling problems arise when the expert evidence cannot be tested against reliability variables and/or when the field of expertise itself is suspect.

Judges should be especially concerned when an expert’s opinions are based solely “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.” Personal opinion, even when it is based on extensive experience, cannot establish reliability or provide the foundation for expertise. Judges applying Rule 702 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.” When these threshold requirements are ignored, prosecutors can present conjecture and speculation disguised as expertise, while denying the defense access to information necessary for effective cross examination. Judges who fail to screen or limit prosecutors’ presentation of police expert testimony create mini-police states by ceding control over the nature and quality of the evidence presented in their courtrooms.

320. Denbeaux & Risinger, supra note 177, at 43.
321. Id. at 52.
322. FED. R. EVID. 702 advisory committee’s note.