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« I Am The Gatekeeper!: Wisconsin Adopts Daubert Test, Kicks Walstad Test To The Curb | Main | New Rules: Court Of Appeals Of Georgia Applies New Framework To Find Statement Nontestimonial, Cites EvidenceProf »

April 12, 2011

Article Of Interest: Brian Gallini's To Serve and Protect? Officers as Expert Witnesses in Federal Drug Prosecutions

As readers of this blog know, I am frequently disturbed by courts continually finding that law enforcement officers can testify that the amount of drugs recovered from a suspect or his car is consistent with intent to distribute (*see, e.g.,* **here**, **here**, **here**, **here**, and **here**). My posts mainly have focused upon why such testimony violates **Federal Rule of Evidence 704(b)**. But in his terrific article, ***To Serve and Protect? Officers as Expert Witnesses in Federal Drug Prosecutions*** (forthcoming, **George Mason Law Review**), **Brian R. Gallini**, a professor at the **University of Arkansas-Fayetteville School of Law**, comprehensively argues that courts often err in admitting this testimony not only under **Rule 704(b)**, but also under **Rule 702** and the Due Process Clause.

First, Professor Gallini sets forth the stakes. He notes that

> The core federal drug statute, 21 U.S.C. § 841(a), prohibits an individual from knowingly or intentionally manufacturing, distributing, dispensing, or possessing with the intent to "manufacture, distribute, or dispense, a controlled substance[.]" Importantly, § 841 does not purport to reach personal use and, instead, is designed to reach drug trafficking. Thus, the typical question in § 841(a) cases is whether the amount of drugs found on a particular defendant is more consistent with personal use **or distribution....** or distribution....

So, assume that an officer uncovers marijuana packaged in Ziploc baggies, scales, and a firearm

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Article Of Interest: Brian Gallini's To Serve and Protect? Officers as Expert Witnesses in Federal Drug Prosecutions

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I Was Set Up Like A M&*%!$

from the defendant's residence. Can the following q&a between the prosecutor and the officer take place at the defendant's prosecution for violation of § 841(a)?

> Q: Based on your training and experience, do you have an opinion, with all of the marijuana that was found in the bedroom, the way it was packaged, the Ziploc baggies, the scales, and the firearm, whether or not the gun was possessed in connection with a drug trafficking crime?
>
> A: Yes, it was.

Should such testimony be admissible under the Federal Rules of Evidence and the Constitution? According to many courts, such as the Tenth Circuit (which reviewed the case in which this q&a occurred), the answer is "yes." According to Professor Gallini, the answer is "no."

Federal Rule of Evidence 702

Actually, to put it more precisely, Professor Gallini posits that such testimony **could** be admissible under Rule 702 but that judges are failing in their roles as judicial gatekeepers with regard to such testimony. Indeed, according to Gallini, courts routinely

> allow expert testimony on a wide variety of topics in drug prosecutions like (1) the amount of drugs in defendant's possession; (2) the modus operandi of drug traffickers; (3) paraphernalia and equipment associated with the drug trade; (4) translations of drug jargon; and (5) periodic testimony on drug **courier profiles**.

Gallini claims that this is inconsistent with **Federal Rule of Evidence 702**, which provides that

> 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.

Moreover, the **Advisory Committee's Note** to the 2000 Amendment to the Rule indicates that "An

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Topical Archive

The Archives

Weekly Archives

April 10, 2011 - April 16, 2011

April 3, 2011 - April 9, 2011

March 27, 2011 - April 2, 2011

March 20, 2011 - March 26, 2011

March 13, 2011 - March 19, 2011

March 6, 2011 - March 12, 2011

February 27, 2011 - March 5, 2011

February 20, 2011 - February 26, 2011

February 13, 2011 - February 19, 2011

February 6, 2011 - February 12, 2011

More...

opinion from an expert who is not a scientist should receive the same degree of scrutiny for reliability as an opinion from an expert who purports to be a scientist." And yet, when law enforcement officers provide the 5 types of testimony mentioned above, judges often act like matadors, in large part based upon other language from that **Note** indicating that

> [W]hen 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.

Gallini argues that courts have placed too much emphasis on the first sentence of this block quote in permitting law enforcement officers to offer the 5 types of testimony mentioned above while failing to focus on the last sentence. How does an officer know that the word "car" is code for "boat" or that the word "pothole" is code for there being a delay in shipment? And how does an officer know that a certain amount of drugs in more consistent with an intent to distribute than intent to use the drugs personally? Professor Gallini cites several cases for the proposition that courts consistently ignore these tough questions, and he concludes that

> Taken together, officer expert testimony in federal drug prosecutions should...be limited to members of law enforcement who (1) did not also participate in the underlying criminal investigation, and (2) are sequestered from other witnesses in the case prior to their testimony. Then, prior to qualifying any member of law enforcement as an expert, district courts must insist upon an explanation from the expert about (1) how her experience led to the conclusion reached; (2) how that experience is an appropriate basis for the offered opinion; and (3) how the experience is reliably applied to **the facts**.

Federal Rule of Evidence 704(b) and the Due Process Clause

Federal Rule of Evidence 704(b) provides that

> 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.

Professor Gallini argues that courts routinely violate this Rule by allowing testimony that

> (1) connects defendant's factual behavior to the *mens rea* set forth in the charging statute, (2) indicates that the facts of defendant's case satisfy the statute's *mens rea*, or (3) responds to a prosecutor's hypothetical that, itself, is modeled after the very facts **in dispute**.

Moreover, Gallini contends that the admission of such evidence also violates the Due Process Clause because it improperly relieves prosecutors of their duty to prove guilt beyond a reasonable doubt because "[t]he jury need only match defendant's conduct with the testimony proffered by the 'expert' in order to reach a conclusion on defendant's mental state and, ordinarily, a corresponding finding **of guilt."** Thus, Gallini concludes that

> Accordingly, guarding defendant's presumption of innocence must require federal courts to do more than routinely admit expert testimony from, for example, a member of law enforcement who (1) served as the investigating agent, (2) testifies as a lay witness, (3) testifies as an expert in drug trafficking, and/or (4) as part of that testimony, concludes that defendant's activities are consistent with drug trafficking. What "doing more" means seems both easy and obvious; indeed, fixing the problem would simply require district courts to stop admitting law enforcement expert opinion testimony that (1) connects defendant's factual behavior to the mens rea set forth in the charging statute, (2) indicates that the facts of defendant's case satisfy the statute's *mens rea*, or (3) responds to a prosecutor's hypothetical that, itself, is modeled after the very facts **in dispute**.

I strongly recommend Professor Gallini's article to readers and hope that its ideas gain some traction in

the courts. I asked Professor Gallini what led him to write the article and he responded:

> I got the idea from a combination of a seminar I teach called Problems in Police Discretion and my doctrinal course on Federal Criminal Law. Hearing from officers about their experiences testifying in the context of my seminar's speaker series alongside our classroom discussion in Federal Criminal Law of 21 USC 841 really got my brain going. Although the *mens rea* set forth in 841 LOOKS daunting, it struck me during those discussions that it rarely poses much of a practical prosecutorial hurdle. From there, I started wondering on my own about the context in which officers offered testimony in federal drug cases. As it happens, and as you know from the article, my research uncovered that officers are most often testifying as experts. That of course made me question where rule 702 fit in.
>
> After learning that 702 seemingly posed no limitation on the introduction of officer testimony, I was taken aback by how far district courts were willing to go in terms of allowing the substance of officer testimony. It struck me that the testimony often extended into an implicit commentary on defendant's mens rea, which seemed to me to be a 704(b) problem and even possibly a due process problem.

-CM

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