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P R O C E E D I N G S

(10:10 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 23-14, Diaz versus United States.

Mr. Fisher.

ORAL ARGUMENT OF JEFFREY L. FISHER

ON BEHALF OF THE PETITIONER

MR. FISHER: Mr. Chief Justice, and may it please the Court:

The Ninth Circuit holds that Rule 704(b) prohibits only explicit opinions that the "particular defendant had the state of mind required to convict." The government appears unwilling to endorse that full test. It seems to agree, contrary to Ninth Circuit precedent, that Rule 704(b) forbids an expert from testifying that people in the defendant's position always have the requisite mens rea.

Such testimony never explicitly mentions the defendant, of course, but as the government seems to recognize, it is clearly in the rules of -- in the words of Rule 704(b) an opinion about whether the defendant had the requisite state of mind. In other words, it

1 establishes a class of individuals including the
2 defendant, and it assigns a mens rea to that
3 class.

4 Agent Flood's testimony here was no
5 different. He testified that in "most
6 circumstances," people like the defendant know
7 they have drugs in the car when they cross the
8 border. The only difference between that
9 testimony and absolute class-wide testimony is
10 that he posited that people like the defendant
11 usually, instead of always, have the requisite
12 mens rea.

13 But any such distinction is
14 immaterial. Imagine an expert took the stand
15 and said: I believe the defendant in this case
16 probably or maybe 80 percent of the time -- or
17 maybe there's an 80 percent likelihood had the
18 requisite mens rea. Obviously, Rule 704(b)
19 would prohibit that testimony.

20 And the testimony here is exactly the
21 same. It expresses an opinion, a probabilistic
22 opinion instead of an absolute opinion, but an
23 opinion about whether the defendant had the
24 requisite -- requisite mens rea.

25 So that leaves the government's final

1 objection, that Rule 704(b) should not be
2 construed to prohibit what the government calls
3 "inferentially relevant testimony."

4 And we agree with that proposition.
5 The rule that I'm advocating today has been
6 employed by the Fifth Circuit for over 20 years,
7 and it makes clear that modus operandi evidence,
8 for example, things like drug traffic
9 organizations use couriers to transport drugs
10 across the border, that they -- that drugs are
11 extremely valuable, are perfectly legitimate.

12 The rule in the Fifth Circuit is that
13 testimony from which a jury might infer mens rea
14 is perfectly permissible, but testimony that
15 assigns a mens rea to the defendant or people in
16 her class is not okay. And that's what Agent
17 Flood did here, and for that reason, we'd ask
18 the Court to reverse.

19 JUSTICE THOMAS: Mr. Fisher, you put
20 quite a bit of weight -- of -- of weight in your
21 argument on the preposition -- on "about." And
22 that was a stylistic change, certainly
23 non-substantive.

24 Do we normally put that much emphasis
25 or that much weight on stylistic changes to

1 statutes?

2 MR. FISHER: Well, I think what I
3 would say, Justice Thomas, is the Court
4 obviously puts a lot of weight on the text of
5 the statute. And so I start with the current
6 text of the statute that is current law.

7 JUSTICE THOMAS: Okay. So, even with
8 that, it says "about defendant." It doesn't say
9 "about" someone else. So you're saying that
10 even if it's indirect, it's about this
11 defendant?

12 MR. FISHER: Let me say two things,
13 Justice Thomas. First, to finish my answer
14 about the word "about," what we say is that
15 preposition is important, just like the prior
16 preposition, "as to," before the stylistic
17 amendment --

18 JUSTICE THOMAS: Yeah.

19 MR. FISHER: -- because it makes clear
20 the Ninth Circuit's clear statement rule
21 requiring an explicit opinion is too narrow. So
22 that's what the preposition "about" does.

23 Now you also asked me about "the"
24 defendant. And our position there is very
25 simple. It is that that word covers either a

1 direct statement about the particular defendant
2 or a statement about a class of people,
3 including the defendant.

4 I don't think the government disagrees
5 that the rule covers a statement covering -- I'm
6 sorry, that -- that the rule covers a class of
7 people including the defendant as long as it's
8 stated in absolute terms. So, if I understand
9 the government's position correctly, it agrees
10 you need not mention the explicit defendant. If
11 you talk about a class of people that includes
12 the defendant and say those people always have
13 the requisite mens rea, I think the government
14 agrees, contrary to the Ninth Circuit, that Rule
15 704(b) applies.

16 JUSTICE THOMAS: Well, I thought
17 the --

18 MR. FISHER: And all we're saying --
19 sorry.

20 JUSTICE THOMAS: Well, I thought the
21 argument there was that if you say "all
22 defendants," all people in this class do this,
23 then it obviously would include the defendant.

24 MR. FISHER: I think that's exactly
25 right, Justice Thomas. So the only move left

1 from there is to say, if the expert were to
2 testify people like this almost always,
3 virtually always, 99 percent of the time,
4 probably, in most circumstances, all of those
5 are still opinions about whether the defendant
6 had the mens rea. They're just not absolute
7 opinions.

8 But they're still stating an opinion
9 about whether a class of people including this
10 defendant have the requisite mens rea. And I
11 think that's why the text of the rule, opinions
12 about whether the defendant had the mens rea,
13 covers this exact case.

14 JUSTICE JACKSON: But I guess I don't
15 --

16 CHIEF JUSTICE ROBERTS: But --

17 JUSTICE JACKSON: -- understand -- oh,
18 sorry.

19 CHIEF JUSTICE ROBERTS: I -- I was
20 just going to ask, but the defense counsel
21 would, of course, know that this witness is
22 going to testify, right?

23 MR. FISHER: Yes.

24 CHIEF JUSTICE ROBERTS: And could it
25 make appropriate inquiries about the nature of

1 his testimony before. And so, after he has
2 testified, he could presumably stand up and ask
3 the expert, you know, Mr. Expert, are you saying
4 that in every case, someone knows that the drugs
5 are in the car? He, presumably, would say no.
6 And are you saying -- are you stating an opinion
7 about whether this individual had -- knew she
8 had drugs in the car? He would have to say no,
9 right?

10 So I don't understand -- I mean,
11 obviously, you would like a case in which this
12 was a very rare occurrence, but all he's saying
13 is that it's not. It's whatever he wants to
14 say, in the majority of cases or whatever, and
15 you can challenge that and you can particularly
16 make clear that what the concern was about in --
17 in drafting this rule, you can make clear that
18 he is not telling you anything about this
19 particular individual.

20 MR. FISHER: Let me say two things
21 about that, Mr. Chief Justice. First of all, I
22 just want to return to the thing I said in the
23 opening, which is, if the expert were to testify
24 that I think there's an 80 percent chance this
25 particular defendant had the mens rea, the same

1 kind of cross-examination could occur. You
2 would say, Mr. Expert, you're not sure, are you?
3 It's possible he didn't have it? Only -- you
4 know, it's only you're saying probably? And I
5 think it would be very hard to argue Rule 704(b)
6 would not cover that testimony.

7 CHIEF JUSTICE ROBERTS: Well, I don't
8 think --

9 MR. FISHER: And the reason why --

10 CHIEF JUSTICE ROBERTS: Go ahead.

11 MR. FISHER: Oh. I think the reason
12 why is because what the drafters of the rule
13 cared about was not an absolute versus
14 probabilistic opinion. What they cared about
15 was the expert assigning a mens rea to the
16 defendant or a class of people like the
17 defendant. In other words, it's the subject of
18 mens rea that's off limits, not --

19 CHIEF JUSTICE ROBERTS: Well, I don't
20 know that --

21 MR. FISHER: -- absolute testimony.

22 CHIEF JUSTICE ROBERTS: I -- I
23 certainly don't have experience in -- in trials,
24 but -- but I don't know that -- could he really
25 say there's an 80 percent chance that this

1 individual had drugs? I think he would have to
2 say more generally that 80 percent of the people
3 that I've studied or whatever have drugs. I
4 don't know that he can ascribe -- maybe he
5 shouldn't be able to ascribe a number to this
6 individual.

7 MR. FISHER: Well -- well --

8 CHIEF JUSTICE ROBERTS: Because they
9 may well be situations where -- and, again, the
10 defense counsel can bring them up -- why this
11 person would not be like the typical individual
12 that the expert --

13 MR. FISHER: Right.

14 CHIEF JUSTICE ROBERTS: -- is
15 testifying about.

16 MR. FISHER: Well, after Rule 704(b),
17 of course, the expert couldn't, but I think,
18 before Rule 704(b), an expert could say -- for
19 example, an expert could say, absolutely, as
20 happened in the Hinckley trial, I believe this
21 defendant did not have the capacity to tell
22 right from wrong, so, therefore, he is insane.

23 And I think after -- and I'd think
24 Congress would have prohibited that in Rule
25 704(b) just like it would prohibit the expert

1 from saying I think most likely Mr. Hinckley was
2 insane and couldn't tell right from wrong.

3 And whether you say that in terms of a
4 percentage or just a verbal locution that's
5 "probably," "usually," "most of the time,"
6 "almost certainly," any of those things would be
7 covered by the rule because they're all an
8 opinion about whether the defendant had that
9 mens rea.

10 JUSTICE JACKSON: But -- but, Mr. --

11 JUSTICE ALITO: Mr. --

12 JUSTICE BARRETT: Mr. Fisher --

13 JUSTICE ALITO: -- Mr. Fisher, your --
14 the -- the Ninth Circuit's rule is clear. Your
15 rule, to my mind, is unclear. I still don't
16 understand it. If you don't think that anything
17 from which the jury could infer mens rea is
18 barred -- by 704, then I don't know where you
19 draw the line.

20 MR. FISHER: Well, Justice Alito, I
21 think it might help to understand what you have
22 to decide in this case if I give you a quick
23 preface to that answer.

24 JUSTICE ALITO: Well, just give me
25 what the rule should be.

1 MR. FISHER: The rule should be that
2 any testimony that the jury would naturally
3 understand as expressing an opinion about the
4 defendant's mens rea is covered by Rule 704(b).

5 JUSTICE ALITO: So that -- if it's --

6 MR. FISHER: That raises --

7 JUSTICE ALITO: -- if it's relevant --
8 all right. Suppose the -- suppose the -- the
9 expert is -- is asked, how many cases do you
10 have personal familiarity with in which a person
11 drove across the border with a large quantity of
12 drugs hidden in the car? Eighty-three cases.
13 And how many of those cases did the person
14 driving the car know that the drugs were there?
15 Eighty-three.

16 Is that barred?

17 MR. FISHER: I -- I think that would
18 be barred because it would be equivalent of
19 saying defendants in this position always have
20 the requisite mens rea.

21 JUSTICE ALITO: Well, it's just a
22 statement of fact about his -- about his -- what
23 he has personal knowledge of.

24 MR. FISHER: Well, remember, the state
25 -- the expert testimony here -- and this is at

1 Pet. App. 13A -- was admitted as an expert
2 opinion about whether the defendant had the
3 requisite mens rea. It's an opinion evidence --

4 JUSTICE ALITO: All right. Well, this
5 isn't --

6 MR. FISHER: -- not facts evidence.

7 JUSTICE ALITO: Okay. So it would be
8 okay if it's not opinion evidence?

9 MR. FISHER: Well, I think it
10 functionally would be opinion evidence
11 regardless of whether you characterized it.

12 But, Justice Alito, let me -- I think it might
13 help the conversation if I explained the Ninth
14 Circuit's rule raises really two questions.

15 One is, is the expert testimony about
16 mens rea and is it about the defendant? And --
17 and -- and we agree with the -- with the Fifth
18 Circuit rule that if you -- if the expert gives
19 testimony that -- from which the jury can merely
20 draw an inference about mens rea, that's
21 perfectly fine, and there might be borderline
22 cases about what's mens rea, but that's not this
23 case because the expert used the word "know."
24 The expert used the word "aware."

25 JUSTICE KAGAN: Well, can I test

1 that --

2 MR. FISHER: So the only question --

3 JUSTICE KAGAN: -- that question about
4 inference? So suppose that the expert gets on
5 the stand and says: In my experience, drug
6 traffickers always inform their carriers before
7 they head out about the nature of the scheme.

8 MR. FISHER: Right.

9 JUSTICE KAGAN: Would that come under
10 your rule or would it not?

11 MR. FISHER: I think it would probably
12 barely fall outside of our rule, Justice Kagan,
13 and that's -- but you have identified an edge
14 case, but the reason --

15 JUSTICE KAGAN: Yeah, it's -- it's --

16 MR. FISHER: -- why it wouldn't fall
17 in --

18 JUSTICE KAGAN: -- very much like --
19 I -- I sort of expected --

20 MR. FISHER: Yeah.

21 JUSTICE KAGAN: -- you to say that --

22 MR. FISHER: Right.

23 JUSTICE KAGAN: -- because it's very
24 much like the example in your reply brief --

25 MR. FISHER: Yeah.

1 JUSTICE KAGAN: -- about tax lawyers
2 being --

3 MR. FISHER: Right.

4 JUSTICE KAGAN: -- taught something.
5 So this is drug couriers are being informed --

6 MR. FISHER: Right.

7 JUSTICE KAGAN: -- about the nature of
8 the scheme.

9 MR. FISHER: So --

10 JUSTICE KAGAN: If you say that, I
11 don't really understand what the point of your
12 rule is.

13 MR. FISHER: Well --

14 JUSTICE KAGAN: I mean, it just
15 suggests that all the expert has to do is, you
16 know, tweak the way he says something and the
17 exact same testimony can come in.

18 MR. FISHER: So let me say the rule
19 and the reason why I gave you the answer I did.
20 Remember, the rule talks about not just any
21 mental state or not facts that might lead to a
22 mental state, but it talks about the mental
23 state of the crime -- of the element of the
24 crime to convict.

25 So, here, the -- that mental state is

1 knowing, and that's what the expert expressly
2 said. In your hypothetical, you have to know
3 not just that the ex -- that the defendant was
4 told that but that she heard it, she understood
5 it, she remembered it, she wasn't told something
6 different --

7 JUSTICE KAGAN: Yeah. How about if I
8 say --

9 MR. FISHER: -- all kinds of those.

10 JUSTICE KAGAN: -- how about if I said
11 something like, in my experience, the -- the --
12 the organization always informs the courier of
13 the nature of the scheme and doesn't allow the
14 courier to set off until she verbally assents?

15 MR. FISHER: Right. I think, at some
16 point, you get so close that that may well be a
17 statement about mens rea. But what I want to
18 emphasize, Justice Kagan --

19 JUSTICE KAGAN: I guess what I'm
20 suggesting -- and it's really the same point
21 that Justice Alito was making, I think -- is
22 that it just seems at that point a -- a kind of
23 game as to how you frame the testimony so that
24 it falls just over the line, you know, or,
25 instead, you can argue that it's just inside the

1 line, but in the end, the government is going to
2 get this testimony in.

3 MR. FISHER: Well, if you think that's
4 too formalistic, you could, of course, make the
5 rule broader. All I'm saying is that there is a
6 core of Rule 704(b) which is statements about
7 the defendant's mens rea, and that's
8 unquestionably what you have in this case. And
9 how far out that goes and whether it covers your
10 hypothetical would just be a different case on
11 different facts.

12 JUSTICE JACKSON: But why is your
13 statement --

14 JUSTICE BARRETT: What about --

15 MR. FISHER: But it has to mean
16 something.

17 JUSTICE BARRETT: -- what about your
18 own -- oh, sorry.

19 JUSTICE JACKSON: Why is it a
20 statement about the defendant's mens rea?
21 That's the part that I'm not understanding. So,
22 you know, the Chief says, if the expert in a
23 situation says 80 percent of the time, you know,
24 when these conditions exist, the person knows.

25 Why isn't there still an inference to

1 be drawn as to whether or not the defendant is
2 in the 80 percent or the 20 percent?

3 MR. FISHER: Because the -- the expert
4 would not -- the expert is just giving a
5 less-than-absolute opinion in that regard.

6 JUSTICE JACKSON: No, I understand,
7 but there's --

8 MR. FISHER: It's still an opinion
9 about whether.

10 JUSTICE JACKSON: Right.

11 MR. FISHER: And it's still about
12 people in the defendant's class. Let me put it
13 to you this way, Justice Jackson.

14 JUSTICE JACKSON: No, the question is
15 whether the defendant is -- is in the class.
16 That's what I'm saying. The inference that
17 remains from a testimony that is not a hundred
18 percent --

19 MR. FISHER: Yeah.

20 JUSTICE JACKSON: -- is whether or not
21 the defendant is in the class that the expert
22 has identified.

23 MR. FISHER: Well, the defendant is
24 certainly in the class, just to use the facts of
25 this case, because the class is people crossing

1 the border with large quantity of drugs in their
2 car. So the defendant is in that class.

3 JUSTICE JACKSON: And the -- and the
4 --

5 MR. FISHER: And our position is
6 simply that the expert is giving a probabilistic
7 opinion as to whether or not she had -- she knew
8 she had drugs.

9 JUSTICE JACKSON: But couldn't you
10 characterize it as the expert is speaking to the
11 class of people who have drugs in their car and
12 know about it?

13 MR. FISHER: Well, I think this brings
14 me --

15 JUSTICE JACKSON: And they say --
16 and -- and -- and if you characterize the class
17 as that, then the question is still whether the
18 defendant is in that class, right?

19 MR. FISHER: Well, I think, you know,
20 that's one way to put it, but I think, Justice
21 Jackson, imagine the expert testified: I think
22 there's an 80 percent chance or I think probably
23 this particular defendant knew she had drugs in
24 the car.

25 That would still leave the same amount

1 of inferential analysis if you want to put it
2 that way to be done by the jury, but it's not
3 inference as to mens rea. It's just inference
4 as to whether or not the defendant is guilty or
5 not. It's still a probabilistic opinion.

6 So I think the only thing I want to
7 persuade you of is that just like an expert
8 giving a probabilistic opinion about the
9 defendant herself leaves, if you want to put it
10 this way, some room for the jury to confirm that
11 that expert is correct that this defendant is
12 one of the majority, the same thing would be
13 true if the expert said the thing about the
14 defendant herself.

15 And -- and convert -- and -- and the
16 other version of this, I think, that helps prove
17 my point is that, I think, again -- and I'll let
18 my -- my friend speak for himself -- but I think
19 I understand the government to say that if the
20 defendant says -- if the expert says people like
21 this always know they have drugs in the car,
22 that's covered by Rule 704(b).

23 Now that's contrary to Ninth Circuit
24 precedent and it doesn't explicitly mention the
25 defendant, but it is covered. And so, if you

1 put together the notion that you don't have to
2 explicitly mention the defendant to cover the
3 defendant with the notion that probabilistic
4 opinions are covered just as much as absolute --

5 JUSTICE ALITO: Well, I don't know --

6 JUSTICE BARRETT: Mr. Fisher --

7 JUSTICE ALITO: -- how that -- I -- I
8 don't know how that testimony, every single
9 person who drives a car across the border with a
10 large quantity of drugs knows that there are
11 drugs in there, how that gets in under 702. The
12 a -- an expert's testimony is admissible under
13 702 if it is the product of reliable principles
14 and methods.

15 I don't know what reliable principles
16 and methods could lead anybody to conclude that
17 every single person who does that knows what's
18 in the car.

19 MR. FISHER: Well, I --

20 JUSTICE ALITO: So there are other
21 rules that take care of the extreme cases. You
22 have -- the expert has to satisfy 702 and then
23 there's always 403 if some -- if in some case
24 the trial judge thinks this is -- this goes too
25 far. I don't know why you have to try to make

1 an exception in 704.

2 MR. FISHER: So let me go through both
3 the rules you mentioned, Justice Alito. Under
4 Rule 702, I think the reason why that evidence
5 typically comes in is the expert couches it as
6 "in my experience." And to go back to your
7 hypothetical, in my experience, 83 out of 83,
8 therefore, people always know.

9 And we cite cases in our brief where
10 the expert has given this exact kind of
11 testimony up to 2013 in the Ninth Circuit, so --

12 JUSTICE ALITO: Well, I mean, the --
13 the fact testimony, 83 out of 83, is one thing.
14 Whether it's permissible to draw from that
15 experience the inference that they always know,
16 I think that's dubious under 702.

17 MR. FISHER: Well, I think you're -- I
18 -- I think you may be right. The NACDL brief
19 talks about some of the problems with law
20 enforcement expert testimony that exist sort of
21 writ large across the courts, and maybe Rule --
22 maybe you have a Rule 702 case that you might
23 want to look at sometime when it comes to that
24 problem. But I don't think you need to do that
25 here because Rule 704(b) is the finer-grained

1 rule that deals particularly with mens rea.

2 JUSTICE GORSUCH: Mr. Fisher --

3 MR. FISHER: And -- yeah?

4 JUSTICE GORSUCH: -- 704 is -- is
5 party agnostic, and so what's going to be good
6 for the goose here is going to be good for the
7 gander. And I would think that would mean that
8 if -- if we're going to allow this testimony
9 that defendants are going to be able to hire
10 former DEA agents to come in and say: Well,
11 there's an 80 percent chance that drug mules
12 don't know.

13 Is that the world we're going to
14 invite if -- if -- if we find for the government
15 here?

16 MR. FISHER: Well, it would certainly
17 be allowed. And, whether defendants can find
18 those experts is maybe a different question.
19 But, certainly --

20 JUSTICE GORSUCH: Oh, in my
21 experience, you know, it's not too hard to hire
22 an expert witness.

23 MR. FISHER: Well --

24 JUSTICE GORSUCH: So, I mean, but --
25 but that's what we're going to have. And I'm

1 just wondering how far removed we're going to
2 wind up from -- from what motivated it, if you
3 want to talk about it in that --

4 MR. FISHER: Yeah.

5 JUSTICE GORSUCH: -- terms or the text
6 of 704 --

7 MR. FISHER: Right.

8 JUSTICE GORSUCH: -- as adopted, which
9 was to stop -- you know, it was motivated in
10 part by the Hinckley case.

11 MR. FISHER: Right.

12 JUSTICE GORSUCH: And we're going to
13 wind up having experts saying there's an
14 80 percent chance this -- that he didn't know it
15 was the President of the United States, he
16 thought it was a duck or -- or --

17 MR. FISHER: Or virtually -- or I'm
18 virtually sure and I'm virtually positive in the
19 other direction.

20 JUSTICE GORSUCH: Going to be right
21 back where we started.

22 MR. FISHER: Right, because what
23 Congress was concerned about was the confusing
24 spectacle of competing opinions on mens rea.

25 And even if -- I would just add one

1 more thing -- even if there were just one
2 expert, if you do want to look at congressional
3 intent, what that intent is clear about is that
4 experts should not be talking about the ultimate
5 issue of mens rea. It's perfectly fine to talk
6 about mental state. It's perfectly talk about
7 -- fine about experiential facts that lend to
8 inferences about mental state. But the jury's
9 special role in criminal cases is designed to
10 find mental state in expert --

11 JUSTICE GORSUCH: And then --

12 JUSTICE BARRETT: But what about --

13 JUSTICE GORSUCH: -- and then just to
14 -- just to finish up, you know, the -- the --
15 the fact that the parties can often get
16 inferences through facts about mens rea and
17 therefore come virtually close to this, is that
18 anything unusual in -- in -- in trial practice?
19 I -- I was always taught there's always a way to
20 skin the evidentiary cat, and I can come up with
21 a whole bunch of facts that -- to suggest that
22 somebody does or doesn't have a mental state.

23 MR. FISHER: Yeah, that's exactly
24 right. And, of course, the prosecutor at
25 closing can connect all of the dots and make an

1 argument to the jury. So I'm not here to make a
2 big dramatic argument, but I am here to make a
3 meaningful argument about testimony that's this
4 explicit about the defendant's mens rea.

5 JUSTICE BARRETT: Well, that --
6 actually, Justice Gorsuch's question brings up
7 one that I had, is what about your client's own
8 expert testimony in this case, you know, an
9 expert who says there's no way for someone to
10 suspect or know that the car has drugs in it?

11 MR. FISHER: So I think, Justice
12 Barrett, that particular sentence of our
13 expert's testimony crossed the line of Rule
14 704(b), but, remember, the trial judge had
15 already ruled at that point that Agent Flood's
16 testimony was admissible and had construed the
17 rule in the way the Ninth Circuit does to bar
18 only explicit opinions about the defendant
19 herself. So the defendant was playing under the
20 same rules that the prosecution was playing
21 under.

22 We agree on a retrial that that
23 particular statement would be out.

24 JUSTICE BARRETT: That that would have
25 to stay out? And what about framework evidence,

1 that the evidence professors say framework
2 evidence is valuable and it comes in in most
3 cases, and, you know, your average juror is
4 probably not going to understand how cartels
5 work? So it would be valuable, I would think,
6 to say things like, well, you know, cartels like
7 to know where the parked -- car is going to be
8 parked on the other side of the border so they
9 know where to find the drugs. This is the value
10 of the drugs. So this is how cartels --

11 MR. FISHER: Yeah.

12 JUSTICE BARRETT: -- do it. So the
13 evidence professors say this would be a terrible
14 rule because framework evidence is valuable.

15 Do you -- what rule do you see for the
16 kind of framework evidence?

17 MR. FISHER: I think the -- the
18 professors just misunderstand our rule. And
19 we're, again, are -- not advocating something
20 out of thin air. It's the Fifth Circuit's own
21 doctrine that we're -- that we're advocating
22 here. And that doctrine makes clear all the
23 stuff you just posited is perfectly admissible
24 because, again, it's -- there -- there's no
25 statement about mens rea in those sentences you

1 just read me. They're just facts in the world
2 that make it highly likely or unlikely a person
3 had a mens rea, but it's not statements about
4 knowledge to use the mens rea in this case.

5 And -- and this brings me back --

6 JUSTICE JACKSON: But, Mr. -- Mr.
7 Fisher --

8 MR. FISHER: -- to Justice Kagan --

9 JUSTICE JACKSON: -- Mr. Fisher,
10 sometimes statements about knowledge are
11 actually defense important. You suggested that
12 in this case the defense put that evidence in
13 sort of because they were living in the world
14 that the court had already established.

15 But one of the things the evidence
16 professors talk about is that if you exclude
17 this kind of evidence, you could have a
18 situation in which you have a battered spouse
19 who assaults their -- the person who is beating
20 them, and they're not going to be able to put on
21 expert evidence that negates mens rea in that
22 situation.

23 What do you say about that? It seems
24 to me this is not all net positive for defense.

25 MR. FISHER: So I think this is the

1 flip side of the exchange I had with Justice
2 Gorsuch. The defendant in that situation can
3 put on an expert to talk about the phenomenon of
4 battered women syndrome. That expert could
5 testify about the cycle of violence and learned
6 helplessness and the features of battered women
7 syndrome.

8 The only thing the expert could not do
9 is say: I think this defendant or people in her
10 position would not have had the requisite mens
11 rea. But then, at closing, the defendant can
12 make that very argument.

13 It's just direct -- testimony about
14 the precise element of the crime -- crime that
15 is barred, the mens rea element of the crime
16 that is barred, by Rule 704(b). So, again, I
17 don't have some broad --

18 JUSTICE JACKSON: But is there a
19 difference between saying the defendant herself
20 didn't have the mens rea or women in this
21 situation didn't have the mens rea? I guess
22 that's what I'm not understanding about your
23 argument.

24 MR. FISHER: I think that those two
25 things are both covered by the rule. Now the --

1 and even the government --

2 JUSTICE JACKSON: Both covered by?
3 But I thought that's what you just said they
4 could get up to the line of saying.

5 MR. FISHER: No, no, no. I think they
6 -- they could describe women in the situation of
7 battered women -- of battered women syndrome and
8 what those symptoms are and what those features
9 are of that -- of that condition, but the expert
10 could not testify as to whether or not a person
11 with that condition would have had the mens rea
12 to commit this crime. It's just the mens rea
13 testimony. It's not mental state testimony,
14 mental condition testimony more generally.

15 JUSTICE SOTOMAYOR: Mr. Fisher, I -- I
16 want to articulate your rule. And you're right,
17 it's different. But you keep saying it's the
18 Fifth Circuit rule. I'm not sure it's the Fifth
19 Circuit rule, because the Fifth Circuit has
20 criticized evidence with respect to what the
21 drug traffic -- the drug cartels' knowledge are.
22 So I think you're breaking from the Fifth
23 Circuit, as the government breaks from the Ninth
24 Circuit. Everybody's trying to find that happy
25 medium.

1 But the Rules of Evidence don't say,
2 even if you can get something in a different
3 way, your mistake is -- you can do it this
4 particular way all the time. I mean, I'm
5 thinking about --

6 JUSTICE SOTOMAYOR: Right.

7 JUSTICE SOTOMAYOR: -- we have a lot
8 of hearsay that you can't get it in on the
9 hearsay, but you can get it in for other reasons
10 that don't go to the ultimate guilt of people.

11 Rules are rules, and there's a reason
12 for them. And I think what you're arguing is
13 this rule says you can talk about modus operandi
14 of drug traffickers generally, but you can't
15 talk about a particular defendant or class of
16 defendants and what their mental state is
17 because that's what the rule tells you you can't
18 do.

19 So it might feel like an exercise
20 without a point, but it is an important point.
21 Isn't that what you're trying to say?

22 MR. FISHER: I think that's right. I
23 think we are defending pretty much what happens
24 in the Fifth Circuit. And the reason why that's
25 the rule is because of the importance of mens

1 rea. It's the -- as the Court itself has
2 highlighted in cases in recent years, it is the
3 heart of our criminal law and -- and it's the
4 heart of a jury's function to make that
5 moralistic qualitative determination.

6 So, if it seems formalistic when I say
7 you're drawing a line, a protective barrier
8 around mens rea, it's because that's what the
9 right of jury trial is about and that's what the
10 drafters of this rule recognized after they get
11 to --

12 JUSTICE GORSUCH: Mr. Fisher --

13 MR. FISHER: -- trial.

14 JUSTICE GORSUCH: -- has the federal
15 government had any trouble convicting drug
16 traffickers in the Fifth Circuit?

17 MR. FISHER: Not to my knowledge.

18 And, of course, the government's had 20 years to
19 bring this issue up if it didn't like the Fifth
20 Circuit law. So I think it works pretty well in
21 the Fifth Circuit.

22 But let me say something that would
23 lead -- if you agreed with the government's
24 concession now that -- saying that people in
25 this position always have the requisite mens

1 rea, you're going to have to draw some very
2 difficult lines. What if the expert testified
3 and said people like this virtually always,
4 99 percent of the time? What if the expert said
5 maybe it's hypothetically possible a
6 defendant -- take the 83 out of 83, and the
7 expert said maybe, maybe it's possible somebody
8 could not have known, but I've never seen such a
9 case? You know, would that count? What if the
10 expert said, like in this case, there's only
11 three situations I can -- I'm aware of where an
12 expert -- I'm sorry -- where the defendant
13 doesn't have the mens rea and those three
14 situations are all different from this case.

15 And then take it one step further in
16 closing argument when defense counsel tried to
17 argue, well, Agent Flood admitted there's a few
18 situations defendants don't have the mens rea.
19 The government objected and said, well, you
20 can't argue that other situations might be
21 possible because, here, you named three.

22 JUSTICE ALITO: But those all sound --
23 those all sound to me like cases in which Rule
24 403 might well come into play.

25 MR. FISHER: Well, remember, what the

1 Ninth Circuit says about Rule 403 and Rule 401
2 is that this testimony goes to the heart of a
3 blind mule defense, like in this case. So it's
4 the exact opposite of being irrelevant or unduly
5 prejudicial.

6 JUSTICE ALITO: Well, it's -- well,
7 it's relevant, but it -- it has a highly
8 prejudicial value and maybe it would be excluded
9 by a lot of trial judges or --

10 MR. FISHER: Well, I think -- I think
11 the government's position is in line with the
12 Ninth Circuit, and we concede there's force to
13 it, that this evidence is damaging because it's
14 so directly relevant to the defendant's mens
15 rea. That's the problem with it.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Justice Thomas?

19 Justice Alito, anything further?

20 JUSTICE SOTOMAYOR: I -- Justice Alito
21 is inviting, I think, even more chaos in the --
22 among courts. If you're going to rely on 403 or
23 702 or any individualized decision-making by
24 judges, you're just throwing this up into the
25 air with no clarity.

1 MR. FISHER: I think that's right,
2 Justice Sotomayor. One way to think about this
3 is you have Rule 403, which is maybe the
4 broadest, most flexible of the Rules of Evidence
5 to deal with prejudicial evidence. You have the
6 next narrower rule, which is Rule 702, which is
7 just about expert evidence and reliable bases
8 for that evidence. And then you have the
9 narrowest of them all, Rule 704(b).

10 I'm only asking you today to rule --
11 to apply Rule 704(b), which is --

12 JUSTICE SOTOMAYOR: I mean, once --
13 once you're asking courts to go into asking
14 every police officer how many of these cases
15 have you had, and when am I going to decide that
16 10 cases is not adequate, but 83 might be?

17 MR. FISHER: Yeah.

18 JUSTICE SOTOMAYOR: When there's
19 550,000 drug arrests, is 83 enough? I don't
20 know the statistical answer to that.

21 Your rule is much simpler, isn't it?

22 MR. FISHER: I think it --

23 JUSTICE SOTOMAYOR: It's, if you're
24 going to talk about a defendant and what a
25 defendant is thinking, that's off limits; if

1 you're talking about modus operandi of what
2 others do or don't do, that's okay?

3 MR. FISHER: Right. So my rule has
4 two components. One is, is it about mens rea?
5 Unquestionably yes here because the expert used
6 the word "know." And is it about the defendant?
7 And our rule there is very simple as well,
8 directly about the defendant or a class of
9 people including her. That's the full scope of
10 that --

11 JUSTICE SOTOMAYOR: And the -- what is
12 permissible, as you said, is if a expert says,
13 drug traffickers prefer to hire people that the
14 traffickers know and trust than to hide the
15 drugs in a stranger car, or drug traffickers
16 want to know where the car goes, so they're
17 going to use a GPS or something like that.
18 That's modus operandi.

19 MR. FISHER: Descriptive modus
20 operandi evidence that does not speak to mens
21 rea directly is perfectly fine.

22 And I -- and Justice Sotomayor, let me
23 add one thing to what you were talking about
24 because I think it goes back to the Chief
25 Justice's question about cross-examination and

1 maybe Justice Alito's question about Rule 702 as
2 well.

3 If the expert testified either -- on
4 direct or cross, look, this is my experience
5 across most cases, but I can't tell you anything
6 about this particular defendant because I don't
7 know anything about this defendant, whether or
8 not she had the mens rea, then you would have a
9 real objection under relevance or Rule 702.

10 Of course, you had nothing like that
11 in this case, you know, so the plain implication
12 to the jury was not just most people like this
13 have the mens rea, but I believe this defendant
14 has the mens rea.

15 CHIEF JUSTICE ROBERTS: Justice Kagan?

16 JUSTICE KAGAN: I feel as though I
17 should offer a bit of my time to Justice Alito
18 to respond to being a chaos inciter.

19 (Laughter.)

20 JUSTICE ALITO: I'll ask Mr. Guarnieri
21 about that.

22 (Laughter.)

23 JUSTICE KAGAN: What was my question?

24 (Laughter.)

25 JUSTICE KAGAN: Here's my question.

1 You've relied quite a number of times on the
2 government's apparent concession that the a
3 hundred percent case would come out your way.

4 MR. FISHER: Yeah.

5 JUSTICE KAGAN: I took the government
6 to be hedging on that question, and I'll just
7 tell you. We'll -- we'll -- we'll find out soon
8 enough. But, if the government is not, in fact,
9 taking the position --

10 MR. FISHER: Yeah.

11 JUSTICE KAGAN: -- that you took about
12 the a hundred percent case, what changes in your
13 argument?

14 MR. FISHER: I don't --

15 JUSTICE KAGAN: I mean, how much of
16 your argument relies on that supposed
17 concession?

18 MR. FISHER: I'm not trying to rely on
19 the concession as such. And I -- I think you're
20 right, there's a little bit of hedge in the
21 brief fairly, so you can ask him, but I think it
22 is -- is a correct statement of law, regardless
23 of who says it or why, that -- that saying
24 everyone in this position has the mens rea is
25 the equivalent of saying the defendant in the

1 courtroom has the mens rea.

2 It is a class of people that
3 necessarily includes the defendant.

4 So there's really only two things you
5 have to decide in this case, Justice Kagan.
6 That's the first thing, is that when you move
7 from the defendant to a class of people
8 including the defendant, whether you're still
9 within 704(b), the answer is yes.

10 And the second question is whether, if
11 that opinion is stated in probabilistic terms
12 instead of absolute terms, you're still within
13 704(b). We say yes. At that point, you're done
14 and you can leave for another day modus operandi
15 versus direct statements of mens rea because,
16 you know, you have a direct statement of mens
17 rea here.

18 CHIEF JUSTICE ROBERTS: Justice
19 Gorsuch?

20 JUSTICE GORSUCH: Just wanted to
21 explore a little bit further your response to
22 the Chief Justice.

23 The 80 percent, he comes in and
24 testifies 80 percent know but admits that he
25 doesn't know about the defendant.

1 How is that evidence in court in the
2 first place?

3 MR. FISHER: That -- that's what I was
4 trying to say, Justice Gorsuch. I think that if
5 the -- if the expert disclaimed any knowledge
6 whatsoever about this defendant and -- and any
7 inference that might be drawn from his overall
8 experience or from his probabilistic opinion,
9 then I think the defense counsel would rise to
10 object and have a very good ground to exclude
11 that opinion.

12 But that's not what happens here.
13 It's the only reason --

14 JUSTICE GORSUCH: Whether it comes out
15 on direct or cross, it wouldn't make any
16 difference.

17 MR. FISHER: That's right.

18 JUSTICE GORSUCH: He shouldn't be in
19 court.

20 MR. FISHER: The only reason the
21 government is offering this testimony is because
22 the expert is implicitly saying: I believe this
23 defendant probably falls within the group.
24 There's no disclaimer here that the expert is
25 offering. And that's the whole point of the

1 testimony. And if -- and if --

2 JUSTICE GORSUCH: So, if we're --

3 MR. FISHER: -- if I could say one
4 other thing, Justice Gorsuch?

5 JUSTICE GORSUCH: Please.

6 MR. FISHER: That is underscored by --
7 by Agent Flood's answers on cross-examination
8 that there's only three possibilities that I'm
9 aware of where the defendant does not know they
10 have drugs, and those possibilities are all
11 different from this case.

12 JUSTICE GORSUCH: Right.

13 MR. FISHER: So, when you add that all
14 up, the expert is effectively saying not just
15 most people but this person by logical
16 implication knew she had drugs.

17 JUSTICE GORSUCH: Correct. And --
18 and -- and so, in this case, the only
19 implication is she knew. In the other cases
20 we've been discussing, the 80 percent --

21 MR. FISHER: Right.

22 JUSTICE GORSUCH: -- and I don't know,
23 then you've got a Daubert problem possibly and
24 we're going to have to tackle that in the next
25 case.

1 MR. FISHER: I think that's right.
2 This is the easier case in that sense too. It's
3 not just a most case. It's a most and the only
4 situations I can think of are something else,
5 so, therefore, you get to all by the totality of
6 Agent Flood's testimony.

7 JUSTICE GORSUCH: Yeah. Whereas down
8 the other road, we're going to have a bunch of
9 Daubert questions. We're also going to have how
10 much probability is enough probability questions
11 too.

12 MR. FISHER: You -- you -- you could.
13 I think -- I think the better rule there is that
14 when it comes to Rule 704(b), any opinion of any
15 probability --

16 JUSTICE GORSUCH: No, I understand
17 your view. But if you should lose --

18 MR. FISHER: Yeah. Yes, we would.

19 JUSTICE GORSUCH: -- we're going to
20 have Daubert questions --

21 MR. FISHER: Yes.

22 JUSTICE GORSUCH: -- and we're going
23 to have probabilistic questions about how much
24 probability is enough.

25 MR. FISHER: Exactly.

1 Ninety-nine percent, I'm virtually certain, but
2 I can't guarantee, all these kinds of verbal
3 formulations would be borderline cases.

4 CHIEF JUSTICE ROBERTS: Justice
5 Kavanaugh?

6 JUSTICE KAVANAUGH: On the text of the
7 rule, that seems to be a problem for you just in
8 my view. And then you rely heavily on the
9 government's saying: Well, even though the text
10 only says that it prohibits expert testimony
11 that this defendant had knowledge, that may also
12 prohibit testimony that all defendants in the
13 class always have knowledge.

14 And you seize on that, understandably.

15 MR. FISHER: Mm-hmm.

16 JUSTICE KAVANAUGH: But then the key
17 move in your argument, I think, is that "always"
18 means the same thing as "usually," and that's
19 just not true.

20 MR. FISHER: Oh, I agree, that's not
21 true. So there's -- there's two steps, Justice
22 Kavanaugh. So the first is whether the
23 defendant, to use the text of the rule, covers a
24 class of people including the defendant.

25 And I think the answer is yes. And I

1 can just give you a couple more examples. If
2 somebody -- if somebody was trying to figure out
3 what a member of this Court thought and somebody
4 answered, well, Supreme Court Justices always
5 think X, that would be a statement about whether
6 that particular Justice had a particular state
7 of mind.

8 And then the second step is whether
9 the "always" versus "probably" matters. It
10 matters in some sense. It's a degree of
11 certitude. But, to go back to the text of the
12 rule, it is still an opinion about whether that
13 Justice has something in her mind.

14 So to say if you're trying to figure
15 out what some justice thinks and somebody says,
16 Justices usually think X, that is a statement
17 about whether the justice has a particular state
18 of mind.

19 Now it's not absolute, but it goes to
20 the nature of expert testimony.

21 JUSTICE KAVANAUGH: It's not -- how is
22 testifying that usually, how is that an opinion
23 about whether the defendant did have a mental
24 state?

25 MR. FISHER: It -- it -- in its

1 opinion about whether the defendant did or did
2 not have the mental state. So did or did not
3 covers the full scope.

4 JUSTICE KAVANAUGH: Yeah.

5 MR. FISHER: And I think an opinion
6 can be absolute or it can be probabilistic.

7 Take the opinion -- take the example
8 we give in our brief where a therapist, after
9 invest -- after interviewing a patient, says:
10 People don't usually have trouble getting out of
11 bed unless they're depressed.

12 Well, that's not a direct statement
13 about that individual, but in context, we
14 understand it to be saying, I think you're
15 depressed. You know, we've talked a lot this
16 morning, Justice Kavanaugh, about the nature of
17 expert testimony. Expert testimony is rarely
18 absolute. I think a couple of you have pointed
19 that out today. It's usually a probabilistic
20 opinion.

21 So, to go back to the Hinckley case,
22 if the expert had said, I think John Hinckley
23 was probably insane, he probably couldn't tell
24 right from wrong, that wouldn't be an absolute
25 opinion, but it would have to be covered by Rule

1 704(b).

2 And the only thing I'm trying to
3 persuade you of today is to say most people in
4 Hinckley's position wouldn't have known right
5 from wrong is exactly the same statement as
6 saying I think Hinckley couldn't tell right from
7 wrong.

8 JUSTICE KAVANAUGH: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice
10 Barrett?

11 JUSTICE BARRETT: So I just want to be
12 sure that I understand how we would articulate
13 your rule if you win.

14 So this is -- you brought up your
15 depression example. So, on page 18 of your
16 brief, in that same paragraph, you talk about
17 the example where, you know, high school seniors
18 generally know the honor code.

19 MR. FISHER: Mm-hmm.

20 JUSTICE BARRETT: So this kind of is
21 similar to the hypotheticals Justice Kagan was
22 giving you early on. What if I said -- so that
23 falls outside of your rule because it refers to
24 knowledge? No. Right?

25 MR. FISHER: It falls what now?

1 JUSTICE BARRETT: It falls -- that
2 would be in -- that would be inadmissible under
3 704(b) under your rule.

4 MR. FISHER: Right.

5 JUSTICE BARRETT: Right. Okay. But
6 what if you had somebody testify -- and let's
7 just say it was an expert, not a fact witness --
8 that yes, the honor code is distributed to all
9 students, we give them time to read it, they
10 sign it at the bottom, and then we walk out.

11 What about that?

12 MR. FISHER: I think that would be
13 okay.

14 JUSTICE BARRETT: That would be okay.
15 And why? So it's just the word "knowledge," is
16 it that formalistic, or once you start stepping
17 back and it takes an inference to get there --

18 MR. FISHER: Right, it's an inference,
19 Justice Barrett.

20 JUSTICE BARRETT: -- it's okay?

21 MR. FISHER: In that scenario you're
22 describing, the -- there could still be
23 questions about whether the person who signed
24 the honor code understood the explanation,
25 whether that person remembered the honor code

1 when the alleged transgression happened, et
2 cetera.

3 But to -- but you asked me about how
4 you would articulate the rule. If you wanted to
5 be extra careful, you don't even have to
6 articulate that part of the rule. Here, you
7 have a statement directly about knowledge.

8 So whatever the line is between
9 knowledge and other statements that might be
10 less direct about the particular mens rea, that
11 would be a different case.

12 JUSTICE BARRETT: Well, I think we'd
13 be down the sowing chaos road if we didn't
14 articulate whoever ruled in that.

15 MR. FISHER: Well -- well, either way,
16 you're going to have to answer that question.
17 Pages 28 to 30 of the government's brief, it
18 says that testimony needs to be understood in
19 context and what it -- and what it signals in so
20 many words.

21 I think the government agrees that
22 statements are going to have to be understood in
23 context as to whether or not they're about mens
24 rea. So we agree with that.

25 We might -- we might calibrate that

1 line a little bit differently, and you could
2 give a first cut at it in this opinion, but,
3 again, all you have to say in this opinion --
4 and this goes back to Justice Kavanaugh's
5 question -- is that the words "the defendant"
6 cover not just statements about the defendant,
7 but they cover statements about a class of
8 people that includes the defendant, regardless
9 of whether they're absolute or probabilistic.

10 Then you're done. You can say that,
11 you know, therefore, we can give some guiding
12 principles to when something is about mens rea
13 or not about mens rea, but you wouldn't even
14 have to do that strictly speaking in this case.

15 JUSTICE BARRETT: Thanks.

16 CHIEF JUSTICE ROBERTS: Justice
17 Jackson?

18 JUSTICE JACKSON: So I guess I'm still
19 a little confused about how your rule works.
20 I'm -- I apologize for that.

21 But Justice Sotomayor suggested that
22 you're saying that expert testimony about modus
23 operandi and actus reus is fine to come in, but
24 expert testimony about mental state is not.

25 So I don't know what happens with

1 battered women's syndrome, which is testimony
2 about the mental state of the defendant. Are
3 you saying that's in or out and why?

4 MR. FISHER: So the -- so mental state
5 in general is okay. So an expert can say: I
6 believe this defendant has battered women
7 syndrome. I believe this defendant, to use the
8 Hinckley example, has schizophrenia. So that's
9 one form of mental state.

10 JUSTICE JACKSON: I thought that's
11 exactly what the rule says you're not supposed
12 to have an expert do.

13 MR. FISHER: No, no, no. What the --
14 no, no, no. What the rule says is the mental
15 state required of the element of -- as an
16 element of the crime.

17 JUSTICE JACKSON: Right.

18 MR. FISHER: So there are general --

19 JUSTICE JACKSON: And in the Hinckley
20 case, the element we were talking about was the
21 defense, that he was saying, I'm insane.

22 MR. FISHER: Right.

23 JUSTICE JACKSON: And so I thought the
24 rule was that you were not supposed to have
25 dueling experts talking about whether or not

1 he's insane. So I'm positing a situation --

2 MR. FISHER: Yeah.

3 JUSTICE JACKSON: -- in which the
4 question is, does this person -- you know, are
5 they guilty of assault? And they would like to
6 put on a defense that they had battered women
7 syndrome --

8 MR. FISHER: Right.

9 JUSTICE JACKSON: -- that -- going to
10 their mental state.

11 MR. FISHER: Right.

12 JUSTICE JACKSON: In or out?

13 MR. FISHER: Some yes, some no. But
14 this is a very important question, so I want to
15 make sure I get it right. So, to use the
16 Hinckley example, you could have dueling
17 testimony as to whether or not John Hinckley,
18 Junior, had schizophrenia or not. That's not
19 the element of the offense. You could have
20 dueling testimony as to whether or not John
21 Hinckley, Junior, had hallucinations or
22 delusions or had difficulty perceiving reality.
23 That's not the element of the crime.

24 The element of the crime is being able
25 to tell right from wrong. That's what you could

1 not have expert testimony about. So, to use --

2 JUSTICE JACKSON: But it says element
3 of the crime or defense.

4 MR. FISHER: Right, but -- but the
5 defense is still negating the mens rea. So the
6 critical thing is to pinpoint the mens rea.

7 So, in the assault case, the mens rea,
8 I think, would be something like a reasonable
9 belief that you were acting in self-defense. I
10 think that's what a typical battered women
11 syndrome case would look like. An expert can
12 take the stand and say, I believe this person
13 has battered women syndrome. Here are
14 characteristics of battered women syndrome:
15 There's a cycle of abuse, there's learned
16 helplessness, there's difficulty leaving. All
17 these things that are not the element of whether
18 or not --

19 JUSTICE JACKSON: All right. So you
20 disagree --

21 MR. FISHER: -- she believed her life
22 was in danger when she acted.

23 JUSTICE JACKSON: You -- you disagree
24 with Justice Sotomayor suggesting that all
25 that's off the table because it's mental state

1 evidence. We have to do some sort of fine --

2 MR. FISHER: I don't know whether I'm
3 disagreeing with Justice Sotomayor, but --

4 JUSTICE JACKSON: Okay. All right.

5 MR. FISHER: -- at least -- at least
6 what I want to say is mental state evidence, to
7 -- just give another lay example, the defendant
8 -- I believe people in this situation are
9 nervous. That would be perfectly fine. It's a
10 mental state, but it's not going to be the
11 element of the crime or a defense.

12 All I'm saying is that Rule 704(b)
13 keeps out that last step, that -- that assigning
14 --

15 JUSTICE JACKSON: Okay. One final
16 question.

17 MR. FISHER: -- the mens rea to the
18 defendant.

19 JUSTICE JACKSON: Thank you. What
20 about intent to distribute? That is a pretty
21 standard charge.

22 MR. FISHER: Yes.

23 JUSTICE JACKSON: Drugs with intent to
24 distribute. And you have an expert who comes
25 in. And I -- in -- in my experience, this is

1 also pretty standard. The police walk into the
2 apartment, there's all this paraphernalia and
3 chemicals and stuff that a layperson --

4 MR. FISHER: Yeah.

5 JUSTICE JACKSON: -- might not
6 understand what this is about.

7 MR. FISHER: Right.

8 JUSTICE JACKSON: And so the expert
9 that the government puts on the stand says: In
10 my expertise, people who have this kind of
11 material in these quantities in their apartments
12 have it because they're manufacturing drugs that
13 they intend to sell.

14 In or out?

15 MR. FISHER: Out, because the expert
16 is speaking to intent, which is the mens rea
17 element. But the expert could --

18 JUSTICE JACKSON: So, if they don't
19 put the word "intent" in, they're manufacturing
20 drugs for sale, at -- in or out?

21 MR. FISHER: I think that that is a
22 harder case, and so the line would be between
23 saying, you know, scales are used to weigh drugs
24 that -- you know, they often get bagged up and
25 sent out for sale. Things about the way that

1 the drug operation might work, things about what
2 those pieces of equipment do or don't do with
3 regard to drugs would be okay. But a direct
4 statement of intent would be not okay.

5 The D.C. Circuit has explained this
6 very clearly and other courts have held that.

7 So --

8 JUSTICE JACKSON: Thank you.

9 MR. FISHER: -- you're right
10 there's -- okay.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 MR. FISHER: Thanks.

14 CHIEF JUSTICE ROBERTS: Mr. Guarnieri?

15 ORAL ARGUMENT OF MATTHEW GUARNIERI

16 ON BEHALF OF THE RESPONDENT

17 MR. GUARNIERI: Mr. Chief Justice, and
18 may it please the Court:

19 By its plain terms, Rule 704(b) comes
20 into play only when the expert is offering an
21 opinion about the defendant's own mental state.
22 That's the key textual limitation that resolves
23 this case.

24 Agent Flood's testimony did not
25 violate Rule 704(b) for the simple reason that

1 he did not express any opinion at all about
2 whether Petitioner herself knew about the drugs
3 hidden in her car. Indeed, he did not mention
4 Petitioner a single time in his entire
5 testimony.

6 The Court should reject Petitioner's
7 invitation to replace the line drawn in the text
8 of Rule 704(b) with one of her own invention.
9 According to Petitioner, Rule 704(b) prohibits a
10 novel and amorphous category of what she has
11 called class-wide mens rea testimony.

12 That proposal cannot be squared with
13 the text, purpose, or history of the rule. And
14 I think the history is particularly instructive
15 here. I want to emphasize three points this
16 morning.

17 First, when Congress enacted Rule
18 704(b) in response to the acquittal of John
19 Hinckley, Congress adopted a reform that applies
20 equally to both sides. It is party agnostic, as
21 Justice Gorsuch observed this morning. It is
22 not a rule targeted at government experts. And
23 whatever the Court says in this case will also
24 govern future expert testimony offered by the
25 defense on issues like insanity or battered

1 women syndrome.

2 Second, Congress kept Rule 704(a) in
3 place. The general rule in federal court
4 continues to be that opinion testimony is not
5 objectionable merely because it embraces an
6 ultimate issue. Rule 704(b) operates as a
7 limited exception to that general rule.

8 And, third, the original text of Rule
9 704(b) confirms that an expert may still testify
10 with respect to the mental state or condition of
11 the defendant, as long as the expert stops short
12 of opining on the ultimate issue. Agent Flood
13 respected that limitation here.

14 I welcome the Court's questions.

15 JUSTICE THOMAS: But Mr. Fisher makes
16 the point that in effect, when you talk about
17 the probable -- probabilities of someone
18 carrying drugs, that you are in effect talking
19 about the defendant, that you could only be
20 concerned about the conduct of the defendant.

21 So the -- how would you respond to
22 that?

23 MR. GUARNIERI: Well, I think my
24 friend on the other side is conflating two
25 distinct issues in this case. One is whether

1 the expert is offering an opinion that is about
2 the defendant herself. Agent Flood did not do
3 that here when he testified in general terms
4 that drug traffickers do not entrust large
5 quantities of drugs to people who are unaware of
6 those -- in most circumstances.

7 JUSTICE THOMAS: Well, his point is
8 that it wouldn't be relevant otherwise if you
9 weren't talking about the defendant.

10 MR. GUARNIERI: Well, I think that's
11 right, Justice Thomas. It's true that it is
12 relevant because we are asking the jury to infer
13 something about the defendant herself, about
14 Petitioner herself, from the expert's opinion.

15 But that doesn't make it an opinion --
16 it doesn't mean the expert is expressing an
17 opinion about the defendant. When Rule 704(b)
18 talks about expressing an opinion about the
19 defendant, it means expressing an opinion framed
20 --

21 JUSTICE GORSUCH: So -- so --

22 MR. GUARNIERI: -- in terms of the
23 defendant's own mental state.

24 JUSTICE GORSUCH: -- if I understand
25 it right, for relevance purposes, it has to be

1 about the defendant, right?

2 MR. GUARNIERI: Yes, I think that's
3 what makes the testimony relevant. Yes.

4 JUSTICE GORSUCH: But that's the only
5 way in which you get this evidence in in the
6 first place. It is -- has to be about the
7 defendant. We're not talking about some
8 stranger to the suit, right?

9 MR. GUARNIERI: Yes, I agree, Justice
10 Gorsuch.

11 JUSTICE GORSUCH: So it's about the
12 defendant for purposes of 702, but it's not
13 about the defendant for purposes of 704. Help
14 me with that.

15 MR. GUARNIERI: It is relevant to the
16 defendant. Let me give you a plain language
17 examine -- example.

18 JUSTICE GORSUCH: Is it with respect
19 to the defendant?

20 MR. GUARNIERI: If I told you, Justice
21 Gorsuch, that I had just read a terrific book
22 about Julius Caesar, I think you would expect
23 that the book at least mentions Julius Caesar
24 somewhere in there.

25 JUSTICE GORSUCH: No.

1 (Laughter.)

2 MR. GUARNIERI: And if you learned
3 that it's a book about ancient Romans in general
4 --

5 JUSTICE GORSUCH: No, I wouldn't
6 necessarily -- you know, it could be about his
7 times and his place and -- and -- and the Roman
8 Empire of the era.

9 MR. GUARNIERI: I think that's exactly
10 right.

11 JUSTICE GORSUCH: Right?

12 MR. GUARNIERI: And that's my point,
13 Justice Gorsuch. We -- we all understand --

14 JUSTICE GORSUCH: Okay. And I'm
15 drawing an inference about him.

16 MR. GUARNIERI: That's right. That's
17 exactly right. And that's how we think the
18 rules operate here.

19 JUSTICE GORSUCH: And you want us to
20 draw -- you want the jury to draw an inference
21 about the mental state of this defendant, don't
22 you?

23 MR. GUARNIERI: Yes. We are offering
24 the testimony because it is relevant to the
25 jury's assessment of Petitioner's own mental

1 state, but that doesn't mean that it is an
2 opinion about the defendant's mental state.

3 If you accept the logic of that
4 argument, a great deal of testimony that is
5 inferentially relevant --

6 JUSTICE GORSUCH: I would think that a
7 great many district courts would, on that
8 theory, say that this testimony should be
9 stricken on 702 grounds. It's just not
10 relevant.

11 MR. GUARNIERI: 704(b) --

12 JUSTICE GORSUCH: Is that what you're
13 inviting?

14 MR. GUARNIERI: No, we are not
15 inviting that, Justice Gorsuch.

16 JUSTICE GORSUCH: No, of course not,
17 right?

18 MR. GUARNIERI: Indeed, the district
19 court in this case, Petitioner made a Rule 401
20 objection to the relevancy of this testimony.
21 The district court overruled it. Petitioner has
22 not renewed that contention in this Court.

23 I -- I think what we are -- there is
24 testimony that is relevant to the jury's
25 assessment of the defendant's mental state that

1 is nonetheless not testimony that is opining
2 directly on the defendant's mental state.

3 JUSTICE JACKSON: Nor could the
4 defendant -- excuse me, nor could the expert
5 actually opine because he's not an examining
6 expert, isn't that right? I mean, there really
7 isn't a world in which this expert could speak
8 directly in a sense to what is going on in this
9 defendant's mind. The only thing he is
10 competent to testify about is sort of, in his
11 expertise, how these things work as a general
12 matter, right?

13 MR. GUARNIERI: I think that's
14 correct, Justice Jackson, and, indeed, in this
15 particular case, Agent Flood confirmed that he
16 was not involved in the investigation of this
17 case when he was asked that on
18 cross-examination.

19 JUSTICE KAGAN: Mr. Guarnieri, do you
20 want to first answer the hundred percent case?

21 MR. GUARNIERI: Sure. So I think
22 Petitioner is misreading our brief on that
23 point. I mean, we think that the distinction
24 between testifying in absolute terms or
25 conditional terms about the way that drug

1 traffickers operate is really more of a
2 reliability issue. I don't think at this point
3 in time we could sponsor any testimony --

4 JUSTICE KAGAN: So, in fact, your
5 argument would be the same if the expert got up
6 and said, in my experience, a hundred percent of
7 the time drug traffickers use couriers who know
8 that there are drugs in the car?

9 MR. GUARNIERI: Yeah, I think we would
10 have the same Rule 704(b) position with respect
11 to that testimony. And -- and the key to the
12 application of Rule 704(b) --

13 JUSTICE GORSUCH: So all defendants
14 know that -- that they -- of -- of drugs, and --
15 and you're still not -- it's still not testimony
16 about the defendant's mental state?

17 MR. GUARNIERI: Well, Justice Gorsuch,
18 I want to be careful and precise here. If the
19 expert testifies that all defendants know or
20 that all drug traffickers and this defendant or
21 this defendant and other drug traffickers --

22 JUSTICE GORSUCH: No, no, no, all
23 mules, to use the -- the common parlance, all
24 mules know that -- that -- that the drugs are
25 drugs in their car --

1 MR. GUARNIERI: Yeah, I do think --

2 JUSTICE GORSUCH: -- that's still --
3 that's still permissible under your view? It's
4 not about the defendant?

5 MR. GUARNIERI: It -- it is not
6 objectionable on Rule 704(b) grounds. It
7 doesn't mean --

8 JUSTICE GORSUCH: Still not about the
9 defendant.

10 MR. GUARNIERI: -- that testimony
11 would necessarily get in.

12 JUSTICE GORSUCH: The defendant just
13 happens to be there. It just to happens to be a
14 trial in which that person is in jeopardy and --
15 and -- and -- but we've got this testimony over
16 here, and it doesn't matter?

17 MR. GUARNIERI: Well --

18 JUSTICE BARRETT: Yeah, I don't
19 understand that --

20 MR. GUARNIERI: -- justice -- Justice
21 Gorsuch, you could --

22 JUSTICE BARRETT: -- right? Because
23 isn't this like necessarily saying a
24 hundred percent of defendants know, aren't you
25 necessarily saying this defendant knows? Isn't

1 that what Justice Gorsuch's --

2 MR. GUARNIERI: I think the
3 distinction between those two --

4 JUSTICE GORSUCH: Apparently not.

5 JUSTICE JACKSON: Isn't the answer,
6 Mr. Guarnieri, that it's only --

7 JUSTICE KAGAN: Well, what is the
8 answer, Mr. Guarnieri?

9 (Laughter.)

10 MR. GUARNIERI: Thank you, Justice
11 Kagan.

12 Look, I think the distinction between
13 those two, the key point that we're trying to
14 get across is that Rule 704(b) forbids a
15 particular form of opinion testimony. The
16 expert cannot opine on the defendant's own
17 mental state.

18 And so I -- we acknowledge in our
19 brief that there are going to be circumstances
20 in which experts testify about a class of people
21 and put the defendant in that class. That form
22 of expert testimony could be objectionable.

23 But if the issue is just that the
24 defendant is describing a general category of
25 person --

1 JUSTICE KAGAN: How -- how about this?

2 MR. GUARNIERI: -- and they want to
3 make a -- a categorical statement about that
4 group of people, I don't think that's a 704(b)
5 problem. It could be --

6 JUSTICE KAGAN: How -- how about this?
7 In -- in -- in my experience, I've seen a lot of
8 cases, and I'll tell you that a hypothetical
9 person with this many kilograms of drugs in its
10 car caught in this kind of way in a car with
11 this make and model, who says the following
12 things to the police when she's caught, in my
13 experience, a person like that is always going
14 to have known about the drugs in her car.

15 MR. GUARNIERI: Yeah, I think that
16 would be objectionable. Of course, that's not
17 the testimony we had in this case, but the D.C.
18 Circuit has a case which we cite in our brief
19 addressing that kind of use of mirroring
20 hypotheticals. I think that's just a
21 transparent way to circumvent Rule 704(b).
22 That's not this case.

23 JUSTICE KAGAN: Okay. So then I'm not
24 really understanding because, if you say, look,
25 you don't have to say Ms. Diaz knows, as long as

1 everybody understands that the description
2 you're giving of the person who knows is --
3 mirrors who Ms. Diaz is, so you're not willing
4 to be as formalistic as to say she has to be
5 named.

6 You're willing to say the same rule
7 should apply if there's a description that
8 basically matches her. Well, then I don't get
9 why you're not willing to say if the description
10 is a class in which everybody agrees she's a
11 part and it's a hundred percent of the class?

12 MR. GUARNIERI: Well, Justice Kagan,
13 the way we would articulate the rule is the same
14 way that the Ninth Circuit has articulated and
15 the Second and D.C. Circuits and other courts of
16 appeals have articulated, and that is that what
17 the expert may not do is testify in such a way
18 that necessarily compels the inference that the
19 defendant had --

20 JUSTICE KAGAN: But that's just --

21 MR. GUARNIERI: -- the requisite mens
22 rea.

23 JUSTICE KAGAN: It's just a matter of
24 degree as to whether the class is really super
25 narrowly about one person or then gets a little

1 bit broader or then gets a little bit broader,
2 but in all these cases, the person is a member
3 of the class, however exactly you define the
4 class. So I guess I don't see why at some point
5 you're willing to draw the line.

6 MR. GUARNIERI: Well, I'm not sure
7 that's true, Justice Kagan. There are going to
8 be cases in which there's a dispute, a factual
9 dispute, about whether or not the defendant is
10 in the class.

11 Does the defendant have this mental
12 condition or defect or this other one or perhaps
13 no mental disease or defect at all? So you can
14 -- the issue -- the parties can join issue on
15 whether the defendant is even in the class that
16 the expert is describing.

17 I -- I -- to step back here, I also
18 want to, again, stress that Rule 704(b) is a
19 limited exception to the general rule here,
20 which is 704(a), and that is that, in general,
21 opinion testimony is not objectionable just
22 because it -- it embraces an ultimate issue.

23 You can have -- when Congress enacted
24 Rule 704(a), it made a judgment that we're going
25 to general -- in general abolish the ultimate

1 issue rule in federal court and, really, these
2 disputes should be channeled through disputes
3 about the reliability of the expert's testimony,
4 whether the expert's testimony is based on
5 sufficient facts and data under Rule 702.

6 You can have robust Daubert
7 gatekeeping under this Court's case law, which
8 is now reflected in the text of Rule 702, and
9 Rule 704(b) is just a limited prohibition on a
10 specific form of expert opinion testimony in
11 criminal trials.

12 Agent Flood's testimony looks nothing
13 like the testimony that Congress forbid when it
14 enacted 704(b).

15 The other point that I would make this
16 morning, I -- you know, and this, I think, goes
17 to some of the concerns about how you engage in
18 the line-drawing that both -- both parties'
19 positions might present, I -- I take -- my -- my
20 -- my friend on the other side has moved this
21 morning in response to a number of the more
22 difficult questions the Court posed was to say
23 that, well, testimony that is -- would provide a
24 basis for the jury to infer the defendant's
25 mental state is not actually about the

1 defendant's mental state unless it is framed
2 explicitly in terms of knowledge.

3 So, for example, the -- the -- the tax
4 lawyer example that we offer in our
5 hypothetical, I take my friend on the other side
6 to agree that testimony that tax lawyers are
7 generally instructed in the requirement to pay
8 some particular tax is not opinion testimony
9 about -- that would be forbidden by 704(b)
10 because it doesn't speak to knowledge.

11 And I think that's actually the
12 correct understanding of "about." It's not
13 about -- it's not about mental state if it's not
14 framed directly or expressly in terms of mental
15 state. But the problem is my -- my friend on
16 the other side doesn't logically carry that
17 through to the rest of the text of Rule 704(b).

18 The opinion has to be not just about
19 mental state but also about the defendant's own
20 mental state. And to be about the defendant's
21 own mental state, the expert has to be in
22 general explicitly taking the stand and
23 expressing an opinion for the jury about what
24 was in the defendant's mind.

25 JUSTICE SOTOMAYOR: Functionally

1 equivalent. Now what we're arguing about,
2 because you've just conceded earlier that if you
3 do -- we can argue about how wide you define the
4 class, but you could just say anyone who has 55
5 -- pounds of drugs in their car, hidden or not,
6 knows the drugs are there, period.

7 To me, that's a functional equivalent
8 of saying this defendant had 55 pounds of drugs,
9 so she has to know. And you admitted to -- to
10 Justice Kagan that there is a -- a point at
11 which you reach that functional equivalency.

12 MR. GUARNIERI: Yeah, I wouldn't
13 really describe that, though, as a -- a -- a
14 dispute about how you define the class. I mean,
15 I think, in general, you --

16 JUSTICE SOTOMAYOR: No, your -- the
17 dispute is about are you -- are you saying it's
18 this defendant?

19 MR. GUARNIERI: I think, in general,
20 the rule here is that the expert may not express
21 an opinion that leaves for the jury no room
22 to -- to make the ultimate inference for itself.
23 And in -- and if you express an explicit opinion
24 about the defendant's state of mind, that could
25 be sufficient for a violation.

1 All we're saying is we want to leave
2 open the possibility that that might not be
3 necessary to -- for a violation because you're
4 going to have these extreme cases in which an
5 expert contrives to offer some opinion that
6 carefully avoids stating an express opinion
7 about the defendant in that particular case but
8 nonetheless logically, necessarily compels the
9 inference that the defendant had the requisite
10 mental state.

11 So we're talking here about the
12 marginal case. And, again, to return to some of
13 the colloquy earlier --

14 JUSTICE JACKSON: Can I just ask
15 before you -- before you go on, I'm wondering
16 whether some of the problem here might be our
17 not really focusing in on the fact that there
18 are different kinds of experts and different
19 kinds of testimony.

20 And so, to the extent that this rule
21 says that it relates to an opinion about whether
22 the defendant did or did not have a mental state
23 or condition and it was generated in the context
24 of a dispute about testimony related to the
25 psychiatric or, you know, physical condition of

1 a particular defendant, Hinckley, I'm just
2 wondering whether the problem might be that this
3 is really directed at not this kind of
4 testimony, the kind of testimony that comes from
5 an expert who hasn't examined this defendant,
6 doesn't know anything about this defendant and
7 is talking about framework or, you know, general
8 modus operandi, whereas this rule seems to be
9 targeting the kind of expert who has examined or
10 knows something about this defendant's mental
11 state.

12 What do you think about that?

13 MR. GUARNIERI: Well, Justice Jackson,
14 I -- I think that's correct as a historical
15 description of what Congress had in mind here
16 when it enacted Rule 704(b), but I think the
17 logic of that intuition supports our position in
18 this case, not Petitioner's, and that is
19 because, when Congress enacted Rule 704(b)
20 against the backdrop of robust public debate
21 about what appropriate testimony, what
22 appropriate expert testimony should be offered
23 in criminal trials involving the insanity
24 defense, it was clear to everyone at the time
25 that Congress was not eliminating all expert

1 testimony in insanity trials.

2 JUSTICE GORSUCH: No, of course not.

3 MR. GUARNIERI: The -- the text of the
4 rule --

5 JUSTICE GORSUCH: I mean, isn't --
6 isn't the line -- I thought the text had to do
7 with whether it's an element of -- of the
8 offense or -- or the defense.

9 So, for example, in Hinckley, an
10 expert could still get up and say and opine on
11 Mr. Hinckley's mental state, to the extent he
12 has schizophrenia, he can say that. And a
13 battered woman, she has what we would define as
14 battered women syndrome.

15 What they can't do is say: And,
16 therefore, Mr. Hinckley or the -- or the other
17 -- any other defendant, did or did not have the
18 mental state required to either convict or to
19 make out an insanity defense.

20 That's the line, isn't it?

21 MR. GUARNIERI: Yes, Justice Gorsuch.
22 And I think that is just an articulation of our
23 position in this case. And -- and -- and to
24 return to our earlier exchange -- and I think
25 this again goes to Justice Jackson's question as

1 well --

2 JUSTICE GORSUCH: And so -- and so, if
3 that's the case --

4 MR. GUARNIERI: -- everyone
5 understands that when the --

6 JUSTICE GORSUCH: If that's the -- if
7 that -- if that's the case, counsel, what's the
8 difference between saying Mr. Hinckley didn't
9 understand right from wrong, A; B, a
10 hypothetical person who meets all -- looks just
11 exactly like Mr. Hinckley couldn't have
12 understood right from wrong; and, C, all persons
13 with the -- with the characteristics of Mr.
14 Hinckley do not understand right from wrong?
15 What are the difference -- what is the
16 difference between those three statements?

17 MR. GUARNIERI: If -- if I've
18 understood the examples that you have offered,
19 Justice Gorsuch, those are all just variations
20 on the expert taking the stand and saying that
21 the defendant, in fact, met the legal standard.
22 And, again, if I -- if I could step back --

23 JUSTICE GORSUCH: And so they should
24 all be -- they're all impermissible, aren't
25 they?

1 MR. GUARNIERI: I -- I think those all
2 could be impermissible if -- if I've understood
3 the three examples. But, Justice Gorsuch,
4 again, earlier I think one of the -- one of --
5 one of our exchanges was about, well, isn't it
6 only -- the fact that it is coming into court at
7 all shows that it's being offered to prove the
8 defendant's mental state. And I think the
9 Hinckley example shows that can't be the correct
10 understanding of Rule 704(b).

11 Everyone understands when you're
12 calling your examining expert in a trial
13 involving the insanity defense to offer that
14 expert's diagnosis of the particular defendant's
15 mental state, the reason it is relevant is
16 because you want the jury to draw some inference
17 about whether the defendant does or does not
18 meet the insanity defense --

19 JUSTICE KAGAN: So, if we think about
20 the insanity --

21 MR. GUARNIERI: -- the -- the legal
22 standard for insanity, and that doesn't mean
23 it's prohibited on 704(b) grounds.

24 JUSTICE KAGAN: If we think about the
25 insanity argument, I mean, an expert can come up

1 to the stand and say a person with these sorts
2 of behaviors or sorts of symptoms, I would say
3 that that person has schizophrenia. That's
4 fine, right?

5 MR. GUARNIERI: Yes.

6 JUSTICE KAGAN: Okay. And then could
7 the person then say: I think that all people
8 with schizophrenia have the necessary capacity
9 to form an intent as to this crime?

10 MR. GUARNIERI: I -- I don't think
11 that that would be objectionable on 704(b)
12 grounds.

13 JUSTICE KAGAN: Okay.

14 MR. GUARNIERI: I -- I doubt it would
15 be reliable, but it wouldn't be objectionable on
16 704(b) grounds. And -- and -- and, Justice
17 Kagan, I mean, if the --

18 JUSTICE KAGAN: Because that to me --
19 okay -- is -- is what the Hinckley controversy
20 was about and why Congress passed this rule,
21 that it didn't want the expert to go from the
22 step of saying looks to me like this person has
23 schizophrenia to the conclusion that, okay, once
24 we say that, we can say that this person has the
25 necessary intent because all people with

1 schizophrenia can form -- you know, have the
2 necessary intent or not.

3 MR. GUARNIERI: Yeah, I think the
4 problem with the particular testimony that
5 Congress was targeting in Rule 704(b) is that
6 the expert is drawing an explicit link between
7 the defendant and the legal requirement that the
8 jury has to find. That's what Congress said, no
9 more of that.

10 JUSTICE KAGAN: Well, that -- that --

11 MR. GUARNIERI: It created a public --

12 JUSTICE KAGAN: -- that is what the
13 expert in my hypothetical is doing, because he's
14 saying this defendant has a certain kind of
15 disease and I'm going to tell you what people
16 with this disease -- you know, whether they're
17 capable of distinguishing right from wrong or
18 whether they're capable of having some other
19 necessary intent for the crime.

20 So he's saying as a fact of the matter
21 in his professional opinion but a
22 hundred percent of the people with this disease
23 are going to have this intent.

24 MR. GUARNIERI: Yeah, well, Justice
25 Kagan, if -- I -- I think you have just --

1 that's a variation on the syllogism that we
2 identify in our brief at page -- pages 28 to 29.
3 If the expert says everyone in this category --
4 if you are in category X, it follows that you
5 have mental condition Y, and also I as an expert
6 have diagnosed the defendant as being in
7 category X, you have just broken down one
8 impermissible opinion into two steps, and we do
9 think 704(b) would keep that out.

10 JUSTICE KAGAN: Well, but --

11 JUSTICE ALITO: Mr. Guarnieri --

12 MR. GUARNIERI: But -- but, again, I
13 mean, it's not the categorical nature of the
14 testimony that is the problem here. If you have
15 a case in which you have called an expert to
16 describe, for example, color blindness and the
17 -- and that's relevant to an ultimate issue in
18 the case, and the expert wants to come into
19 court and say everyone who has color blindness,
20 this is what follows from that, the expert
21 doesn't need to qualify that testimony in order
22 to circumvent Rule 704(b) --

23 JUSTICE ALITO: I mean, Mr. Guarnieri,
24 you're making this --

25 MR. GUARNIERI: -- or comply with Rule

1 704(b).

2 JUSTICE ALITO: -- a lot more
3 complicated than I think it has to be. 704(b)
4 says about whether the defendant did or did not
5 have a mental state or condition, dah-dah-dah.
6 It doesn't say "is relevant to."

7 Congress -- the -- the Rules Committee
8 presumably knew what the standard was for
9 relevance, and if they wanted to make -- to say
10 that the expert cannot state an opinion, cannot
11 state anything that is relevant to the issue,
12 they would have said so -- they would have said
13 so explicitly.

14 And a lot of these hypotheticals, it
15 seems to me, are taken care of by other rules.
16 I don't know how any expert could say a hundred
17 percent of the time this is true. I -- I don't
18 think that's reliable. It's subject to
19 objection under 702. And some of these matters
20 could be handled under 403.

21 I don't know why you're -- and -- and
22 then some -- some of them could just be fuel for
23 devastating cross-examination. If -- you know,
24 if an expert says a hundred percent of the time
25 this is true, I -- I -- I think that that would

1 be -- that might well harm the -- the case of
2 the party who introduces -- introduces that
3 testimony.

4 But let me ask you this. There are
5 people who think that there's a lot of chaos in
6 the states that comprise the Ninth Circuit, but,
7 I don't know, until this morning, it hadn't
8 occurred to me that maybe the cause for this
9 chaos is the Ninth Circuit's rule about 704.

10 Do you think that's true?

11 MR. GUARNIERI: No. We have not seen
12 any practical problems in applying -- in
13 applying the longstanding understanding of Rule
14 704(b) that we are advocating in this case.

15 And, Justice Alito, to -- to your
16 earlier points, I entirely agree with you that
17 many other rules will take care of some of the
18 hypotheticals that we are battering about today.
19 I took the Court to just be interested in how do
20 you define the outer limits of how Rule 704(b)
21 should apply.

22 Of course, this case doesn't
23 necessarily present any occasion to address
24 those outer limits because Agent Flood's
25 testimony here looked nothing like some of the

1 hypotheticals that we've been discussing this
2 morning.

3 The other point I would make, Justice
4 Alito -- and -- and we advert to this in our
5 brief -- Rule 702 itself was recently amended in
6 ways that were meant to discourage experts from
7 overstating the certainty with which they could
8 express their opinions on the stand. Rule 702
9 and Daubert gatekeeping is really the way that
10 you handle concerns that an expert is stating
11 something in categorical or absolute terms that
12 is just not supportable by the facts underlying
13 the expert's opinion.

14 JUSTICE GORSUCH: Counsel, have you
15 had any trouble convicting drug mules in the
16 Fifth Circuit?

17 MR. GUARNIERI: No, Justice Gorsuch.
18 And -- and I -- I take your point that this
19 isn't going to be critical testimony in every
20 case or -- or, indeed, in any particular case.
21 And we have instances in which --

22 JUSTICE GORSUCH: I mean, in this
23 case, for example, the defendant couldn't roll
24 down her window and the border agent well knows
25 that that usually means there are drugs stuffed

1 inside the panels of -- of the vehicle, right?
2 I mean, one can draw an inference from that
3 pretty quickly when she says, I can't -- I can't
4 roll down my window.

5 I mean, there -- there's -- in my
6 experience, I mean -- and in the Tenth Circuit,
7 for example, we -- we took as a reliable
8 indication sometimes one -- one contributing
9 factor for a traffic stop was there -- there --
10 there are air fresheners in the car, okay, and
11 it was traveling below the speed limit, okay,
12 and in a panel van, and the -- and the windows
13 couldn't roll down. I mean, the -- all the
14 modus operandi evidence in the world. And you
15 can draw inferences from that.

16 The one thing the rule says is you
17 can't reach inside someone's head. And it
18 doesn't seem to be a problem in the Fifth
19 Circuit.

20 MR. GUARNIERI: Justice Gorsuch, I
21 don't -- I don't dispute that. I think you're
22 right. We are -- we are convicting defendants
23 of illegally importing drugs in the United
24 States in the Fifth Circuit without this
25 testimony.

1 And -- and so too I think we could
2 obtain convictions in the Ninth Circuit without
3 this testimony. And -- and we have a harmless
4 error argument here, which, you know, I mean,
5 the upshot of that argument is, I think, the
6 other evidence in this case was overwhelming
7 that Petitioner knew about the drugs in her car.

8 Nonetheless, this is helpful and
9 reliable testimony, and we think the jury should
10 be allowed to hear it. And -- and I think, if
11 you're thinking about the case through the lens
12 of, you know, what -- what is sort of the
13 practical -- the practicalities here, if you
14 adopt Petitioner's rule on the other hand, it's
15 going to open up a host of arbitrary and
16 difficult line-drawing exercises that I don't
17 think he really had persuasive answers to this
18 morning.

19 And so I think what the Court should
20 do is stick to the text of Rule 704(b) itself,
21 and Rule 704(b) only comes into play when the
22 defendant expresses an opinion about the
23 defendant's own -- excuse me -- when the expert
24 expresses an opinion about the defendant's own
25 mental state.

1 And Agent Flood didn't do that here.
2 He said, in most circumstances, drug traffickers
3 do not entrust large quantities of drugs to
4 people who are unaware of those drugs. He
5 explained why that was true. And he elaborated
6 on cross-examination that, of course, he -- he
7 is aware of some scenarios in which the
8 traffickers may try to use so-called blind
9 mules, and he described the facts of those
10 scenarios, and they don't meet the facts of this
11 case.

12 Everything that occurred here occurred
13 in full compliance with Rule 704(b), and we
14 would ask the Court to affirm.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Justice Thomas?

18 Justice Alito?

19 JUSTICE ALITO: On the question of
20 whether you've had difficulty convicting mules
21 in the Fifth Circuit, it reminds me of Rule
22 10,000 of the rules of -- the Federal Rules of
23 Evidence, which used to be applied by district
24 judges to exclude evidence that prosecutors
25 wanted to admit, which -- which was the you

1 don't need it rule.

2 So, you know, if it -- you don't need
3 it and there's a conceivable possibility --
4 there's a possibility that it might create an
5 issue on appeal, the judge would keep it out.
6 Do you think that's -- we ought to create that
7 rule, make that an enforceable, judge-made
8 addition to the Federal Rules of Evidence?

9 MR. GUARNIERI: No. The federal
10 government opposes that rule, Justice Alito.

11 (Laughter.)

12 MR. GUARNIERI: No, I -- there --
13 there is -- there's a metaphor in the Advisory
14 Committee notes to Rule 401, I think it's from
15 Professor McCormick, and he said as to relevancy
16 that a brick is not a wall. And what he meant
17 was you have to build your case up brick by
18 brick. Every brick is not itself going to be
19 dispositive of the whole case, but they're
20 helpful. And we are entitled to present
21 reliable evidence, reliable and helpful
22 evidence, of Petitioner's guilt and of -- of
23 guilt generally in cases like this.

24 This -- I think this is just -- it --
25 it's -- there's -- the question shouldn't be do

1 we need it. It's does it -- is it prohibited by
2 the Federal Rules or the Constitution, and this
3 testimony is not.

4 CHIEF JUSTICE ROBERTS: Justice
5 Sotomayor?

6 JUSTICE SOTOMAYOR: So you have not
7 backed off of your answer to Justice Gorsuch or
8 to Justice Kagan that if a hundred percent
9 inference is pointing to the defendant, that's a
10 functional equivalency and you would agree that
11 that should be excluded, but you say it should
12 be excluded under a different rule perhaps.

13 But you didn't even go that far. You
14 said under 704 that might cross the line --

15 MR. GUARNIERI: Well --

16 JUSTICE SOTOMAYOR: -- to say that
17 every defendant with schizophrenia had --
18 doesn't know right from wrong or knows right
19 from wrong because some expert could say
20 schizophrenia doesn't cloud your mind, it just
21 makes you believe you have a reason to do it.

22 So which is it?

23 MR. GUARNIERI: Well, Justice
24 Sotomayor -- Sotomayor, two points. One, I
25 mean, to the extent that I muddled things this

1 morning, I regret it, but I -- the key thing
2 from our point of view about the application of
3 Rule 704(b) is whether the testimony is framed
4 in terms of the defendant.

5 And I think my friend on the other
6 side gets some mileage out of positing
7 hypotheticals where he's talking about, oh, a
8 class that obviously includes the defendant or
9 necessarily includes the defendant and things
10 like that. I think it really does matter
11 whether the expert takes the stand and opines
12 about the defendant in particular. That's
13 really the key dividing line, and that's the
14 dividing line --

15 JUSTICE SOTOMAYOR: Well, I think we
16 all --

17 MR. GUARNIERI: -- that follows
18 directly from --

19 JUSTICE SOTOMAYOR: -- agree on that.
20 He says the defendant knew. That's a violation
21 of the rule.

22 MR. GUARNIERI: That's right.

23 JUSTICE SOTOMAYOR: The question is,
24 when he says the defendant, all people who have
25 X, Y, and Z know, you're willing to say, if all

1 people know who have X, Y, and Z, then it has to
2 be this defendant, correct?

3 MR. GUARNIERI: Well, I think the --
4 the key question from our perspective in
5 confronting a hypothetical like that would be
6 has the -- the defendant -- excuse me -- has the
7 testifying expert himself taken the stand and
8 put the defendant in that class.

9 If all that is at issue is that the
10 jury could --

11 JUSTICE SOTOMAYOR: Well, he's only
12 there because --

13 MR. GUARNIERI: -- infer from other
14 evidence, I mean, in order to put Petitioner in
15 the class of drug couriers here --

16 JUSTICE SOTOMAYOR: Sorry. So how
17 about if he says 99.9 percent --

18 MR. GUARNIERI: Yeah. I can't --

19 JUSTICE SOTOMAYOR: -- know?
20 Ninety-five percent know? Ninety percent know?
21 Where do we draw the line?

22 MR. GUARNIERI: Yeah, I don't think
23 that's the line that Rule 704(b) draws. It's
24 not a rule about categorical versus conditional
25 testimony. It's a -- it's a line about expert

1 opinion testimony about the defendant.

2 JUSTICE SOTOMAYOR: About the --

3 MR. GUARNIERI: The distinction --

4 JUSTICE SOTOMAYOR: -- about a
5 defendant's mental state?

6 MR. GUARNIERI: Yes. Yes. And I
7 think, if you have concerns in a particular case
8 that a defendant's opinion -- excuse me, that an
9 expert opinion is, you know, overstating the
10 certainty with which that expert could describe
11 some fact of the world, that's a problem under
12 Rule 702 and Daubert. It's not a problem under
13 Rule 704(b).

14 CHIEF JUSTICE ROBERTS: Justice Kagan?

15 JUSTICE KAGAN: Mr. Fisher might have
16 some line-drawing problems, but I think you do
17 too, Mr. Guarnieri.

18 And I mean, if I -- if -- if -- if I
19 understand what you're now saying, you're now
20 saying on the one hand, if an expert got up and
21 said a hundred percent of drug mules know what
22 they're doing, that could not be excluded under
23 your rule, but -- but if the expert got up and
24 said, I think that this defendant, what -- it --
25 it looks like from the packaging she was working

1 for this particular drug cartel, and now I'm
2 going to tell you that a hundred percent of
3 mules who work for this particular drug cartel
4 know -- know that they're carrying drugs, then
5 you say it is excluded. Is that correct?

6 MR. GUARNIERI: Yeah, I think that is
7 the expert expressing an opinion for the jury
8 about the defendant having the requisite mental
9 state. That's out under 704(b).

10 JUSTICE KAGAN: Okay. And so then, if
11 we go back to the one that is not excluded, it's
12 the expert getting up and just saying, all drug
13 mules have knowledge of what they're doing. I
14 guess I'm just not seeing the difference between
15 that statement and the other one because
16 everybody knows that this woman was caught in a
17 car with drugs, so she's a drug mule. And the
18 expert is saying all drug mules have knowledge.
19 So, once you're going to tell me that the other
20 is excluded, that should be excluded too.

21 MR. GUARNIERI: Well, Justice Kagan,
22 let me try and answer that question on two
23 levels, one just a mechanical level.

24 JUSTICE KAGAN: Well, I just want it
25 like on my level.

1 (Laughter.)

2 MR. GUARNIERI: Well, I think -- I --
3 I think this --

4 JUSTICE KAGAN: Like the level of the
5 question.

6 MR. GUARNIERI: Justice Kagan, the --
7 the reason -- the distinction between those two
8 is the distinction drawn in the text of Rule
9 704(b) itself, which is is the expert expressing
10 an opinion about the defendant. And in one, the
11 expert is expressing an opinion, taking the
12 stand and testifying to the jury I as an expert
13 have concluded and as a matter of my expert
14 opinion that the defendant had the mental state,
15 the requisite mental state. Rule 704(b) forbids
16 that.

17 Now the -- the -- the second-level
18 response that I also wanted to offer to -- to
19 your question, Justice Kagan, is I -- we have --

20 JUSTICE KAGAN: Well, I don't really
21 under -- okay.

22 MR. GUARNIERI: -- there's -- there's
23 a -- there's a rationality, there's a reason
24 that Congress drew that -- the line that it drew
25 in Rule 704(b) and it has to do with the

1 Hinckley trial and the concerns that there's a
2 kind of expert opinion testimony that is
3 particularly problematic that Congress wanted to
4 keep out and that's it.

5 JUSTICE KAGAN: Okay. Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Gorsuch?

8 JUSTICE GORSUCH: I am thoroughly
9 confused. So a hypothetical saying someone in
10 John Hinckley's situation who looks just like
11 John Hinckley but isn't John Hinckley couldn't
12 have had the requisite mental state, that's out?

13 MR. GUARNIERI: Well, again, it's --
14 it's not --

15 JUSTICE GORSUCH: Is -- is that out or
16 in? Just out or in?

17 MR. GUARNIERI: I mean, the -- the
18 so-called mirroring hypotheticals --

19 JUSTICE GORSUCH: Yes.

20 MR. GUARNIERI: -- I think are out --

21 JUSTICE GORSUCH: All right. Okay.

22 MR. GUARNIERI: -- under a proper --

23 JUSTICE GORSUCH: All right. Okay.

24 MR. GUARNIERI: -- understanding of
25 Rule 704(b). We accept that.

1 JUSTICE GORSUCH: Now I say -- now I
2 have the expert who says in the John Hinckley
3 case or the mule case, just flip it around, all
4 people with schizophrenia cannot form or can
5 form the requisite intent or all mules can -- do
6 or do not know. In or out?

7 MR. GUARNIERI: I -- I don't think
8 that testimony like that would be objectionable
9 on 704(b) grounds.

10 JUSTICE GORSUCH: So that's all in?

11 MR. GUARNIERI: I mean --

12 JUSTICE GORSUCH: I'm sorry. I'd
13 understood you in prior questions to say that
14 was out.

15 MR. GUARNIERI: Well, it -- the --

16 JUSTICE GORSUCH: Did I misunderstand
17 you, or have you spoken both ways today?

18 MR. GUARNIERI: I do not think I have
19 spoken both ways. The line I have tried to draw
20 here, and it's the line that our brief
21 articulates, is is the expert opining about the
22 defendant herself.

23 JUSTICE GORSUCH: Now why would
24 Congress draft a rule saying experts can't opine
25 about the defendant's mental state after the

1 Hinckley trial and forbid a district judge from
2 admitting evidence about a mirroring
3 hypothetical that looks just like John Hinckley
4 but allow in, still allow in an expert to say
5 nobody in the class in which John Hinckley falls
6 has the requisite mental state? What -- what
7 rational Congress would -- would do such a
8 thing?

9 MR. GUARNIERI: I -- I think Rule
10 704(b), if you look at the history of the
11 provision, reflects a judgment by Congress that
12 having dueling experts in insanity cases
13 directly opine for the jury on whether the
14 defendant satisfies the legal definition of
15 insanity was unseemly, that it created a public
16 spectacle --

17 JUSTICE GORSUCH: Exactly.

18 MR. GUARNIERI: -- that undermined the
19 integrity of the proceedings --

20 JUSTICE GORSUCH: But you're allowing
21 in --

22 MR. GUARNIERI: -- and that it led to
23 overstatement by the expert.

24 JUSTICE GORSUCH: -- all of that
25 testimony -- you're still allowing in all of

1 that testimony.

2 MR. GUARNIERI: Well, I think again --
3 and this --

4 JUSTICE GORSUCH: All he has to say
5 is, instead of Hinckley or instead of the
6 mirroring hypothetical, all persons in this
7 category.

8 MR. GUARNIERI: This goes back to an
9 exchange that I had with Justice Jackson
10 earlier. I think it was the understanding of
11 everyone involved at the time and the text of
12 the original rule reflects that you are still
13 going to have experts who can come in in a
14 criminal trial and testify with respect to the
15 mental state or condition of the defendant.

16 JUSTICE GORSUCH: Certainly.

17 MR. GUARNIERI: That's not prohibited
18 by Rule 704(b).

19 JUSTICE GORSUCH: With respect to
20 whether he has -- whether he has schizophrenia,
21 sure, whether he has mental illness, yes, but
22 not -- I mean, the text of the rule says not
23 with respect to the element of the crime or the
24 defense.

25 MR. GUARNIERI: That's right.

1 JUSTICE GORSUCH: Okay. Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Kavanaugh?

4 JUSTICE KAVANAUGH: On the text, if we
5 stick to the text, that should be our key,
6 right?

7 MR. GUARNIERI: I -- I think we win
8 this case under the text, Justice Kavanaugh.

9 JUSTICE KAVANAUGH: Right. And are
10 the hypotheticals you've been getting real-world
11 hypotheticals?

12 MR. GUARNIERI: No -- no, I don't
13 think so, although --

14 JUSTICE KAVANAUGH: And what --

15 MR. GUARNIERI: -- I will acknowledge
16 that in the Ninth Circuit there was a time when
17 we did elicit testimony that no drug trafficking
18 organizations used blind mules because that's
19 what we accurately -- we honestly believed at
20 the time. And that testimony, we don't sponsor
21 testimony like that anymore because it's -- it's
22 not true.

23 JUSTICE KAVANAUGH: And it's not true
24 and if it -- someone tried to introduce
25 testimony like that, I think Justice Alito said

1 this, other rules take care of that in terms of
2 reliability, et cetera?

3 MR. GUARNIERI: Yes.

4 JUSTICE KAVANAUGH: Yeah. Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Barrett?

7 Justice Jackson?

8 JUSTICE JACKSON: So I guess that
9 drawing a line between testimony about a class
10 or a group on the one hand and testimony about
11 an individual happens at trial all the time.
12 Judges are familiar with drawing that line. And
13 I'm interested in the law professors', evidence
14 professors' brief because they point to one
15 context in which that happens with fair
16 frequency, which is with respect to eyewitness
17 testimony.

18 And they say courts often allow expert
19 testimony regarding factors that on average
20 interfere with accurate eyewitness
21 identifications. However, courts do not allow
22 experts to draw an individual inference and
23 testify that a particular witness is likely
24 inaccurate.

25 They go on to say, because social

1 science research isn't reliably -- even though
2 it is itself replicated and reliable, it can't
3 support a reliable statement about an individual
4 case, especially when that social scientist
5 hasn't really examined that individual case.
6 And so judge -- judges, they at least say, are
7 pretty familiar with the kind of line.

8 So is this the line you're drawing?

9 MR. GUARNIERI: Yeah, well, Justice
10 Jackson, I -- I think that brief -- the point
11 the professors are making in that brief is that
12 concerns that the expert has testified in some
13 way that overstates the expert's ability to draw
14 an inference about the particular case are not
15 unfamiliar in federal court. Courts handle
16 those kinds of concerns every day under Rule
17 702. And you could have a similar dynamic for
18 testimony like this.

19 JUSTICE JACKSON: Right. And that --
20 I guess what I'm suggesting is that there is a
21 difference between a -- an expert talking about
22 a group, an "on average," and here are the
23 statistics that relate to how people operate or
24 think or whatever as a group and that that's
25 actually a different kind of testimony and

1 ultimate, you know, goal and -- and -- and
2 helpful thing for jurors when they are trying to
3 draw the inference as to whether or not this
4 individual, right, is a member of that group,
5 meaning acted in the same way or thought in the
6 same way. That's still left to the jury so long
7 as the expert doesn't himself say -- go on to
8 say, and this individual is in that group,
9 right?

10 MR. GUARNIERI: I think that's exactly
11 right. We think that's how Rule 704(b) should
12 work. And, here, Agent Flood did -- certainly
13 left a great deal for the jury, a -- a great
14 number of the links in the chain of inferences
15 for the jury itself to draw.

16 JUSTICE JACKSON: Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Rebuttal, Mr. Fisher?

20 REBUTTAL ARGUMENT OF JEFFREY L. FISHER
21 ON BEHALF OF THE PETITIONER

22 MR. FISHER: Thank you.

23 I'd like to start by just making
24 absolutely clear for the Court that the
25 government is not defending the Ninth Circuit's

1 case law on the -- Rule 704(b). So, on the
2 mirroring situation the Court has talked about,
3 there's a Ninth Circuit case from 2005 called
4 Younger, where the Ninth Circuit says that
5 evidence is admissible because it does not
6 particularly speak to the defendant, with "the
7 defendant" in italics in that opinion. So the
8 government there is moving away from the Ninth
9 Circuit's view.

10 I don't fully understand exactly what
11 the government is saying about what we've called
12 hundred percent testimony or "always" testimony,
13 but, Justice Kavanaugh, I do want to absolutely
14 stress those are real-world examples. They're
15 at page 23 of our brief. That's the exact
16 testimony that agents like Agent Flood gave in
17 cases like this until 2013, when the government
18 discovered there actually were some blind mules
19 out there.

20 So it's merely a -- it's merely a
21 situation of this particular scenario where the
22 government's backed off it for empirical
23 reasons. But you could have other cases where
24 an expert would testify in the real world that
25 people with schizophrenia can never tell right

1 from wrong, that ex -- that -- that -- that
2 executives in corporations when they lie to
3 government investigators always know they're
4 telling a lie. That would be perfectly
5 real-world examples.

6 And I think, regardless of what the
7 government's precise position is, it's very
8 difficult to argue that kind of testimony would
9 be okay under Rule 704(b).

10 Let me give you one last scenario
11 about the government's line-drawing problems.
12 There's a case called Watson from the Third
13 Circuit that's in our brief. The government
14 itself seems to agree with the outcome in
15 Watson. In that case, the prosecutor asked the
16 expert: Do you have an opinion as to whether or
17 not the defendant here had the requisite intent?
18 The expert says: Yes, I have an opinion.
19 People like this generally have the requisite
20 intent.

21 The government seems to agree that is
22 out under Rule 704(b). Now maybe that's
23 because, at pages 28 to 30, it draws a
24 contextual rule of some kind. But there are
25 these very difficult line-drawing problems under

1 the government's rule.

2 Our rule is simple. If you talk about
3 "the" defendant herself, it's -- it's covered by
4 Rule 704(b), or a class of people including the
5 defendant, you're talking -- you're covered by
6 Rule 704(b). Here, the class of people, Agent
7 Flood is quite specific, people carrying large
8 quantities of drugs across the border. That's
9 the class. The defendant here is unquestionably
10 a member of that class. And so his testimony is
11 about the defendant.

12 I want to say one last thing. Justice
13 Kagan and Justice Jackson asked about some of
14 the history and intent of Rule 704(b). Let's
15 just use the Hinckley case. And the Senate
16 report is only a page long. I would urge you to
17 read that if you think that's important here.
18 And what the Senate said was, we're concerned
19 about experts testifying about the subject of
20 mens rea.

21 And so, after the Hinckley trial, if
22 an expert were to testify we think people like
23 this who are exhibiting these conditions
24 generally couldn't tell right from wrong or
25 probably couldn't tell right from wrong or in

1 most circumstances couldn't tell right from
2 wrong, it seems crazy to think Congress would
3 have thought that was okay under the Hinckley
4 trial.

5 The problem in the Hinckley trial was
6 that the expert was testifying not just about
7 facts from which a jury could infer mens rea,
8 but the jury was expressing an opinion on the
9 ultimate issue of mens rea from which the jury
10 could go into the jury room and do nothing but
11 say, oh, we agree with the expert.

12 And whether the expert expressed that
13 opinion in terms of probably this -- this
14 defendant had the mens rea or didn't have the
15 mens rea or certainly, the problem is that the
16 jury can go back to the jury room and say:
17 Look, sounds like Agent Flood, you know, thinks
18 people like this generally have the mens rea.
19 He must be right. We'll go along with that.

20 The point of the right to jury trial
21 and the point of the ultimate issue doctrine is
22 that when it comes to the special subject of
23 mens rea -- and, Justice Jackson, I want to be
24 really specific here -- mens rea as the element
25 of the crime to convict or as the defense, that

1 particular subject has a wall around it. The
2 jury is -- is -- is required to make an
3 independent moralistic, qualitative
4 determination.

5 And that's what Agent Flood did wrong
6 here. He said most people like this know they
7 have drugs in their car. Knowledge is the exact
8 element of the crime.

9 So whatever -- whatever else Rule
10 704(b) may cover in terms of statements that
11 cover mens rea, this one explicitly did, and
12 that's why it went over the line.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 The case is submitted.

16 (Whereupon, at 11:35 a.m., the case
17 was submitted.)

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Official

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