

No. _____

IN THE
Supreme Court of the United States

RONALD TINGLE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

THOMAS W. PATTON
Federal Public Defender

DANIEL J. HILLIS
Assistant Federal Public Defender
Office of the Federal Public Defender
600 East Adams Street, 3rd Floor
Springfield, Illinois 62701
Phone: (217) 492-5070
Email: dan_hillis@fd.org
COUNSEL OF RECORD

QUESTION PRESENTED

- I. Is there a violation of Federal Rule of Evidence 704(b) when an expert witness for the government opines that: a gun's proximity to drugs and proves the gun was "utilized as protection by [the defendant] to protect himself and/or the methamphetamine and the currency"; and drugs in the defendant's home were "definitely for distribution"?

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED.....	ii
TABLE OF AUTHORITIES CITED	iv
OPINION BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	2
STATEMENT OF THE CASE.....	2
REASONS FOR GRANTING THE WRIT	5
I. The Federal Courts Of Appeals Have Recently Become Divided About Whether An Expert Can, Despite Federal Rule of Evidence 704(b)'s Explicit Prohibition, Testify Whether A Defendant Had The Mental State That Constituted An Element Of A Charged Offense.....	5
CONCLUSION.....	13

INDEX TO APPENDIX

Opinion of the United States Court of Appeals for the Seventh Circuit	1a-10a
Final Judgment.....	11a
Petition for Rehearing or Hearing <i>En Banc</i>	12a-28a
Order Denying Petition for Rehearing and Rehearing <i>En Banc</i>	29a
Trial Transcript pages.....	30a-41a

TABLE OF AUTHORITIES CITED

PAGE

Cases

<i>United States v. Anderson</i> , 509 Fed.Appx. 868 (11th Cir. 2013).....	10, 13
<i>United States v. Campos</i> , 217 F.3d 707 (9th Cir. 2000)	9, 13
<i>United States v. DiDomenico</i> , 985 F.2d 1159 (2d Cir. 1993)	7
<i>United States v. Felak</i> , 831 F.2d 794 (8th Cir. 1987)	9, 13
<i>United States v. Gutierrez–Farias</i> , 294 F.3d 657 (5th Cir. 2002).....	8, 13
<i>United States v. Harris</i> , 393 Fed.Appx. 314 (6th Cir. 2010).....	9, 13
<i>United States v. Haynes</i> , 729 F.3d 178 (2d Cir. 2013)	6, 13
<i>United States v. Mitchell</i> , 996 F.2d 419 (D.C. Cir. 1993)	10, 13
<i>United States v. Offill</i> , 666 F.3d 168 (4th Cir. 2011).....	8, 13
<i>United States v. Reyez</i> , 183 Fed.Appx. 755 (10th Cir. 2006).....	10, 13
<i>United States v. Richard</i> , 969 F.2d 849 (10th Cir. 1992).....	10
<i>United States v. Tingle</i> , 880 F.3d 850 (7th Cir. 2018)	2
<i>United States v. Valle</i> , 72 F.2d 210 (1st Cir. 1995).....	6, 13
<i>United States v. Watson</i> , 260 F.3d 301 (3d Cir. 2001)	7, 9, 13

Statutes

18 U.S.C. § 924(c).....	2, 3, 9, 11
18 U.S.C. § 924(c)(1)(A)	11, 12

21 U.S.C. § 841	3, 11
21 U.S.C. § 841(a)	12
21 U.S.C. § 841(b)(1)(B)(viii)	12
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1291	2
28 U.S.C. § 3742	2

Other Authorities

Fed.R.Evid. 704(b).....	2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13
Seventh Circuit Pattern Criminal Jury Instruction	11

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2017

RONALD TINGLE,
PETITIONER,
vs.
UNITED STATES OF AMERICA,
RESPONDENT.

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

Petitioner, RONALD TINGLE, respectfully prays that a writ of certiorari issue to review the published opinion of the United States Court of Appeals for the Seventh Circuit, issued on January 25, 2018 affirming the denial of Mr. Tingle's criminal appeal and the order denying Mr. Tingle's Petition for Rehearing and Petition for Rehearing *en banc* issued February 20, 2018.

OPINION BELOW

The decision of the United States Court of Appeals for the Seventh Circuit is published at 880 F.3d 850. (Pet. App. 1a-10a)

JURISDICTION

The appellate court entered its judgment on January 25, 2018. (Pet. App. 11a). A timely petition for rehearing and petition for rehearing *en banc* was filed. (Pet. App. 12a-28a). It was denied on February 20, 2018. (Pet. App. 29a). The court of appeals had jurisdiction pursuant to 28 U.S.C. §§ 1291 and 3742. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

EVIDENTIARY RULE INVOLVED

Federal Rule of Evidence 704(b) states:

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.

STATEMENT OF THE CASE

This petition seeks review of a Rule 704(b) evidentiary issue that is the basis for a circuit-split. By allowing the government's expert to testify that Mr. Tingle intended to commit the § 924(c) offense and the possession with intent to distribute offense, the Seventh Circuit has established precedent that is contrary to every other circuit. This Court should address this issue so that criminal defendants across the country are treated equally.

1. After the Indiana State Police received information from a confidential informant that Ronald Tingle was selling methamphetamine, police conducted several controlled buys at Mr. Tingle's residence. (Pet. App. 2a). Police obtained and executed a search warrant at the residence where they found 165 grams of methamphetamine, digital scales, and \$5,520 in cash. *Id.* Police also found a loaded handgun on top of a desk that contained methamphetamine, scales, and money. *Id.*

2. Before trial, the government notified the court that it intended to introduce expert-witness testimony. (Pet. App. 4a). The government provided information on the expert's qualifications and explained of how expert testimony would aid the jury. *Id.* Pursuant to its standard courtroom procedures, the district court refused to label any witness as an expert. *Id.* Nevertheless, the district court gave a jury instruction informing the jurors that they had heard testimony from expert witnesses. *Id.*

3. At trial, Mr. Tingle admitted the distribution offenses and defended only the possession with intent to distribute and firearm counts. (Pet. App. 3a). The trial focused on a gun that was the basis for an 18 U.S.C. § 924(c) charge and 165 grams of methamphetamine that was the basis for 21 U.S.C. § 841 intended distribution charge. *Id.* Mr. Tingle contended the firearm was not possessed in

furtherance of drug trafficking and that he amassed the 165 grams of methamphetamine for personal use during a planned year-long boat trip. *Id.*

4. The prosecution presented expert testimony from an agent for the Drug Enforcement Agency (DEA). The agent testified that the gun's proximity to drugs and proved the gun was "utilized as protection by [the defendant] to protect himself and/or the methamphetamine and the currency". (Pet. App. 30a-41a. The same agent testified about the quantity of methamphetamine located in Mr. Tingle's home, referenced the scale and packaging found there, and told the jurors that the methamphetamines were "definitely for distribution". (Pet. App. 40a).

5. The jury convicted Mr. Tingle of distributing controlled substances, possessing a firearm in furtherance of a drug trafficking offense, and possessing a controlled substance with the intent to distribute it. (Pet. App. 3a). The judge imposed the mandatory minimum 35 years' imprisonment. (R.189).

6. Mr. Tingle appealed to the Seventh Circuit and argued, among other things, that the DEA agent's expert testimony violated Rule 704(b) because the agent opined that Mr. Tingle had the intent to commit the firearm offense and the possession with intent to distribute offense. (Pet. App. 3a).

7. The Seventh Circuit issued a precedential opinion which, despite the words on the transcript pages, concluded the expert's testimony "does not speak

directly to [Mr.] Tingle’s mental state”. (Pet. App. 6a). *Tingle* also said that while the expert testified regarding his impression of the evidence in this case instead of speaking generally . . . he framed his responses in light of his training and experience.” *Id.* *Tingle* found no Rule 704(b) error. (Pet. App. 7a).

8. Mr. Tingle moved for a rehearing or for an *en banc* hearing, noting that the *Tingle* opinion created a circuit split. (Pet. App. 12a-28a). The Seventh Circuit denied that motion. (Pet. App. 29a).

REASONS FOR GRANTING THE WRIT

This Court should grant *certiorari* to resolve the Rule 704(b) issue. Mr. Tingle asked the Seventh Circuit to apply Rule 704(b)’s plain language to find the government’s expert erroneously opined on ultimate issues of intent given how intent is the exclusive province of the jury. The Seventh Circuit rejected Mr. Tingle’s request in an opinion that will have a lasting disadvantage for defendants who proceed to trial. Moreover, the Seventh Circuit’s opinion creates a circuit split that ensures unequal treatment of criminal defendants in the Seventh Circuit vis-à-vis every other circuit on the Rule 704(b) issue. This case presents an ideal vehicle for resolving the circuit conflict.

I. The Federal Courts Of Appeals Have Recently Become Divided About Whether An Expert Can, Despite Federal Rule of Evidence 704(b)’s Explicit Prohibition, Testify Whether A Defendant Had The Mental State That Constituted An Element Of A Charged Offense.

There is an irreconcilable difference between how the Seventh Circuit applied Federal Rule of Evidence 704(b) in *Tingle* versus how other circuit has applied it. As noted above, Rule 704(b) states:

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.

Id.

1. Circuit courts of appeal uniformly hold that an expert's testimony violates Rule 704(b) if it states or suggests the defendant's intent or *mens rea* for a charged offense since such a conclusion is for the jury to make. In *United States v. Valle*, 72 F.2d 210 (1st Cir. 1995), the First Circuit said: "Given the unambiguous language of the rule and the weight of authority, we hold that Rule 704(b) prohibits all direct expert testimony concerning a criminal defendant's intent, regardless of the witness's field of expertise, so long as intent is an element of the crime charged." *Id.* at 216 (footnote omitted). Although *Valle* concluded the expert testimony didn't violate Rule 704(b), *Valle* did so because the witness never directly characterized the defendant's intent to distribute but merely explained that drug quantity was consistent with distribution rather than personal use. *Id.*

In *United States v. Haynes*, 729 F.3d 178 (2d Cir. 2013), the Second Circuit said "[i]t is well established that Rule 704(b) 'disables even an expert from

expressly stating the final conclusion or inference as to a defendant's actual mental state at the time of a crime.'" *Id.* at 196 (quoting *United States v. DiDomenico*, 985 F.2d 1159, 1164 (2d Cir. 1993) (internal quotation marks and citations omitted)). The district court erroneously admitted the agent's testimony regarding that the defendant "realized" drugs were in a car since that was expert testimony about the defendant's state of mind. *Id.* *Haynes* explained, "[s]uch testimony is prohibited because it 'poses a uniquely heightened danger of intruding on the jury's function.'" *Id.* (quoting *DiDomenico*, 985 F.2d at 1164-65).

The Third Circuit, in *United States v. Watson*, 260 F.3d 301, 309-10 (3d Cir. 2001), determined that Rule 704(b) bars a prosecutor from eliciting expert testimony about whether a defendant intended to distribute drugs. An officer in *Watson* violated Rule 704(b) by testifying about the purpose of 100 plastic bags found on the defendant. *Id.* at 309. The officer opined that the defendant "possess[ed] with the intent to distribute to someone else." *Id.* At another juncture during the trial, a different officer violated Rule 704(b) by testifying that the defendant took a bus trip for the purpose of distributing drugs rather than obtaining drugs for personal use. *Id.* at 309-10. *Watson* reversed the judgment against the defendant because "the District Court erred when it admitted the Government's expert testimony concerning Watson's mental state. That evidence went to the heart of the Government's case and plainly prejudiced defendant."

Id. at 310. As in *Watson*, the expert testimony in Mr. Tingle's case erroneously opined on his mental state. That testimony was improper because it went to the heart of the case by showing intended distribution and disproving personal consumption.

In *United States v. Offill*, 666 F.3d 168 (4th Cir. 2011), the Fourth Circuit said, experts can offer opinions based on a lawyer's hypothetical questions. *Id.* at 177 (citations omitted). However, *Offill* cautioned that such testimony was "subject of course to the limitations that the witness not testify as to the defendant's 'intent,' as precluded by Rule 704(b)." (citations omitted). Unlike *Offill*, the agent in Mr. Tingle's case didn't answer hypotheticals; he directly opined about Mr. Tingle's intent.

The Fifth Circuit's opinion in *United States v. Gutierrez-Farias*, 294 F.3d 657 (5th Cir. 2002) addressed a case where an agent with the DEA testified as an expert on the business of transporting narcotics through South Texas. The Fifth Circuit held that admission of the expert testimony violated Rule 704(b) because the agent's testified the defendant knew he was smuggling drugs. *Id.* at 663. "Rather than assisting the jury to understand the evidence presented on complicated fact issues, the agent presented the jury with a generalization that in most drug cases the person hired to transport the drugs knows that the drugs are in the vehicle." *Id.* That was the functional equivalent of an agent's direct

comment on mental state in violation of Rule 704(b). *Id.* The expert testimony in *Tingle* went beyond the functional equivalent of direct comment on mental state; he made direct comments. (Pet. App. 6a-7a).

In *United States v. Harris*, 393 Fed.Appx. 314 (6th Cir. 2010), a § 924(c) case, the Sixth Circuit said that by offering a specific statement that gave an opinion as to how a defendant used guns at issue, an expert's testimony violated Rule 704(b). *Id.* at 320. *Harris* noted the rule may be violated when the expert refers directly to a defendant's intent, mental state, or *mens rea*. *Id.* (citing *Watson*, 260 F.3d at 309). Again, that's the sort of impermissible testimony that occurred in *Tingle*. It should have been deemed a Rule 704(b) violation.

The Eighth Circuit in *United States v. Felak*, 831 F.2d 794, 797 (8th Cir. 1987), prohibited a defense expert from testifying that the defendant lacked "the requisite mental state to satisfy the meaning of the words 'willful' or 'evasion' or 'fraud'" as contained in the criminal allegations against him. The district court excluded the testimony under Rule 704(b) and the Eighth Circuit affirmed. *Id.* Similarly, in *United States v. Campos*, 217 F.3d 707, 711 (9th Cir. 2000) a defendant wanted to present testimony from a polygraph examiner about the truthfulness of a defendant response when the defendant was asked if she knew drugs were in a van. *Id.* The polygraph examiner told the judge he would opine that the defendant was truthful when she said she didn't know drugs were in the van. *Id.*

The district court determined Rule 704(b) barred the testimony and the Ninth Circuit affirmed. *Id.* at 711-12. Likewise in *United States v. Anderson*, 509 Fed.Appx. 868, 873 (11th Cir. 2013), the Eleventh Circuit found that a district court properly excluded a defense expert from opining that the defendant lacked the intent to commit a sex offense against a child.

In *United States v. Reyez*, 183 Fed.Appx. 755, 759 (10th Cir. 2006), the Tenth Circuit concluded that an expert violated Rule 704(b) by testifying that the defendant's behavior "'led me to believe that [Mr. Reyez] had knowledge' of the presence of methamphetamine". Such testimony "expressly stat[es] the final conclusion or inference as to a defendant's actual mental state". *Id.* (quoting *United States v. Richard*, 969 F.2d 849, 854 (10th Cir. 1992)). The district court abused its discretion in admitting the opinion. *Id.* The D.C. Circuit reached a similar conclusion in *United States v. Mitchell*, 996 F.2d 419, 422 (D.C. Cir. 1993). There, an expert impermissibly testified that the packaging of certain quantities of crack cocaine in ziplock bags established the defendant had the "intent to distribute". *Id.*

2. Mr. Tingle was charged with possessing a firearm in furtherance of a drug distribution offense and with possessing drugs with the intent to distribute them. (Pet. App. 2a). An agent from the Drug Enforcement Agency testified as an expert for the government, telling the jury he participated in hundreds of gun

and drug cases and that a 9mm Smith & Wesson found during the search of Mr. Tingle's home was significant because its proximity to a large amount of methamphetamine and money proved it was "utilized as protection by Mr. Tingle to protect himself and/or the methamphetamine and the currency". (Pet, App. 30a-41a). The same agent testified about the quantity of methamphetamine located in Mr. Tingle's home, referenced the scale and packaging found there, and told the jurors that the drugs were "definitely for distribution". (Pet. App. 41a).

3. By testifying as he did, the expert explicitly told the jury that Mr. Tingle had the intent to commit the § 924(c) firearm offense and the § 841 distribution offense. His testimony violated Rule 704(b)'s command that an expert stay silent about a defendant's mental state. *Id.* Deciding intent is a jury's exclusive province, yet the agent testified about Mr. Tingle's *mens rea* and said Mr. Tingle intended to commit the offenses. The expert testimony about intent impermissibly addressed an ultimate issue reserved for the jury; thus, it violated the plain language of Rule 704(b).

4. The § 841 offense required the Government to prove Mr. Tingle intended to distribute the 165 grams of methamphetamine to another person. *See Seventh Circuit Pattern Criminal Jury Instruction* at p. 646. The § 924(c)(1)(A) offense required the Government to prove Mr. Tingle possessed a firearm in

furtherance of a drug trafficking felony. *See Seventh Circuit Pattern Criminal Jury Instruction* at pp. 237-38. *Tingle* wrongly held the agent's testimony about the Mr. Tingle's intent did not violate Rule 704(b). (Pet. App. 7a). *Tingle* wrongly determined that the expert witness committed no error. *Id.* By saying the drugs in the house were "definitely for distribution" and that a gun there was "utilized as protection by Mr. Tingle to protect himself and/or the methamphetamine and the currency", the expert's testimony violated Rule 704(b). (Pet. App. 30a-41a).

5. The expert's testimony went to the heart of the government's case since Mr. Tingle was charged with intending to distribute methamphetamine in violation of 21 U.S.C. §§ 841(a) and 841(b)(1)(B)(viii) and with possessing a firearm in furtherance of a drug trafficking felony in violation of 18 U.S.C. § 924(c)(1)(A). It would have been impermissible under the other circuit precedent cited above.

6. Not only is *Tingle* incompatible with other circuit precedent, it will dissuade other defendants from going to trial in the Seventh Circuit since *Tingle* lets prosecutors elicit expert testimony on an ultimate issue in violation of Rule 704(b). The relatively few jury trials held by district courts within the Seventh Circuit will only decline now that Rule 704(b) has been effectively abrogated. The proper application of Rule 704(b) should be adhered to in every case and in every circuit, but *Tingle* thwarts that effort.

7. The Seventh Circuit's ruling squarely conflicts with the decisions of the other U.S. courts of appeals. Just as *Felak*, *Campos* and *Anderson* properly found that expert testimony about a defendant's intent would violate Rule 704(b), *Tingle* should have found the expert's testimony violated that rule. The expert testimony impermissibly opined on intent. *Mitchell*, 996 F.2d at 422. Like the agent in *Reyez* who wrongly testified about the defendant's knowledge, the agent here wrongly opined about Mr. Tingle's intent. *Reyez*, 183 Fed.Appx. at 759. It wasn't testimony given in response to acceptable hypotheticals. See *Offill*, 666 F.3d at 177. It's the sort of impermissible testimony that occurred in *Harris*, 393 Fed.Appx. 320, *Watson*, 260 F.3d at 309, and *Gutierrez-Farias*, 294 F.3d 663. It spoke directly to Mr. Tingle's intent, which Rule 704(b) forbids. See *Haynes*, 729 F.3d at 196; *Valle*, 72 F.2d at 216.

8. This case is an ideal vehicle for resolving the circuit conflict the Seventh Circuit's *Tingle* opinion creates. The issue was squarely presented to the Seventh Circuit and *Tingle* squarely resolved the issue based on Rule 704(b).

CONCLUSION

For the foregoing reasons, the petition for writ of *certiorari* should be granted.

RONALD TINGLE, Petitioner

THOMAS W. PATTON
Federal Public Defender

s/ Daniel J. Hillis
Assistant Federal Public Defender
Office of the Federal Public Defender
600 East Adams Street, 3rd Floor
Springfield, Illinois 62701
Phone: (217) 492-5070
Email: dan_hillis@fd.org
COUNSEL OF RECORD

Dated: March 2, 2018