

In the
United States Court of Appeals
For the Seventh Circuit

No. 17-1604

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RONALD TINGLE,

Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Indiana, New Albany Division.
No. 15-cr-00023 — **Tanya Walton Pratt**, Judge.

ARGUED NOVEMBER 6, 2017 — DECIDED JANUARY 25, 2018

Before BAUER, KANNE, and ROVNER, *Circuit Judges*.

KANNE, *Circuit Judge*. Ronald Tingle was tried and convicted of possessing and distributing methamphetamine and of possessing a firearm in furtherance of a drug trafficking crime. On appeal, he argues that the district court erred when it allowed a government witness to give expert testimony without properly vetting the witness's credentials and when it allowed the same witness to testify regarding the defendant's mental state. Additionally, Tingle argues that he should

have been granted access to grand jury materials and that his case should have been dismissed based on prosecutorial vindictiveness. For the reasons that follow, each of these claims fails, and the judgment of the district court is affirmed.

I. BACKGROUND

The Indiana State Police received information from a confidential informant that defendant, Ronald Tingle, was selling methamphetamine. Through the confidential informant, the police conducted several controlled buys at Tingle's residence. Then the police obtained and executed a search warrant at the residence. During the search, the police discovered 165 grams of methamphetamine, digital scales, \$5,520 in cash in the house, and an additional \$1,190 on Tingle's person. The police also found eight firearms, including a loaded handgun on top of a desk that contained methamphetamine, scales, and money.

A grand jury returned an indictment charging Tingle with one count of possession of methamphetamine with intent to distribute and three counts of distribution, as well as a forfeiture allegation. The government offered Tingle a plea deal. During the plea negotiation, the government informed Tingle that if he rejected the offer, the government would seek a superseding indictment adding charges that would increase the mandatory minimum sentence. Tingle rejected the offer, and the government obtained two superseding indictments charging Tingle with additional offenses that increased the possible mandatory minimum sentence. Tingle's counsel filed a motion to dismiss the additional charges based on prosecutorial vindictiveness. The motion was denied.

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Tingle filed a pretrial motion seeking disclosure of grand jury testimony, which the district court denied. He also filed a motion to suppress items found in the search, which was denied, and a motion to bar the government from introducing a 1982 drug conviction, which was granted.

At trial, the court told the government that it would not label any witness as an “expert witness,” pursuant to the judge’s courtroom procedures. Despite this procedure, the court gave a final jury instruction on expert witnesses, without identifying which witnesses were considered experts. Tingle and the government agreed to this instruction without objection.

Tingle testified and admitted to possessing the methamphetamine, but denied the distribution allegations. He claimed the drugs were for personal use, explaining that he was planning a year-long boat trip to justify the large quantity. Agent Steele, a DEA agent, testified regarding the amount of drugs and the location of the guns found during the search of Tingle’s house. The jury convicted Tingle on all counts. Tingle appeals.

II. ANALYSIS

Tingle raises four issues on appeal: whether the district court allowed an expert witness to testify without properly certifying his credentials; whether Agent Steele improperly testified regarding Tingle’s mental state; whether Tingle should have been granted access to grand jury transcripts; and whether the charges should have been dismissed for prosecutorial vindictiveness. For the reasons that follow, each of these claims fails.

A. Whether the district court failed to assess Agent Steele's credentials before allowing him to testify as an expert witness

Before trial, the government notified the court that it intended to introduce expert-witness testimony. It provided information on the experts' qualifications and an explanation of how their testimony would be helpful to the jury. Pursuant to its standard courtroom procedures, the district court refused to label any witnesses as experts. At the conclusion of the trial, however, the district court told the jury that they had heard testimony from expert witnesses. The district court instructed the jury to "judge these witnesses' opinions and testimony the same way you judge the testimony of any other witness." (R. 151 at 12.) Tingle and the government agreed to this instruction.

Tingle argues the court allowed Steele to testify as an expert witness without properly examining his credentials or considering whether expert testimony would assist the jury. Because this argument is raised for the first time on appeal, we review the district court's decision to admit Steel's testimony for plain error. *United States v. Phillips*, 596 F.3d 414, 416 (7th Cir. 2010).

When "[f]aced with a proffer of expert scientific testimony ... the trial judge must determine at the outset ... whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 592 (1993); *see also* Fed. R. Evid. 702. "This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology can be applied to the facts in issue." *Daubert*, 509

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U.S. at 592–93. In *Kumho Tire Co. v. Carmichael*, the Supreme Court clarified that this “gatekeeping” obligation of the court applies to all expert testimony. 526 U.S. 137, 147–49 (1999).

Although the court never held a *Daubert* hearing, a hearing is unnecessary “where the reliability of an expert’s methods is properly taken for granted.” *Id.* at 152. It is clear that Steele was properly qualified to testify as an expert in his field and that his testimony could be helpful to the jury. Steele served as a DEA agent for sixteen years and as a trooper with the Missouri State Highway Patrol for fourteen years. He attended the DEA academy and the Missouri State Highway Patrol Academy. He was involved in many drug cases, including searches of drug suspects’ residences and vehicles. Steele explained that his testimony was based on that training and experience. Expertise of this sort is helpful to a jury in a drug distribution case. See *United States v. Winbush*, 580 F.3d 503, 510–11 (7th Cir. 2009). The district court did not err in allowing Steele to testify.

That being said, the district court’s practice of not identifying expert witnesses is problematic. The Federal Rules of Evidence and Supreme Court precedent make clear that courts must examine the qualifications of expert witnesses and consider whether the expert’s testimony will be helpful to the jury. The district court cannot use such procedures to avoid its gatekeeper responsibility.

B. Whether Agent Steele improperly testified regarding Tingle’s mental state

Tingle also argues that the district court erred when it allowed Steele to testify regarding Tingle’s mental state. Tingle

did not object to this testimony at trial, so the plain error standard of review applies. *Phillips*, 596 F.3d at 416.

No expert witness may state an opinion as to whether a defendant had a mental state that constitutes an element of the charged crime. Fed. R. Evid. 704(b). Circumstantial evidence regarding a criminal defendant's state of mind, however, is admissible. See *Winbush*, 580 F.3d at 511–12 (noting that direct evidence of intent to distribute is “predictably rare, so the government often employs expert testimony”). Tingle argues that Steele testified regarding Tingle's mental state when he said that the amount of drugs found in the residence was “definitely for distribution” (R. 201 at 70) and when he testified that the gun found on top of the desk where the drugs and money were located was “utilized as protection by Mr. Tingle to protect himself and/or the methamphetamine and the currency (R. 201 at 70–71).”

When read in context, Steele's testimony does not speak directly to Tingle's mental state. He compared the quantity of drugs found in the search with the amount of an average user's personal consumption. He also described the proximate location of the gun to the drugs and explained that guns found elsewhere in a house would not typically be considered as used in connection with drugs. True, Steele testified regarding his impression of the evidence in this case instead of speaking generally, but he framed his responses in light of his training and experience.

In *Winbush*, an FBI agent was asked about various quantities of drugs. 580 F.3d at 512. The agent testified that, “from [his] perspective,” the discovery of a given quantity of crack cocaine would indicate that an individual should be investigated as a trafficker. *Id.* The agent further testified that a given

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quantity of crack cocaine was “distribution level ... not user level.” *Id.* The court decided the testimony was not an inadmissible opinion on the defendant’s intent. *Id.*

In *United States v. Blount*, drugs, a scale, and a handgun were found on the defendant’s bed during a search of his home. 502 F.3d 674, 676 (7th Cir. 2007). A police officer testified that, given the location of the items, he thought that the gun was likely used to protect the defendant’s drug business. *Id.* at 677. The court concluded that “[n]o juror could have believed that [the officer] was using special personal knowledge of [the defendant] rather than assisting the jury to infer [the defendant’s] motives from a general trend linking guns and drugs.” *Id.* at 679. Therefore, the court decided, this testimony did not violate Rule 704. *Id.*

The testimony offered in this case is very similar to the testimony in *Winbush* and in *Blount*. Admission of the testimony was not an error, let alone plain error.

C. Whether the district court abused its discretion when it refused Tingle access to the grand jury materials

Tingle filed a pretrial motion seeking disclosure of all grand jury materials. The district court denied the motion. We review the district court’s decision not to disclose grand jury materials for abuse of discretion. *Walker v. Sheahan*, 526 F.3d 973, 977–78 (7th Cir. 2008).

Information from a grand jury inquiry is presumptively secret. Fed. R. Crim. P. 6(e). The district court need not allow the defense to examine grand jury materials in the absence of a showing of a particularized need. *United States v. Procter & Gamble Co.*, 356 U.S. 677, 683 (1958); *see also Dennis v. United States*, 384 U.S. 855, 870–72 (1966); *Pittsburg Plate Glass Co. v.*

United States, 360 U.S. 395, 400 (1959). To obtain grand jury materials, the moving party “must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that the request is structured to cover only material so needed.” *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 222 (1979).

Tingle had an opportunity to explain why he should have access to the grand jury materials when he moved for disclosure. He failed to show that his need for disclosure outweighed the need for secrecy. The district court did not abuse its discretion when it denied the motion.

D. Whether the district court erred when it denied Tingle’s motion to dismiss the superseding indictment

Finally, Tingle argues that his due process rights were violated when the prosecutor sought superseding indictments after Tingle rejected the government’s plea offers. He argues that the superseding indictments were sought immediately after he rejected the offer—thus exercising his constitutional right to a jury trial—and that there was no basis for seeking a superseding indictment at that time. Tingle moved to have the charges against him dismissed on this basis. The district court denied his motion without a hearing. We review the district court’s legal conclusions *de novo* and its findings of fact for clear error. *United States v. Spears*, 159 F.3d 1081, 1086 (7th Cir. 1998).

To obtain an evidentiary hearing on a prosecutorial vindictiveness claim, Tingle needed to show he “offer[ed] sufficient evidence to raise a reasonable doubt that the government acted properly” in seeking the superseding indictments.

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United States v. Falcon, 347 F.3d 1000, 1004 (7th Cir. 2003). Prosecutorial vindictiveness is, in some contexts, presumed where a prosecutor takes action that is detrimental to a defendant after the defendant exercises a legal right. *United States v. Goodwin*, 457 U.S. 368, 373 (1982); *Spears*, 159 F.3d at 1086. But “the Supreme Court has refused to extend the presumption of vindictiveness to pre-trial prosecutorial conduct.” *Spears*, 159 F.3d at 1086. So, no presumption applies here.

The government informed Tingle that it would seek the superseding indictments if he rejected the plea offer. In *Alabama v. Smith*, the Supreme Court said that a prosecutor may “threaten[] a defendant with increased charges if he does not plead guilty, and follow[] through on that threat if the defendant insists on his right to stand trial.” 490 U.S. 794, 802 (1989); see also *Goodwin*, 457 U.S. at 378–79 (“For just as a prosecutor may forgo legitimate charges already brought in an effort to save the time and expense of trial, a prosecutor may file additional charges if an initial expectation that a defendant would plead guilty to lesser charges proves unfounded.”). In this case, Tingle was well aware that the prosecutor intended to exercise his authority to file additional charges if the plea offer was not accepted. Tingle’s motion to dismiss was properly denied.

III. CONCLUSION

Although the district court should have labeled Agent Steele an expert witness, Steele had the requisite qualifications to testify as an expert in this case. Steele’s testimony, drawn from his training and experiences, provided circumstantial evidence of Tingle’s intent to commit the crimes, but Steele did not improperly opine on Tingle’s mental state. The district court did not err when it allowed Steele to testify.

Nor did the district court err when it denied Tingle's motion for access to grand jury transcripts without a hearing or when it denied Tingle's motion to dismiss the charges brought against him.

The judgment of the district court is, therefore, AFFIRMED.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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FINAL JUDGMENT

January 25, 2018

Before:

WILLIAM J. BAUER, *Circuit Judge*

MICHAEL S. KANNE, *Circuit Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

No. 17-1604	UNITED STATES OF AMERICA, Plaintiff - Appellee v. RONALD TINGLE, Defendant - Appellant
Originating Case Information:	
District Court No: 4:15-cr-00023-TWP-VTW-1 Southern District of Indiana, New Albany Division District Judge Tanya Walton Pratt	

The judgment of the District Court is **AFFIRMED**, in accordance with the decision of this court entered on this date.

No. 17-1604

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

RONALD TINGLE,
Defendant-Appellant.

Appeal from the United States District Court for
the Southern District of Indiana, New Albany Division
Case No. 4:15-cr-00023
Hon. Tanya Walton Pratt

PETITION FOR PANEL REHEARING OR REHEARING *EN BANC*

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ORAL ARGUMENT REQUESTED

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 17-1604

Short Caption: United States v. Tingle

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement stating the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

- (1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Ronald Tingle

- (2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Thomas W. Patton and Daniel J. Hillis of the Federal Public Defender for the Central District of Illinois; Bryan Darling

- (3) If the party or amicus is a corporation: N/A

- i) Identify all its parent corporations, if any; and

N/A

- ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

=====

Attorney's Signature: s/ Daniel J. Hillis Date: February 2, 2018

Attorney's Printed Name: Daniel Hillis

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes ☒ No ☐

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**FEDERAL RULE OF APPELLATE PROCEDURE 35(b)(1) STATEMENT
REGARDING REASONS FOR REHEARING OR REHEARING *EN BANC***

This Court should grant rehearing for two reasons. First, while *United States v. Tingle*, --- F.3d ---- 2018 WL 543053 (7th Cir. Jan. 25, 2018), acknowledges the district court failed to satisfy its “gatekeeping” duty before allowing the government’s expert to testify, it wrongly dispatches that error by concluding the agent had sufficient experience/training to testify as an expert. *Id.* at *2. Furthermore, *Tingle* arrives at that position by incorrectly performing the fact-finding about the agent’s qualifications that the trial court was required to do for itself under Supreme Court precedent and Federal Rule of Evidence 702.

Second, *Tingle* wrongly applied Federal Rule of Evidence 704(b) and Circuit precedent when affirming the admission of expert testimony concerning Mr. Tingle’s intent to distribute methamphetamine and use a gun in furtherance of a felony drug trafficking offense. 2018 WL 543053 at *3. Rule 704(b) bars expert witnesses from opining about whether a defendant had a mental state that constitutes an element of the charged crime. Fed. R. Evid. 704(b). Unlike cases where a case agent never testified that a defendant had the mental state to commit an element of the offense, the Government’s expert testified that the drugs in Mr. Tingle’s house were “definitely for distribution”. *Id.* Additionally, the agent testified that “the gun found on top of the desk where the drugs and money were located was ‘utilized as protection by Mr. Tingle to protect himself

and/or the methamphetamine and the currency”’. *Tingle*, 2018 WL 543053 at *3. That testimony violated Rule 704(b).

By holding as it did, *Tingle* creates a Circuit split. Mr. Tingle pointed out in his opening brief that *United States v. Watson*, 260 F.3d 301, 309-10 (3d Cir. 2001) determined that it was plainly erroneous for a prosecutor to elicit expert testimony in violation of Rule 704(b) that defendant possessed drugs with the intent to distribute them. (R.16 at 26). The prosecutor here elicited that same testimony from her expert. (R.201 at 70). *Tingle* determined that the testimony was “not an error, let alone plain error”’. 2018 WL 543053 at *3. Given that Rule 704(b) is a federal rule of evidence which should be uniformly applied in United States courthouses, the enormous gulf between *Watson* and *Tingle* is worthy of rehearing or an *en banc* determination.

INTRODUCTION

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. *Tingle*, 2018 WL 543053 at *1. 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.*

A grand jury indicted Mr. Tingle with one count of possession of methamphetamine with intent to distribute, three counts of distribution, and possession of a firearm in furtherance of a drug trafficking felony. *Id.* Mr. Tingle went to trial. *Id.* At trial, the judge told the government that it would not label any witness as an “expert witness,” pursuant to her courtroom procedures. *Id.*

Mr. Tingle admitted he possessed the methamphetamine in house, but denied the distribution allegations. *Id.* He said the drugs were for his personal use during an upcoming year-long boat trip. *Id.* An agent with the Drug Enforcement Agency testified the drugs in Mr. Tingle’s house were “definitely for distribution”. *Tingle*, 2018 WL 543053 at *3. The agent also testified that “the gun found on top of the desk where the drugs and money were located was ‘utilized as protection by Mr. Tingle to protect himself and/or the methamphetamine and the currency’”. *Id.* at *3. The jury convicted Mr. Tingle on all counts and this Court affirmed. *Id.* at *4.

In its opinion affirming the district court, this Court cited Supreme Court precedent and Rule 702 as requiring a judge to perform its “gatekeeping” duty before allowing expert testimony to be given, and acknowledged that the district court did not undertake the required task. *Id.* at *2. However, *Tingle* nevertheless affirmed the admission of the expert testimony despite the violation of precedent and Rule 702. 2018 WL 543053 at *2. Also, *Tingle* found that the expert testimony

that the drugs in Mr. Tingle's house were "definitely for distribution" did not violate Rule 704(b). *Id.* at *3. Similarly, *Tingle* found it wasn't a Rule 704(b) violation for the agent to testify that "the gun found on top of the desk where the drugs and money were located was 'utilized as protection by Mr. Tingle to protect himself and/or the methamphetamine and the currency'". *Id.* at *3.

REASONS FOR GRANTING REHEARING

A rehearing is proper if this Court overlooked or misapprehended a point of law or fact. *See* Fed.R.App.P. 40(a)(2). A petition for rehearing "should alert the panel to specific factual or legal matters that the party raised, but that the panel may have failed to address or may have misunderstood." *Easley v. Reuss*, 532 F.3d 592, 593 (7th Cir. 2008).

I. The *Tingle* opinion acknowledges the judge failed to exercise her "gatekeeping" duty under Federal Rule of Evidence 702 and Supreme Court precedent, but nevertheless affirms admission of expert testimony despite noncompliance with Rule 702 and precedent.

Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 592 (1993) says that when "[f]aced with a proffer of expert scientific testimony ... the trial judge must determine at the outset ... whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." Subsequently, *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-49 (1999), explained that the "gatekeeping" obligation of the court applies to all expert testimony. *See also* Fed. R. Evid. 702.

Tingle correctly said that “[t]he Federal Rules of Evidence and Supreme Court precedent make clear that courts must examine the qualifications of expert witnesses and consider whether the expert's testimony will be helpful to the jury.” 2018 WL 543053 at *2 (emphasis added). That undertaking is a prerequisite for a trial court to exercise its discretion to allow expert testimony of any sort.¹

The Government proffered, via a written submission of credentials, that it had an agent who was an expert on drugs and guns. The record in this case contains nothing to show that the trial court ever examined the Government's expert's qualifications before allowing him to testify at trial. As such, *Tingle* should have found the judge improperly allowed the Government to admit an agent's expert testimony about drugs and guns. Instead of adhering to what it said is required by Rule 702 and Supreme Court precedent, *Tingle* detours into an assessment of the agent's credentials to show that he was an expert.

Respectfully, whether the agent was qualified to render expert testimony was an assessment the district court was required to undertake as part of the gatekeeping duty. Finding that the agent had the necessary expertise/training

¹ An oddity affecting the “gatekeeping” duty is the district court's local rule for expert witnesses. The local rule says: “Counsel may establish qualifications; the Court will not declare a witness to be ‘an expert’.” See <http://www.insd.uscourts.gov/sites/insd/files/Courtroom%20Procedures%20TWP.pdf>. How can district court satisfy the gatekeeping duty while having a local rule where the district court prevents itself from declaring a witness to be an expert? *Tingle* did not dismantle the local rule. The local rule will surely be cause for future problems.

does not remediate the gatekeeping error the district court plainly made here.

Allowing rehearing is a means of correcting *Tingle's* improper finding on the *Daubert* issue. Thus, a rehearing is proper. *See, generally, Easley*, 532 F.3d at 593.

II. Tingle wrongly determined that the Government's expert witness committed no error when he said the drugs in Mr. Tingle's 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."

Federal Rule of Evidence 704(b) states that:

. . . 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.

The Government charged Mr. Tingle with intending to distribute methamphetamine in violation of 21 U.S.C. §§ 841(a) and 841(b)(1)(B)(viii). (R.1). It also charged him with violating 18 U.S.C. § 924(c)(1)(A). (R.1). The § 841 offense required the Government to prove Mr. Tingle intended to distribute the 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.

During Mr. Tingle's trial, the government's expert said that the drugs in Mr. Tingle's house were "definitely for distribution"---as opposed to being

amassed for personal consumption per Mr. Tingle's theory of defense. *Tingle*, 2018 WL 543053 at *3 (citing R.201 at 70). By opining that Mr. Tingle had the intended to distribute methamphetamine the agent testified about Mr. Tingle's mental state. Since mental state is an element of an § 841(a) offense, the testimony violated Rule 704(b)'s plain language prohibiting that sort of expert testimony.

Rather than giving Rule 704(b) text its effect, *Tingle* relies on *United States v. Winbush*, 580 F.3d 503 (7th Cir. 2009) and *United States v. Blount*, 502 F.3d 674 (7th Cir. 2007) to conclude the agent's "testimony was not an error, let alone plain error". 2018 WL 543053 at *3. Neither case supports *Tingle*'s conclusion.

Winbush said that an agent "may testify in general terms about facts or circumstances from which a jury might infer that the defendant intended to distribute drugs." 580 F.3d at 512 (citations omitted). But that's not what happened at Mr. Tingle's trial. The agent at Mr. Tingle's trial did not testify just about general facts or circumstances. He specifically testified that the drugs Mr. Tingle had were "definitely for distribution". See *Tingle*, 2018 WL 543053 at *3. Moreover, in *Winbush* the defendant failed because he couldn't "point to a direct statement of his intent in [the agent's] testimony". 580 F.3d at 512. By contrast, *Tingle* says the agent testified that the drugs in Mr. Tingle's house were "definitely for distribution". 2018 WL 543053 at *3. So, the agent testified about Mr. Tingle's intent and that allows him to prevail under *Winbush*.

As for *Blount*, there was no Rule 704(b) violation in that case because the government's expert never referred to the defendant's "intent" or "intentions". 502 F.3d at 679. However, the agent who testified in Mr. Tingle's case clearly referred to Mr. Tingle's intent when he said the drugs in Mr. Tingle's house were "definitely for distribution". 2018 WL 543053 at *3. With respect to the § 924(c), *Tingle* said the agent testified that "the gun found on top of the desk where the drugs and money were located was 'utilized as protection by Mr. Tingle to protect himself and/or the methamphetamine and the currency'". *Id.* at *3. By referring to Mr. Tingle's intentions for the drugs and the gun, the agent's testimony went awry of *Blount*. The agent's testimony violated Rule 704(b).

The misapplication of *Winbush* and *Blount* are sufficient grounds for a panel rehearing or *en banc*. *Tingle* effectively removes Rule 704(b)'s prohibition on improper expert testimony as to a defendant's intent and will allow future prosecutions to use expert testimony in violation of the Rule's plain language.

Additionally, *Tingle* creates a Circuit split. Mr. Tingle pointed out in his opening brief that *United States v. Watson*, 260 F.3d 301, 309-10 (3d Cir. 2001) determined that it was plainly erroneous for a prosecutor to elicit expert testimony in violation of Rule 704(b) that defendant possessed drugs with the intent to distribute them. (R.16 at 26). The prosecutor in *Tingle* elicited that same testimony from her expert. (R.201 at 70). And *Tingle* determined that such elicited

testimony was “not an error, let alone plain error”. 2018 WL 543053 at *3.

Accordingly, whereas the Third Circuit has determined that improperly elicited testimony which violates Rule 704(b) is plain error, the Seventh Circuit’s *Tingle* opinion has held that such testimony isn’t error at all.

The disconnect between *Watson* and *Tingle* is a serious one given that Federal Rules of Evidence are to be uniformly applied across the Circuits. Moreover, it is discomfoting that *Tingle* did not discuss *Watson* even though Mr. Tingle explicitly relied upon *Watson* as grounds for relief. (R.16 at 26).

REASONS FOR GRANTING REHEARING

The *Tingle* opinion strays from the precedent it cites concerning Rule 702. It also seriously damages Rule 704(b)’s prohibition on experts opining about a defendant’s mental state and causes a Circuit split. Therefore, a panel rehearing or *en banc* hearing is necessary to address those matters.

CONCLUSION

WHEREFORE this Court should grant Mr. Tingle's petition.

Respectfully submitted,

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s/ Daniel J. Hillis
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Attorneys for Defendant-Appellant,
RONALD TINGLE

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)(C)

The undersigned certifies that this brief complies with the volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(C) and Circuit Rule 32 in that it contains 2,178 words and 190 lines of text as shown by Microsoft Word 2010 used in preparing this brief.

s/ Daniel J. Hillis
DANIEL J. HILLIS

Dated: February 2, 2018

No. 17-1604

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

RONALD TINGLE,

Defendant-Appellant.

Appeal from the United States
District Court for the Southern
District of Indiana, New Albany
Division

Case No. 4:15-cr-00023

Hon. Tanya Walton Pratt,
United States District Judge,
Presiding.

NOTICE OF FILING AND PROOF OF SERVICE

TO: Mr. Gino Agnello, Clerk, United States Court of Appeals, 219 South
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PLEASE TAKE NOTICE that on February 2, 2018, the undersigned
attorney electronically filed the foregoing with the Clerk of Court for the United
States Court of Appeals for the Seventh Circuit by using the CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the

CM/ECF system. I further certify that some of the participants in the case are not CM/ECF users. I have mailed the foregoing documents by First Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier within three calendar days, to the non-CM/ECF participants.

s/ Daniel J. Hillis

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United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

February 20, 2018

Before

WILLIAM J. BAUER, *Circuit Judge*

MICHAEL S. KANNE, *Circuit Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

No. 17-1604

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RONALD TINGLE,
Defendant-Appellant.

Appeal from the United States
District Court for the Southern District
of Indiana, New Albany Division.

No. 15-cr-00023

Tanya Walton Pratt,
Judge.

ORDER

On consideration of the petition for rehearing and rehearing *en banc*, no judge in active service has requested a vote on the petition for rehearing *en banc* and the judges on the panel have voted to deny rehearing. It is, therefore, ORDERED that rehearing and rehearing *en banc* are **DENIED**.

1 **KEVIN STEELE, GOVERNMENT'S WITNESS, SWORN**

2 **DIRECT EXAMINATION**

3 BY MS. MINDRUM:

4 Q. Good morning, Special Agent Steele.

5 A. Good morning.

6 Q. Can you state and spell your name for the record.

7 A. Kevin Steele, S-T-E-E-L-E.

8 Q. And where are you employed?

9 A. As a special agent with the federal Drug Enforcement
10 Administration out of Indianapolis.

11 Q. How long have you been a special agent with the DEA?

12 A. Approximately 16 and a half years.

13 Q. Did you have other prior law enforcement before working
14 for the DEA?

15 A. Yes, I did. I was a trooper with the Missouri State
16 Highway Patrol for approximately 14 years prior to that.

17 Q. What training did you receive as a DEA special agent?

18 A. The training with the DEA consisted of four months at the
19 DEA academy out in Quantico, Virginia, which consisted of
20 primarily anything that involved prosecution of narcotics,
21 evidence handling, firearms, defensive tactics, and just your
22 basic how to conduct a narcotics investigation.

23 Q. And do you have training that continues throughout the
24 course of your career at the DEA?

25 A. Yes, we do. We have to every year do continuing education

1 on classes pertaining to narcotics enforcement.

2 Q. What are your duties and responsibilities as a special
3 agent at DEA?

4 A. My duties as a special agent at DEA consist of -- we
5 basically do everything. We start -- we develop informants,
6 we write reports, we do controlled buys, we write affidavits,
7 we conduct Title 3 investigations, we conduct search
8 warrants. Those are our primary duties as an agent.

9 Q. How many search warrants would you say you've participated
10 in during the course of your career? And you can approximate.

11 A. Several hundred.

12 Q. You also mentioned that you do controlled buys?

13 A. Yes, that's correct.

14 Q. And how many controlled buys would you say you've
15 conducted during the course of your career?

16 A. Over the course of my career, approximately 250.

17 Q. And of the work that you've participated in, approximately
18 how many methamphetamine investigations have you participated
19 in?

20 A. Of those investigations, I would be safe to say probably
21 between 75 and 100 of those investigations contained
22 methamphetamine.

23 Q. During the course of your methamphetamine investigations,
24 do you use -- I'm going to list a couple of different
25 techniques, and let me know if you have conducted those

1 techniques -- physical surveillance?

2 A. Yes, we do.

3 Q. Consensual recording?

4 A. Yes.

5 Q. What are consensual recordings?

6 A. Consensual recordings is when we have a confidential
7 source that we do our controlled buys with, we will have them
8 place phone calls to whoever they're going to purchase the
9 narcotics from and record those conversations.

10 Q. As part of your investigations, do you also interview
11 people who use methamphetamine?

12 A. Yes, we do.

13 Q. And who deal methamphetamine?

14 A. Yes.

15 Q. How many people would you say you've interviewed who use
16 and deal methamphetamine? And you could approximate.

17 A. Some of the cases involve multiple defendants. I would
18 estimate between probably around 150 individuals.

19 Q. And during the course of these interviews where you
20 interview both dealers and users of methamphetamine, do you
21 have an understanding of how people use methamphetamine?

22 A. Yes, I do.

23 Q. Do you also have an understanding of quantities of
24 methamphetamine?

25 A. Yes, I do.

1 Q. And the street prices of methamphetamine?

2 A. Yes, I do.

3 Q. Specifically in the Southern District of Indiana?

4 A. Yes, I do.

5 Q. Based off of these understandings, how much would a user
6 typically ingest of methamphetamine?

7 A. A user will typically ingest very small quantities, which
8 is typically a tenth of a gram. If you do more than that, the
9 person, you know, subjects themselves to possibly overdosing,
10 but it's typically -- for meth, it's small quantities.

11 Q. How about dealers? How much do they typically sell?

12 A. Dealers are what -- from my training and experience, what
13 I've observed is, dealers is anyone that will sell anywhere
14 from an eight ball, which is 3.5 grams, all the way to ounces,
15 half ounces, pounds, or multiple pounds in some instances.

16 Q. How many grams are in 1 ounce?

17 A. There is 28 grams per ounce.

18 Q. And you also mentioned that you understand the street
19 prices of methamphetamine. Could you describe your
20 understanding of street prices within the Southern District of
21 Indiana?

22 A. Yes. The street prices for methamphetamine during the
23 period of this investigation, per-gram amount, typically
24 ranged anywhere between \$80 and \$120 per gram. As far as
25 ounce quantities were concerned, we were paying between \$1,200

1 and \$1,700 per ounce. And as far as pound quantities, we were
2 paying between \$12,000 and \$17,000 per pound.

3 Q. And when you say you were paying, under what circumstances
4 would you be paying?

5 A. The circumstances that we would be paying for that would
6 be if we had a cooperating source that could buy ounces or
7 grams or pounds. And they would be directed by their source
8 of supply, how much he was charging, and that's what we would
9 have to pay.

10 Q. Is that how you learned what some of these street values
11 are?

12 A. That's correct.

13 Q. Have you testified before in court?

14 A. Yes, I have.

15 Q. Approximately how many times?

16 A. Over my 30-year career, 300 to 400 times, probably.

17 Q. Have you had the occasion to be qualified as an expert?

18 A. Yes, I have.

19 Q. Approximately how many times?

20 A. I've testified as an expert witness in federal court four
21 to five times.

22 Q. Now, based on your training, experience, and expertise, if
23 someone possesses a certain quantity of methamphetamine, what
24 do you consider in looking at the quantity to determine
25 whether someone is a distributor versus someone who might be

1 purely possessing that for their own personal use?

2 A. We typically look -- if the person just possesses, like we
3 had said, the small amounts, which would be the gram amounts,
4 typically that person is using that for themselves.

5 There's also other factors that we look at as far as
6 whether we think that that person is distributing narcotics or
7 not: obviously, the amount of narcotics that they possess, as
8 well as packaging materials, electronic scales, whether they
9 have large amounts of U.S. currency, and if they also possess
10 firearms or not.

11 Q. Now, packaging materials, what type of packaging are we
12 talking about?

13 A. The packaging materials can be where they cut off the
14 corners of plastic bags, and that's typically what they put
15 the eight ball amounts in. And then they knot it up for
16 distribution. And then for the larger amounts, they will put
17 it in Ziploc bags, put it in Tupperware containers, and other
18 plastic bags, as well.

19 Q. Now, many people probably have Ziploc backs or plastic
20 bags in their house, their kitchen, their garages for items
21 that they would normally use nondrug related; is that correct?

22 A. That's correct.

23 Q. When do you -- at what point do you feel that those items
24 are consistent with drug trafficking? Under what
25 circumstances?

1 A. Typically, if the person is distributing narcotics, they
2 will have the items, the packaging items, in close proximity
3 to where the narcotics is being stored at just for relative
4 ease, if nothing else, so they don't have to go around looking
5 for it. So that's where those are located.

6 Q. And is that the same with a scale? A scale, in and of
7 itself, might not necessarily be drug trafficking, indicative
8 of drug trafficking; is that correct?

9 A. That's correct. But most of the time, those that are
10 involved in the distribution of narcotics will have some type
11 of electronic scale located in their residence or inside their
12 vehicles.

13 Q. Is that based off of your experience in conducting search
14 warrants in drug trafficking activity?

15 A. That's correct.

16 Q. Now, based upon the search warrant that was executed in
17 this matter, you were present -- you've been present in the
18 courtroom for all the testimony; is that correct?

19 A. That's correct.

20 Q. And that search warrant was executed on September 2nd,
21 2015?

22 A. Yes, it was.

23 Q. Were there items that were located during the course of
24 that search warrant that, based on your training, experience,
25 and expertise, are consistent with the distribution of

1 methamphetamine?

2 A. Yes, it was. The bags were located, the electronic scales
3 were located, large amounts of currency, as well as firearms.

4 Q. What about where those items were relative to one another?

5 A. And, once again, they were in close proximity to each
6 other inside Mr. Tingle's residence.

7 Q. I would like to show you what's been previously admitted
8 into evidence as Government Exhibit 40. Can you see that on
9 your screen?

10 A. Yes, I do.

11 Q. And do you recognize that exhibit?

12 A. Yes, I do. Government's Exhibit 40 is a photograph of a
13 container that was located inside the residence or the
14 basement area of Mr. Tingle's residence that contained \$5,000
15 of United States currency.

16 Q. And how was that United States currency bundled?

17 A. The currency -- as you can see from the photograph, the
18 currency was bundled with rubber bands. And each of the
19 bundles contained what is commonly referred to as a "stack,"
20 or \$1,000.

21 Q. And is that -- is that indicative of anything based off of
22 your training and experience?

23 A. Yes. We commonly see that those involved in the
24 distribution of narcotics place their currency in stacks so
25 they know how much money that they do have.

1 Q. And you also mentioned some of the items that are
2 consistent with someone that's distributing firearms (sic)?

3 A. Yes.

4 Q. And what types of firearms are typically associated with
5 drug dealing, based on your training, experience, and
6 expertise?

7 A. The types of firearms that we most often see are
8 semiautomatic pistols, or they can be assault rifles. We've
9 come across several of those, as well. And some of the people
10 have just regular long guns and shotguns in their residence.

11 Q. Now, typically, would a long gun or shotgun be consistent,
12 in and of itself, of someone who is involved in drug
13 trafficking activity?

14 A. Not necessarily, no.

15 Q. When would -- when would that rise to the level, based on
16 your training and experience?

17 A. In the -- if it's in close proximity to where the
18 narcotics or currency is located would be one of the primary
19 indicators.

20 Q. How about location within the residence?

21 A. Yes. If it's -- the firearms aren't located with the
22 narcotics or money, typically we don't necessarily think that
23 they're used -- utilized during the drug trafficking within
24 that residence.

25 Q. Could a long gun be used to protect a drug stash if need

1 be?

2 A. Oh, absolutely. Particularly the shotguns and/or any of
3 the other small caliber firearms could be used as defense of
4 themselves from other narcotics traffickers or somebody that
5 knows that you're dealing narcotics and have a supply of money
6 and/or drugs at the residence.

7 Q. Now, you were present in the courtroom when Roger Williams
8 testified, who is the chemist in this matter; is that correct?

9 A. Yes, I was.

10 Q. And did you hear him talk about how much pure
11 methamphetamine was located in the residence on September 2nd,
12 2015?

13 A. Yes, I did.

14 Q. And what is the significance of the amount of drugs that
15 were located in the residence based on your training and
16 experience?

17 A. The significance on the amount that was recovered from
18 Mr. Tingle's residence, approximately 165 grams, would
19 indicate, based upon my training and experience, that that
20 subject was distributing crystal methamphetamine.

21 Q. You said users typically use grams at a time; is that
22 correct?

23 A. That's correct.

24 Q. How many doses would 165 grams amount to, approximately?

25 A. Thousands.

1 Q. And what would be the street value of 165 grams of
2 methamphetamine?

3 A. The 165 grams would roughly be 6,000 to 8,000.

4 Q. What -- in your opinion, based on your training and
5 experience, what is your opinion regarding the amount of drugs
6 that was located in the house?

7 A. As far as my opinion on the amount of drugs that was
8 located in the Tingle residence, it was definitely for
9 distribution.

10 Q. Now, I'm also going to show you what's been previously
11 marked as Exhibits 25, 26, and 27, which is actually in front
12 of you right now.

13 A. Okay.

14 Q. And do you recognize that item?

15 A. Yes, I do.

16 Q. And what are they?

17 A. Exhibit 25 is the Smith & Wesson 9mm semiautomatic handgun
18 that was located on top of the desk in the basement area of
19 the Tingle residence during the search warrant.

20 Q. And based on your training, experience, and expertise,
21 what is the significance of where that firearm in particular
22 was located?

23 A. The significance of this particular firearm was based upon
24 its proximity to where the large amount of methamphetamine was
25 located, as well as the large amount of currency that the

1 firearm was utilized as protection by Mr. Tingle to protect
2 himself and/or the methamphetamine and the currency.

3 MS. MINDRUM: Your Honor, at this point the
4 government doesn't have any further questions for this
5 witness. Thank you.

6 THE COURT: Thank you.

7 And, Mr. Darling, you may cross-examine the witness.

8 MR. DARLING: Thank you, Your Honor.

9 **CROSS EXAMINATION**

10 BY MR. DARLING:

11 Q. Good morning.

12 A. Good morning.

13 Q. Did you perform any other investigation concerning that
14 firearm that you have in front of you, Exhibit 25?

15 A. On this particular, we had -- as far as this firearm was
16 concerned, we had obtained a federal search warrant to obtain
17 a DNA sample from Mr. Tingle. After that DNA sample was
18 collected, then the DNA sample was provided to the Indiana
19 State Police Laboratory, where they conducted the forensic
20 analysis on this particular firearm to see who, in fact, had
21 touched this particular firearm.

22 Q. Did you conduct an investigation as to who owned or
23 purchased that firearm?

24 A. Yes, we did.

25 Q. What did those results show?