

Challenging Law Enforcement “Expert” Testimony

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Why Law Enforcement “Experts” Matter

- They testify frequently.
 - So often that the Supreme Court has said police need absolute immunity from § 1983 liability for testifying falsely. *Rehberg v. Paulk*, 132 S. Ct. 1497 (2012) (because “police officers testify with some frequency,” if they “were routinely forced to defend against [perjury] claims based on their testimony,” it would divert attention from official duties).

Why Law Enforcement “Experts” Matter

- They may be the only witnesses, particularly if your client does not put on evidence.
 - And that does not necessarily entitle you to voir dire to weed out pro-law enforcement jurors. *See United States v. Lancaster*, 96 F.3d 734 (4th Cir. 1996) (en banc) (not necessarily error to refuse defense request to ask prospective jurors whether they would be biased in favor of officers).

Why Law Enforcement “Experts” Matter

- Judges and jurors believe the police.
 - *E.g.*, David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 Am. J. Crim. L. 455 (1999).
 - Difficult to win a civil suit for police misconduct. *See Galazo v. Piekza*, 2006 WL 141652 (D. Conn. Jan. 19, 2006) (“Often the case boils down to a ‘he said, he said’ between a police officer and a plaintiff who frequently possesses a criminal record. Regardless of jury instructions to the contrary, juries tend to believe the testimony of a police officer over that of a convicted criminal.”).

Why Law Enforcement “Experts” Matter

- Jurors overvalue expert testimony.
 - *See Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 595 (1993) (“Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it.” (quotation omitted)).

What Can You Do? Request Disclosures

- **Request** expert disclosures.
 - Fed. R. Crim. P. 16(a)(1)(G) (*At the defendant's request*, the government must give to the defendant a written summary of any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. . . .”).
 - Even if you can't think of a reason the Government would have an expert, it may have law enforcement “experts.”
 - Note that request triggers reciprocal disclosure.

What Can You Do? Challenge Disclosures

- Challenge the sufficiency of disclosures.
 - Fed. R. Crim. P. 16(a)(1)(G) (“The summary provided under this subparagraph must describe the witness’s opinions, the bases and reasons for those opinions, and the witness’s qualifications. “).
 - Fed. R. Crim. P. 16(d)(2) (if party fails to comply with Rule 16, court may “(A) order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms and conditions; (B) grant a continuance; (C) prohibit that party from introducing the undisclosed evidence; or (D) enter any other order that is just under the circumstances”).

Deficient Expert Disclosures: Example 1

“Shawn Collins is a Special Agent with the Bureau of Alcohol, Tobacco, Firearms and Explosives. He will testify about drug trafficking investigations and methods utilized by drug traffickers to operate and protect their drug business.”

- Qualifications? Some
- Opinions? None
- Bases and reasons for opinions? None

Deficient Expert Disclosures: Example 1

The Fourth Circuit's take:

“While [the defendant] has a *viable argument* that the government's short and summary notice failed to meet the requirements of Rule 16(a)(1)(G), we need not decide whether the district court's admission of the testimony was plain error, [the defendant] cannot establish that any such error affected his substantial rights.”

United States v. Garcia-Lagunas, 2016 WL 682976 (4th Cir. Feb. 19, 2016).

Deficient Expert Disclosures: Example 2

The district court excluded experts, and the Fourth Circuit affirmed, where disclosures “included only the general topics concerning which each proposed expert would testify, and “failed to describe the witnesses’ opinions or provide the bases and reasons for the witnesses’ opinions.” *See United States v. Concessi*, 38 F. App’x 866, 868 (4th Cir. 2002) (per curiam).

- Guess which party offered the experts who were excluded?

What Can You Do? Challenge Disclosures

- Code word “expert”—ask for a code word list. *See United States v. Cerna*, 2010 WL 2347406 (N.D. Cal. June 8, 2010). Minimum level of particularity to satisfy Rule 16:

With respect to the recording DH 999 dated MM–DD–YYYY, Officer XYZ will testify that the word “piece” meant “gun” and the word “item” meant “package of cocaine.” The basis for this opinion is his experience in monitoring drug transactions and in listening to 1600 recordings involving the same individuals between 2004 to 2009, many of which used the same terms in the same way.

What Can You Do? Undisclosed “Experts”

- Don't let the Government evade the disclosure requirements by having a law enforcement officer testify as a lay witness based on her training and experience.

What Can You Do? Undisclosed “Experts”

Fed. R. Evid. 701: Opinion Testimony by Lay Witnesses

If a witness is *not testifying as an expert*, testimony in the form of an opinion is limited to one that is:

- (a) rationally based on the witness’s perception;
- (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
- (c) *not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.*

What Can You Do? Undisclosed “Experts”

An opinion based on training and experience is “within the scope of Rule 702”:

[T]he text of Rule 702 expressly contemplates that an expert may be qualified on the basis of experience.

Fed. R. Evid. 702 advisory committee’s note to 2000 amendments.

What Can You Do? Undisclosed “Experts”

Fed. R. Evid. 701 advisory committee’s note to 2000 amendments

Rule 701 has been amended to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing. . . . By channeling testimony that is actually expert testimony to Rule 702, the amendment also ensures that a party will not evade the expert witness disclosure requirements set forth in Fed. R. Civ. P. 26 and Fed. R. Crim. P. 16 by simply calling an expert witness in the guise of a layperson. . . .

What Can You Do? Undisclosed “Experts”

- *United States v. Johnson*, 617 F.3d 286 (4th Cir. 2010) (error to allow officer not qualified as expert to interpret phone calls based on his credentials and training; “exactly what Rule 701 forbids”).
- *United States v. Stacks*, 571 F. App’x 164 (4th Cir. 2014) (error (but harmless) to allow officer not qualified as expert to testify that “burner” and “iron” are slang terms for firearms based on his experience).

What Can You Do? Gatekeeping

- Ask the district court to exercise its gatekeeping function before trial by challenging the reliability and helpfulness of expert testimony.
- “The trial court’s gatekeeping function requires more than simply ‘taking the expert’s word for it.’” Fed. R. Evid. 702 advisory committee’s note to 2000 amendments.

What Can You Do? Gatekeeping

Fed. R. Evid. 702. A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- **(a)** the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- **(b)** the testimony is based on sufficient facts or data;
- **(c)** the testimony is the product of reliable principles and methods; and
- **(d)** the expert has reliably applied the principles and methods to the facts of the case.

What Can You Do? Gatekeeping

Reliability requirement: *Daubert* for experiential experts

A witness can be an expert based on experience alone, but the district court must “require an experiential witness to ‘explain how [his] experience leads to the conclusion reached, why [his] experience is a sufficient basis for the opinion, and how [his] experience is reliably applied to the facts.’”

United States v. Wilson, 484 F.3d 267, 274 (4th Cir. 2007) (alterations in original) (quoting Fed. R. Evid. 702 advisory committee’s note to 2000 amendments).

What Can You Do? Gatekeeping

Helpfulness requirement

- “the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.” Fed. R. Evid. 702(a).
- “If . . . attempts are made to introduce meaningless assertions which amount to little more than choosing up sides, exclusion for lack of helpfulness is called for by the rule.” Fed. R. Evid. 701 advisory committee’s note to 1972 proposed rules.
- Rule 702 “contemplates that an expert’s opinion testimony will be ‘helpful to the jury,’ not merely helpful to the prosecutors as transmutations of simple fact testimony.” *United States v. Garcia*, 752 F.3d 382, 393 (4th Cir. 2014).

What Can You Do? Gatekeeping

Not reliable

United States v. Watson, 2011 WL 1565812 (E.D. Mich. Apr. 25, 2011):

Roger: Cuz, on my, on my kids, all I did was just give a little tester out.

Shawn Smith: Shit, you probably gave too much.

Roger: No, no, hell no. I ain't give no grizzly out.

Shawn Smith: No, you gave seven tenths out. It's three three.

Roger: Noooh. I only did one person.

Officer could not testify that “grizzly” meant “gram.”

What Can You Do? Gatekeeping

Not helpful to the jury

- *United States v. Wilson*, 484 F.3d 267 (4th Cir. 2007) (opinion that “he take too long, I’m going to go see my other man, yo” meant “if he keeps on taking forever to supply him, that he’s going to go to another supplier”).
 - “The actual language . . . needed no translation.”
 - Officer “was not so much interpreting the meaning [of the comment] as he was adding language to it.”
- *United States v. Garcia*, 752 F.3d 382 (4th Cir. 2014) (“a hundred forty five point” means “145 grams of heroin,” amount seized from defendant).

What Can You Do? Trial Objections

- Is it outside the scope of the expert disclosure?
- Is it “lay opinion” based on training and experience?
- Is it reliable/helpful?
- Is the “expert” simply providing inadmissible fact testimony?
 - Fed. R. Evid. 703
 - Confrontation Clause
- Is it unduly prejudicial?

What Can You Do? Trial Objections

Fed. R. Evid. 703. An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury **only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.**

What Can You Do? Trial Objections

Confrontation Clause. Beware the “expert” witness who parrots testimonial hearsay, such an investigator who interviewed alleged co-conspirators.

- “[A]n expert’s use of testimonial hearsay is a matter of degree. The question is whether the expert is, in essence, giving an independent judgment or merely acting as a transmitter for testimonial hearsay.” *United States v. Johnson*, 587 F.3d 625, 635 (4th Cir. 2009) (internal citations omitted).
- Compare *United States v. Mejia*, 545 F.3d 179(2d Cir. 2008) with *United States v. Palacios*, 677 F.3d 234 (4th Cir. 2012).

What Can You Do? Trial Objections

United States v. Garcia, 752 F.3d 382 (4th Cir. 2014):

- Interviews with co-conspirators were “significant ingredient” in agent’s expertise; “it was incumbent upon the Government to demonstrate that Agent Dayton was not merely channeling information and statements by non-testifying participants in the conspiracy into the trial record.”
- Applying the test from *Johnson*—independent judgments or testimonial hearsay? “Here, we cannot say that Agent Dayton was giving such independent judgments.”