IN THE

SUPREME COURT OF THE UNITED STATES

No. _____

OCTOBER TERM, 2021

JARVIS THOMAS,

Petitioner,

- vs -

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether Fed. R. Evid. 704(b) precludes a government expert in a criminal case from opining that the defendant knowingly participated in the charged criminal activities by testifying in response to a hypothetical which mirrors the facts of the instant case?

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Petitioner respectfully prays that a *writ of certiorari* issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on September 7, 2021.

JURISDICTION AND CITATION OF OPINION BELOW

On September 7, 2021, the Ninth Circuit affirmed Petitioner's conviction in an unpublished Memorandum opinion, attached as Exhibit "A" to this petition. The Ninth Circuit denied Petitioner's petition for rehearing, and suggestion for rehearing en banc, on November 17, 2021. This Court has jurisdiction to review the Ninth Circuit's decision pursuant to 28 U.S.C. § 1254.

FEDERAL RULE OF EVIDENCE AT ISSUE

> Rule 704. Opinion on an Ultimate Issue
>
> (a) In General — Not Automatically Objectionable. An opinion is not objectionable just because it embraces an ultimate issue.
>
> (b) Exception. In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.
>
> Fed. R. Evid. 704(b).

INTRODUCTION

Petitioner asks the Court to grant review in the instant case to decide an important Fed. R. Evid. 704(b) question which is the subject of significant conflict and disclarity among the circuits. Petitioner was charged with conspiring to possess methamphetamine with the intent to distribute, and possessing methamphetamine with the intent to distribute. His defense was mere presence. The government presented an expert witness who, in response to a hypothetical set of facts which perfectly mirrored the facts of the instant case, testified that the person in the hypothetical, who was obviously Petitioner, knowingly participated in the charged criminal activities. The Ninth Circuit found that this hypothetical and answer were proper because "[e]xpert witnesses also may field hypotheticals based on their own interpretations of the facts in the record." [Ex. "A" at 4]. Other circuits, however, have concluded that such expert testimony based upon a hypothetical mirroring the facts of the case at bar are barred by Rule 704(b). See, e.g., United States v. Boyd, 55 F.3d 667, 672 (D.C. Cir. 1995) (in a drug distribution case, holding that the "government may not "recite a list of 'hypothetical' facts that exactly mirror the case at hand and then ask an expert to give an opinion as to whether such facts prove an intention to distribute narcotics.").

This is a particularly important issue given the implications of the Ninth

Circuit's interpretation of Rule 704(b) in this case. If district courts in the Ninth Circuit are permitted to allow the government to introduce expert testimony that a defendant was a knowing and willful drug trafficker through the use of a hypothetical based upon the exact facts from a particular case, "[t]here would be little need for a trial before a jury if an expert is allowed simply to declare the defendant's guilt." Boyd, 55 F.3d at 672. This is exactly what is sanctioned by the panel's conclusion here where, in the context of a drug distribution case where intent is a required element of the charge, it broadly held that "[e]xpert witnesses may [] field hypotheticals based on their own interpretation of the facts in the record." [Ex. "A" at 4]. Petitioner now asks the Court to review this case in order to address whether the government is allowed to circumvent Fed. R. Evid. 704(b)'s prohibition on an expert stating that a criminal defendant had the mental state or condition required for the charged crime by presenting this opinion in response to a hypothetical which mirrors the facts of the case at bar.

STATEMENT OF FACTS AND CASE

In December 2017, the government obtained an indictment charging Petitioner and another with conspiracy to possess with intent to distribute, and to distribute, at least 500 grams of a mixture containing methamphetamine and 50 grams of actual methamphetamine (count one), and possessing with the intent to distribute

at least 500 grams of a methamphetamine mixture (count two).[1] [CR 11]. The charges pertained to drug activities which allegedly occurred in Bakersfield, California and in North Dakota.

The government subsequently obtained a second superseding indictment against Petitioner and Tommie Thomas (Petitioner's cousin). [ER 185-96]. This indictment also listed several acts which Petitioner, Tommie Thomas, and other co-conspirators allegedly performed in connection with the charges. Id. Tommie Thomas pled guilty to count four of the second superseding indictment. [CR 96].

Petitioner stood trial in August 2019. The government's theory was that Petitioner and his co-conspirators purchased methamphetamine in Bakersfield to resell both in that area, as well as in North Dakota. The government asserted that the money earned from selling the methamphetamine in North Dakota was returned to Bakersfield through money transfers. The government attempted to link Petitioner to a specific methamphetamine purchase which occurred on November 1, 2017, and an attempted purchase on November 4, 2017.

The government relied in part on recorded phone calls to present its case.

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[1] "PSR" refers to the pre-sentence report. "ER" refers to Appellant's excerpts of record. "SER" refers to the government's supplemental excerpts of record. "RT" refers to the reporter's transcript of proceedings. "CR" refers to the clerk's record.

It admitted the calls through its case agent who also offered testimony as to the meaning of many of the statements on the calls, and the conclusions to draw from the conversations. The government also called a Fed. R. Evid. 702 expert (Special Agent Both) to discuss terminology used on the recorded calls, and also to respond to a hypothetical question from the government which exactly mirrored an event where the government claimed Petitioner came to a location to approve a drug transaction. That exchange went as follows:

> Q. Let me -- based on your training and experience, I'd like to give you another hypothetical. So the supplier of methamphetamine brings to a meeting a large quantity of methamphetamine that he intends to sell to other individuals. This meeting was prearranged by the supplier and some individuals seeking to obtain the methamphetamine. Let's call them Mr. A and Mr. B.
>
> A. Okay.
>
> Q. So Mr. A and Mr. B wait with the supplier for nearly an hour while the supplier has this large quantity of methamphetamine. Some records show that Mr. A and Mr. B attempt to contact a third individual. Let's call him Mr. C. After about an hour, Mr. C arrives, looks at the methamphetamine and shortly thereafter the supplier gives the methamphetamine to Mr. A and Mr. B.
>
> Based on your training and experience, what was Mr. C's role in the transaction, if any?
>
> A. Okay. Well, like to go back, earlier you talked about how these transactions usually happen quickly. That is

> typically the case. But often there's unforeseen circumstances. And I would say, from that hypothetical, that person A and person B were the persons negotiating with the source. And person C was probably the one authorizing the transaction. And that person typically would have the money.
>
> And like I was saying earlier, when that person shows up with the money, when the money and the drugs come together, that's a quick transaction. So they can dilly around earlier when those aren't together. But from my training and experience, person C would be the person probably calling the shots and probably getting information from A and B about whether this is a legitimate deal, whether the narcotics look good, whether the packaging and everything looks right, whether the price is right.
>
> And then once person C came, he probably would also have the money typically and then would authorize the transaction. At that point it would probably go fairly quickly. So I would say A and B are lower level associates, person C would be the one -- potentially the main -- the higher level person with the money who would actually authorize the transaction.

[SER 219-20].

Petitioner's defense was that while others, including his brother William Thomas and cousin Tommie Thomas, may have been engaging in drug transactions during this period, Petitioner was not involved in these transactions and was not part of any conspiracy to distribute drugs. Petitioner asserted that he communicated and spent time with these other individuals because they were family and he was close to

them, not because he was involved in the drug trade.

The jury convicted Petitioner of both counts of the indictment. The district court sentenced Appellant to 320 months custody and five years of supervised release on each count, to run concurrently. [ER 181-83].

On direct appeal, Petitioner raised, among other claims, the argument that the testimony of Special Agent Both in response to the hypothetical violated Rule 704(b). Specifically, Petitioner argued that because the hypothetical mirrored the facts of this case as related to the drug transaction in which the government claimed Petitioner was involved, Both's testimony represented improper expert opinion testimony that went directly to Petitioner's intent as to the charge counts. The panel disagreed, writing that "[e]xpert witnesses also may field hypotheticals based on their own interpretations of the facts in the record." [Ex. "A" at 4]. The Ninth Circuit denied Petitioner's petition for rehearing, and suggestion for rehearing en banc, without further comment.

ARGUMENT

THE COURT SHOULD GRANT THIS PETITION TO DECIDE WHETHER IT IS PERMISSIBLE FOR THE GOVERNMENT TO USE A HYPOTHETICAL QUESTION WHICH MIRRORS THE FACTS OF THE CASE AT BAR TO ELICIT EXPERT TESTIMONY THAT A CRIMINAL DEFENDANT KNOWINGLY COMMITTED THE CRIMINAL ACTS CHARGED AGAINST HIM

A. Fed. R. Evid 704(b)

Rule 704(b) is absolutely clear in its proscription: "No expert witness … may state an opinion … as to whether the defendant did or did not have the mental state … constituting an element of the crime charged…. Such ultimate issues are matters for the trier of fact alone." Fed. R. Evid. 704(b). Congress added this provision out of a desire to "eliminate the confusing spectacle of competing expert witnesses testifying to directly contradictory conclusions as to the ultimate legal issue to be found by the trier of fact." S. Rep. No. 98-225 at 230-31 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3412-13 ("S. Rep. 98-225").

Although enacted to limit psychiatric testimony when a criminal defendant relies upon the defense of insanity . . . Rule 704(b) applies in fact to all instances in which expert testimony is offered as to a mental state or condition constituting an element of the crime charged or defense thereto . . . ." United States v. Boyd, 55 F.3d 667, 672 (D.C. Cir. 1995). "A prohibited 'opinion or inference'

under Rule 704(b) is testimony from which it necessarily follows, if the testimony is credited, that the defendant did or did not possess the requisite mens rea." United States v. Campos, 217 F.3d 707, 711 (9th Cir. 2000) (quoting United States v. Morales, 108 F.3d 1031, 1035 (9th Cir. 1997) (en banc). "Thus, with respect to a criminal defendant's mental state, Congress confirmed that 'the jury is the lie detector.'" Campos, 217 F.3d at 711 (quoting United States v. Barnard, 490 F.2d 907, 912 (9th Cir. 1973)).

B. The Government Violated Rule 704(b) By Eliciting Expert Testimony That Petitioner Committed The Charged Acts Based On A Hypothetical Which Mirrored The Facts Of The Instant Case

Petitioner was charged with two counts in this case - conspiring to distribute methamphetamine, and possession of methamphetamine with the intent to distribute. Both counts required the government to prove that Petitioner acted with specific intent. As to the mens rea for the conspiracy charge, the government was required to prove that Petitioner "willfully participat[ed] in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy . . . ." [CR 150 at 17]. For count two, the government had to prove that Petitioner " knowingly possessed methamphetamine . . . with the intent to distribute it to another person." [CR at 21].

To attempt to show that Petitioner was a willful and knowing participant in the charged acts, the government did not simply present its evidence connected to these acts and then argue to the jury that this evidence demonstrated that Petitioner committed these crimes. Instead, through the testimony of expert witness Both, the government also presented the jury with its expert's opinion, through the use of hypotheticals which perfectly mirrored the facts of this case, that Petitioner "did [] have the mental state … constituting an element of the crime charged." Fed. R. Evid. 704(b). This testimony violated Rule 704(b), and denied Petitioner a fair trial as guaranteed by the Due Process Clause.

C. There Is Significant Discord Among The Circuits On This Question

While the Ninth Circuit found that the expert here properly responded to the hypothetical based on his own interpretations of the facts in the record, [Ex. "A" at 4], other circuits would have come out the other way given this record. Starting with the D.C. Circuit, in Boyd, 55 F.3d at 670-72, defendant in a drug case claimed that testimony from a government expert witness in response to a hypothetical which mirrored the facts of his case improperly addressed his mental state. The government's question to the expert there was as follows: "Now, finally, suppose that plainclothes vice officers drive into the area. The person holding the

plastic bag – as the officers pull up to that person, the person holding the plastic bag flees from the area; and, within a block or two, tosses the plastic bag containing the crack/cocaine under a car in the area. Now, given those hypothetical facts, Officer Stroud, in your opinion, is that person's possession of the mixture or substance, 6.037 grams containing crack/cocaine, possession for personal use or is it consistent with possession with intent to distribute?" Id. at 670. The expert witness answered: "Possession with intent to distribute." Id.

The D.C. Circuit found that this testimony violated Fed. R. Evid 704(b), concluding that "[t]his court has never held that the Government may simply recite a list of "hypothetical" facts that exactly mirror the case at hand and then ask an expert to give an opinion as to whether such facts prove an intention to distribute narcotics." Id. at 671-72. "Indeed, we would have been remiss even to suggest such an approach, because it flies in the face of Rule 704(b). Yet, this is exactly what happened in the case at hand." "[T]he prosecutor simply restated the facts of this case in his question to Officer Stroud, and, although termed a hypothetical, that question was plainly designed to elicit the expert's testimony about the intent of the defendant. . . . [I]t is inescapable that the testimony amounted to "an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged." Id. at 672.

Other circuits have aligned with the D.C. Circuit concerning the impropriety of using a hypothetical which mirrors the facts of a case to present expert testimony that a defendant had, or did not have, the requisite intent to commit the charged offenses. In United States v. Manley, 893 F.2d 1221, 1224-1225 (11th Cir. 1990), the Eleventh Circuit examined defendant's claim in a bank robbery case where defendant presented an insanity defense that the district court improperly excluded his expert's proposed testimony that, based on a hypothetical which mirrored his mental health condition, he was not able to appreciate the nature and quality of his actions. The Eleventh Circuit affirmed, finding that defense counsel's hypothetical assumed facts which identified the defendant, and that "the defense posed a question designed to elicit the expert's opinion on the ultimate legal issue. Whether such question was posed in the form of a hypothetical is immaterial." Id. at 1225.

Similarly, in United States v. Dennison, 937 F.2d 559, 565-66 (10th Cir. 1991), the Tenth Circuit considered whether the district court improperly excluded defendant's proposed defense expert testimony that alcohol and drug consumption by a hypothetical person with the same mental disorder suffered by the defendant would render the person incapable of forming the specific intent necessary to commit assault. It affirmed, finding that although the expert's testimony "was premised on a hypothetical person suffering borderline personality disorder and couched in terms

of the characteristics of the illness itself, the necessary inference was that the instant defendant did not have the capacity to form specific intent at the time of his crimes because of the combined effects of his intoxication and mental illness. Under Rule 704(b) such an inference is for the jury to make, not an expert witness." Id.

Still other circuits have focused on whether the word "intent" was specifically included in the hypothetical or expert testimony in determining whether such testimony violates Rule 704(b). In United States v. Wilson, 964 F.2d 807, 810 (8th Cir. 1992), Rule 704(b) was held not to bar a drug agent's expert testimony that 130 grams of methamphetamine, the exact amount found on the defendant, was not a typical "user quantity." In finding no violation of Rule 704(b), the court stressed that "nowhere in the record is there a specific statement in which [the agent] says that [the defendant] had the intent to distribute the methamphetamine." Id.

In United States v. Foster, 939 F.2d 445, 454 (7th Cir. 1991), the Seventh Circuit held that Rule 704(b) did not preclude a detective from testifying "that, as a general rule, drug couriers" use cash, aliases, beepers, one-way tickets, "masking agents such as talcum powder," and hard-sided suitcases, all of which the defendant had used as well. Rule 704(b) did not bar such testimony, that court held, because although the testimony would support the inference that the defendant knew of the cocaine in his suitcase, the record contained no "specific statement in which

[the expert] opines that [the defendant] had the requisite mental state."

Subsequently, however, in United States v. Lipscomb, 14 F.3d 1236, 1240-43 (7th Cir. 1994), the Seventh Circuit discussed that this distinction (whether the word "intent" is used) really makes no difference. There, defendant claimed that district court erred in permitting officers to give their expert opinions on whether the cocaine they found on him was for distribution. The Seventh Circuit ultimately found that the testimony was proper because each of the challenged opinions was immediately followed by a precise explanation of the grounds for the opinion, and the grounds cited made it clear that the officers were relying on their knowledge of common practices in the drug trade, rather than on some special familiarity with the workings of Lipscomb's mind. Id. at 1243. But notable for this petition was the Seventh Circuit's consideration of the fact that the expert testimony never specifically mentioned defendant's intent:

> In the first place, though officers did not in fact say "intent" or "intended," they might as well have, for the effect would have been exactly the same. If the drugs found on Lipscomb "were for street-level distribution," as each of the officers testified, then Lipscomb possessed them for that purpose; he intended to distribute them. Further, it would seem to make little difference that the officers' opinions were based on an analysis of the external circumstances of the arrest, for the officers still would have "stated an opinion or inference as to whether the defendant did or did not have the mental state or condition

> constituting an element of the crime charged," and this is what the rule forbids.

Lipscomb, 14 F.3d at 1240-41. See also United States v. Smart, 98 F.3d 1379, 1389 (D.C. Cir. 1996) (finding that Seventh Circuit standard from Lipscomb accurately encapsulates the law up to this point, as it "avoids any talismanic reliance on whether or not the prosecutor or expert used the word "intent" in order to determine whether a violation of Rule 704(b) has occurred.").

While the expert in the instant case never used the specific word "intent," the above passage from Lipscomb makes clear that his testimony nonetheless established this exact point in violation of Rule 704(b). Expert witness Both stated that person C's role in the hypothetical transaction was to authorize the transaction, and that he was the higher level person with the money who was calling the shots. [SER 219-20]. Because the not-so-hypothetical hypothetical mirrored the unique facts of the instant case, the government clearly established that person C was Petitioner. Applying this record to Lipscomb, although "[witness Both] did not in fact say 'intent' or 'intended,' [he] might as well have, for the effect would have been exactly the same." Lipscomb, 14 F.3d at 1240-41. In other words, if, as Both testified, Petitioner went to the location of the drug deal to authorize the transaction, and he also was a leader who was calling the shots, then he certainly was willfully

participating in a conspiracy to distribute and knowingly possessing methamphetamine for distribution. Even absent the use of the specific term "intent," that is the only conclusion to be reached based upon this hypothetical and response.

D. This Case Presents The Court With An Excellent Opportunity To Clarify The Law On This Important Rule 704(b) Issue

The Ninth Circuit has sanctioned a dangerous and constitutionally-infirm practice by giving blanket approval to prosecutors to use a hypothetical which mirrors the facts of a criminal case at trial to present expert testimony that the defendant committed the charged acts. "There would be little need for a trial before a jury if an expert is allowed simply to declare the defendant's guilt," Boyd, 55 F.3d at 672, but that is precisely what the government is allowed to do pursuant to the Memorandum in this case. Petitioner asks the Court to grant review of this important Rule 704(b) issue to provide lower courts with much-needed guidance as to the propriety of the government presenting this sort of unfair and unduly prejudicial expert testimony.

CONCLUSION

For the above reasons, Petitioner respectfully requests that the Court grant the instant petition to review the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

Dated: December 28, 2021

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