Recent Rulings on Expert Testimony About Defendants' Mens Rea: A Double-Edged Sword

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Recent Ninth Circuit rulings have opened the door to a much broader use of expert evidence concerning the mens rea of criminal defendants. In United States v. Morales, 108 F.3d 1031 (9th Cir. 1997), the Ninth Circuit read Rule 704(b)'s prohibition on expert evidence regarding a defendant's mental state more narrowly than it had before, overruling the Ninth Circuit's leading case in the area and permitting in evidence that had previously been barred. The Morales decision creates an opportunity for defense counsel in white collar and other cases to use a broad range of expert testimony to explain to the jury issues related to the defendant's mental state. At the same time, it is a weapon that can be wielded by the prosecution as well, and recent published decisions indicate that they may be using it more frequently and creatively than are defense counsel.

This article will discuss Rule 704(b) and the implications of the Morales opinion. It will then address other limitations on the admissibility of expert testimony regarding the defendant's mental state, tactics that prosecutors are using to introduce such expert testimony against defendants, and strategies for using mens rea expert evidence to strengthen defenses.

Federal Rule of Evidence 704(b)

Before the adoption of the Federal Rules of Evidence, the common law prohibited testimony that contained an opinion on an ultimate issue of fact. See Maury R. Olicker, The Admissibility of Expert Witness Testimony: Time to Take the Final Leap?, 42 U. Miami L. Rev. 831, 848 (1987-88). The rule was much criticized, and when the Federal Rules of Evidence were adopted in 1975, the "ultimate issue" rule was specifically rejected. Rule 704(a) provides that "an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." As the advisory committee noted, the ultimate issue rule was "unduly restrictive, difficult of application and generally served only to deprive the trier of fact of useful information."

However, in 1984 as part of the Insanity Defense Reform Act, Rule 704 was amended to include subsection (b). Rule 704(b) reads:

> No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state 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 or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

While the amendment was directed primarily at testimony on the issue of whether a defendant is insane, the Report of the Senate Judiciary Committee explained that "the rationale for precluding ultimate opinion psychiatric testimony extends beyond the insanity defense to any ultimate

mental state of the defendant that is relevant to the legal conclusion sought to be proven. S. Rep. No. 98-225, 98th Cong., 1st Sess. 231.

Who is an Expert Witness under Rule 704(b)?

Until recently, it has been unclear in the Ninth Circuit whether Rule 704(b) applies to all expert witnesses called to testify about a defendant's mental state or condition, or whether it applies only to psychologists, psychiatrists and other mental health experts. Several circuits have suggested that Rule 704(b) has a limited reach that encompasses only mental health experts. See, e.g., United States v. Gastiaburo, 16 F.3d 582, 588 (4th Cir. 1994); United States v. Lipscomb, 14 F.3d 1236, 1240-43 (7th Cir. 1994); United States v. Richard, 969 F.2d 849, 855 n. 6 (10th Cir. 1992).

The Ninth Circuit in Morales explicitly rejected this view. The court eschewed the analyses of other circuits based upon the legislative history of the rule, finding the language of Rule 704(b) "perfectly plain." 108 F.3d at 1036. According to the Morales court, the rule "does not limit its reach to psychiatrists and other mental health experts. Its reach extends to all expert witnesses." Id.

The Scope of Rule 704(b) pre-*Morales*

Prior to the Ninth Circuit's recent decision in Morales, the court had taken a very broad view of Rule 704(b)'s prohibition of expert testimony regarding a defendant's mens rea. In United States v. Brodie, 858 F.2d 492 (9th Cir. 1988), the Ninth Circuit held that Rule 704(b) precluded expert testimony not only on whether the defendant had the mental state constituting an element of the crime charged, but on predicate matters from which the jury might "extrapolate" whether the defendant possessed the necessary mens rea. Id. at 496.

In Brodie, a husband and wife were charged with failure to file tax returns. They attempted to call an accountant to testify that they owed very little in taxes during the years in question. Their apparent purpose in calling this accountant was to support their claim that their failure to file was not willful. The district court excluded the expert testimony, and the Ninth Circuit upheld the exclusion. The court held that the jury might have "'use[d] that [testimony] to extrapolate to another position . . . ," thereby rendering the accountant's testimony "an opinion as to the Taxpayers' willfulness, a mental state which is an element of the crime charged." Id.

In cases after Brodie, the court began to back away from this broad interpretation of Rule 704(b). In United States v. Rahm, 993 F.2d 1405 (9th Cir. 1993), for example, the court indicated that there was a difference between testimony in which an expert expressed an opinion as to the defendant's mens rea and testimony from which the jury could, but was not compelled, to infer that she did not know the bills were counterfeit. In Rahm, the defendant was charged with attempting to knowingly pass counterfeit currency. The defense attempted to offer expert testimony that the defendant had poor visual perception and consistently overlooked important visual details, testimony which would have bolstered the defendant's claim that she did not know

the money was counterfeit. The Ninth Circuit reversed the conviction on the ground that the district court improperly excluded the proffered expert testimony. The court held that the jury could have inferred from the expert's testimony that the defendant did not have the requisite mens rea, but that such an inference was not compelled, and that the testimony was not barred under Rule 704(b). Id. at 1411-12.

A similar distinction was made in United States v. Gomez-Norena, 908 F.2d 497, 501-02 (9th Cir. 1990), where the court permitted expert testimony from a DEA agent that the possession of $200,000 worth of cocaine was consistent with an intent to distribute rather than with possession for personal use. Because the agent did not give his opinion of what the defendant actually thought, the expert could give testimony that supported an inference that the defendant had the requisite mens rea. Id. at 502.

Morales and the Ninth Circuit's Narrower Interpretation of Rule 704(b)

In Morales, the court resolved this growing split in circuit authority. The court explicitly overruled Brodie and held that Rule 704(b) excluded only testimony as to a defendant's actual mental state during the charged offense or testimony that necessarily would imply that ultimate conclusion. 108 F.3d at 1037-38.

In Morales, San Francisco Assistant Federal Public Defender (and CACJ member) Larry Kupers was representing a bookkeeper charged with making false entries in a union ledger. Kupers attempted to introduce expert testimony from an accountant regarding Morales's level of knowledge and understanding of bookkeeping principles. The testimony was offered to back up Morales's own testimony that she had never intended to make false entries and that she simply did not know that the entries she was making were incorrect. The district court excluded the proffered testimony, holding that it was "a conclusion that . . . is properly within [the province of] the jury." Id. at 1033.

On appeal after an en banc hearing, the district court reversed Morales's convictions on the ground that the expert testimony was not prohibited by Rule 704(b) and that its exclusion did not constitute harmless error. The court found that the accountant was not going to state an opinion that Morales did not intend to make false entries. Instead, she was going to offer her opinion as to a predicate matter -- that Morales had a weak grasp of bookkeeping knowledge. Id. at 1036-37. The court found that even if the jurors believed the accountant, they would still have had to draw their own inferences to answer the ultimate question of whether she willfully made false entries. Id. at 1037.

The court held that expert opinion testimony is prohibited under Rule 704(b) only where it necessarily follows from the testimony that the defendant did or did not possess the requisite mens rea. Where that conclusion is not compelled by the expert testimony, the testimony is not objectionable under Rule 704(b). Id. at 1037. In so holding, the Ninth Circuit brought itself in line with several other circuits that had previously addressed the scope of Rule 704(b). See, e.g., United States v. Richard, 969 F.2d 849, 854-55 (10th Cir. 1992) ("The rule does not prevent the

expert from testifying to facts or opinions from which the jury could conclude or infer the defendant had the requisite mental state."); United States v. Foster, 939 F.2d 445, 454 (7th Cir. 1991) (expert testimony "merely assisted the jury in coming to a conclusion as to [defendant's] mental state; it did not make that conclusion for them"); cf. United States v. Dunn, 846 F.2d 761, 762 (D.C. Cir. 1988) ("It is only as to the last step in the inferential process -- a conclusion as to the defendant's actual mental state -- that Rule 704(b) commands the expert to be silent.").

Other Hurdles to Admissibility of Expert Testimony Concerning a Defendant's State of Mind

Simply because expert testimony concerning a defendant's mental state is not objectionable under Rule 704(b), it does not mean that it is admissible. There are several other obstacles to admitting such evidence that should be kept in mind with proffering or objecting to mental state opinion testimony.

1. Rule 702

Rule 702 governs the admissibility of expert opinion testimony concerning "scientific, technical, or other specialized knowledge." In the Ninth Circuit, an expert witness's "[t]estimony is admissible under Rule 702 if [1] the subject matter at issue is beyond the common knowledge of the average layman, [2] the witness has sufficient expertise, and [3] the state of the pertinent art or scientific knowledge permits the assertion of a reasonable opinion." United States v. Winters, 729 F.2d 602, 605 (9th Cir. 1984).

Under the first prong of the test, the trial court must determine whether the proffered testimony involves a "proper subject" for expert testimony. United States v. Rahm, 993 F.2d 1405, 1413 (9th Cir. 1993). The "proper subject" inquiry focuses upon whether the expert testimony improperly addresses matters within the understanding of the average juror. See United States v. Christophe, 833 F.2d 1296, 1299 (9th Cir. 1987). The Ninth Circuit has repeatedly held that expert testimony should not "invade[] the province of the jury." United States v. Binder, 769 F.2d 595, 602 (9th Cir. 1985). And despite scholarly arguments to the contrary, "this circuit continues to guard -- perhaps too jealously -- from expert elucidation, areas believed to be within the jurors' common understanding." Rahm, 993 F.2d at 1413.

This prong of the test has occasionally proved fatal for expert testimony. In United States v. Amaral, 488 F.2d 1148, 1152-53 (9th Cir. 1973), the court found that expert testimony on the unreliability of eyewitness testimony improperly invaded the province of the jury. Similarly, in United States v. Barnard, 490 F.2d 907, 912-13 (9th Cir. 1973), the Ninth Circuit found that the trial court properly excluded psychiatric and psychological testimony as to the credibility of a co-defendant, because credibility is a matter to be decided by the jury. However, challenges to the admissibility of evidence as not being a "proper subject" tend to fail more often than succeed. For example, in Shad v. Dean Witter Reynolds, Inc., 799 F.2d 525, 530 (9th Cir. 1986), a case involving churning of brokerage accounts, the district court was found to have erred in excluding expert testimony on churning on the grounds that the jury could understand the issue

without expert assistance. The Ninth Circuit held that such testimony should have been admitted because it would have assisted the jury in the complex analysis of the history of the broker's management of the accounts.

The third prong of the test is encapsulated in the Supreme Court's decision in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). Under Daubert, the trial court must ensure that the expert's testimony "both rests on a reliable foundation and is relevant to the task at hand." Id. at 597. The Court laid out certain factors, such as testing, peer review, error rates and acceptability in the relevant scientific community, which the trial court may use in determining the reliability of a particular theory or technique. Id. at 593-94. As the Court recently explained in Kumho Tire Co. v. Carmichael, --- U.S. ---, 1999 WL 140731 (1999), the "gatekeeper" obligation defined in Daubert applies not just to scientific testimony but to all expert testimony. Kumho Tire overrules several Ninth Circuit opinions that had held that Daubert applies only to testimony that involves scientific theory and not specialized knowledge. See, e.g., United States v. Bighead, 128 F.3d 1329 (9th Cir. 1997); United States v. Cordoba, 104 F.3d 225, 230 (9th Cir. 1997).

This prong offers defense counsel an opportunity to challenge proffered government expert testimony. The threat of having to undergo a Daubert hearing may cause the prosecutor to be more hesitant to offer a novel expert and the court to be more wary of finding the expert's testimony admissible. The hearing itself can provide counsel with valuable information to use against the expert during cross-examination.

2. Rule 402

The threshold for relevance set by Rule 402 is very low, but in the context of expert testimony regarding mens rea, it can still be an effective tool for excluding testimony. In United States v. Scholl, — F.3d —, 1999 WL 140731 (9th Cir. 1999), defense counsel sought to have an expert on compulsive gambling testify that pathological gamblers have distortions in thinking and denial which affect their ability to keep records. The testimony was offered to explain why the defendant did not truthfully report his income on his tax returns. The district court's decision to exclude the evidence as irrelevant under Rule 402 (and inadmissible under Rule 403 as well) because there was no "fit" between the expert testimony and the issue of willfulness in the case was upheld by the Ninth Circuit. The court held that the expert's opinion would have been that compulsive gambling disorder makes one believe that he has lost more than he has won, not that he is unable to remember what occurred or accurately record his winnings and losses for tax purposes. Id. Therefore, evidence that compulsive gamblers are in denial would not tend to show that the defendant did not believe that his tax return correctly reported his winnings and losses.

Reading the Scholl decision together with the Morales decision, it would seem that counsel must walk a fairly narrow line when offering expert testimony on mental state. Under Morales, an expert may not testify about a defendant's mental state where the jury is compelled to find that he did or did not have the requisite mental state if they believe the testimony. Under Scholl,

however, the expert's testimony must at least give rise to an inference as to whether the defendant had the requisite mental state.

3. Rule 403

Expert testimony on mental state must also survive scrutiny under Rule 403 and may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. While Rule 403 was fatal to the proffered testimony in Scholl – the court found the gambling disorder evidence "confusing, inconsistent and misleading" -- it was of no avail to the defendant in United States v. Plunk, 153 F.3d 1011 (9th Cir. 1998). In Plunk, the government called a police officer to testify as an expert witness regarding the use of "cryptic technology" used by drug dealers and to interpret various encoded conversations between Plunk and his co-conspirators. Id. at 1016. After finding the testimony admissible under Rule 704(b), the Ninth Circuit held that it was not plain error for the district court to admit the expert's interpretations of the encoded conversations under Rule 403. The court noted that the decoded words and phrases "carried tremendous probative value; without them, the jury would have been completely incapable of comprehending the conspirators' exchanges." Id. at 1019. And, in light of the court's repeated cautionary instructions to the jury that it could assign the expert's testimony whatever value it wished, there was no significant danger of unfair prejudice. Id.

Prosecutors' Use of Expert Testimony Regarding Defendants' Mens Rea

In recent cases, prosecutors have used the Morales ruling to good effect. In Plunk, as discussed above, the government relied on the Morales decision to justify the admission of expert testimony on the meanings of code words contained in recordings of wiretapped telephone conversations. The defendant argued that the police officer's expert opinion about the significance of certain phrases in the conversations constituted expert testimony compelling the conclusion that the defendant had the requisite mens rea. The Ninth Circuit agreed with the government and found no violation of Rule 704(b). Specifically, the court found nothing in the officer's testimony that comprised an explicit opinion that the defendant intended anything in conjunction with the crimes charged or anything that compelled such an inference. Id. at 1018.

Similarly, in United States v. Webb, 115 F.3d 711 (9th Cir. 1997), a case involving charges of possession of ammunition by a felon, the government had offered police expert testimony regarding the reasons criminals conceal weapons in the engine compartments of their cars. The police expert testified that people conceal weapons in their cars because police seldom search there, because they are easily accessible (as compared with storing them at home), and because it is easier to claim they did not know about the weapon if it was discovered. Id. at 712. The Ninth Circuit rejected the defendant's argument that such testimony constituted improper expert opinion testimony under Rule 704(b). Again, the court held that because the expert never offered an opinion about whether the defendant knew the weapon was hidden in the car, the expert did not give an impermissible opinion.

The decision in Webb highlights a strategy the prosecution frequently uses to skirt the prohibition against mens rea testimony. Rather than introducing evidence of the defendant's state of mind, the government presents testimony about the modus operandi of persons who engage in the sort of criminal conduct of which the defendant is charged. In United States v. Lockett, 919 F.2d 585 (9th Cir. 1990), for example, the government introduced expert testimony from a police officer that only persons intimately involved with a cocaine packaging operation are usually allowed at the packaging site. The court admitted the modus operandi testimony on the grounds that the jury could determine on its own whether there was a cocaine distribution operation in that case and whether the defendant's presence was an exception to the general practice of cocaine packaging operations. Id. at 590. See also, United States v. Espinosa 827 F.2d 604, 611-612 (9th Cir. 1987) (law enforcement expert testimony that defendant acted in accordance with usual criminal modus operandi admissible); United States v. Stewart, 770 F.2d 825 (9th Cir. 1985) (DEA agent's opinion testimony that defendant's driving behavior indicated he was attempting to avoid surveillance and he probably was delivering drugs to customers on another occasion admissible as modus operandi evidence).

The government's use of modus operandi evidence is not without limits. The D.C. Circuit has recently held that the government may not offer modus operandi testimony that exactly parallels conduct that the defendant is alleged to have engaged in. In United States v. Boyd, 55 F.3d 667, 671 (D.C. Cir. 1995), the court held that mirroring hypotheticals often present "a line that expert witnesses may not cross." The court noted in Boyd that testimony in response to such a hypothetical will suggest that the expert possesses knowledge of the defendant's mental state, even when the expert does not explicitly identify the defendant in her answer. Id. at 672. The effect is that the expert is essentially testifying as to the mental state of the defendant in violation of Rule 704(b).

The prohibition against mirroring hypotheticals is not as firm as it may appear, however. In United States v. Toms, 136 F.3d 176 (D.C. Cir. 1998), the following hypothetical was posed to the government's police expert: "Now assume a person is driving in a vehicle, and is pulled over for driving recklessly, Detective Brown, and when the passenger in that vehicle is pulled out, he is found to be sitting on a gun. Now, assume later 67 grams of crack are found under the rear seat, over $8,000 is found in the air conditioning vents, and the driver of the vehicle has $2,000 on his person. What would be the relationship there between, let's say, the gun and the drugs and the roles of these various individuals?" Id. at 184. Even though these facts precisely tracked the allegations against the defendant, the court found that the officer's testimony in response to the hypothetical did not violate Rule 704(b) because the officer just talked about the driver and passenger's "relationship" to the drugs and gun, not about their "intent." (To be fair, the D.C. Circuit Court noted that the trial in Toms took place before the decision in Boyd was handed down, and it is doubtful that such a hypothetical would now be permitted.)

Modus operandi testimony from government agents poses a serious danger to defendants in white collar cases, as well as the drugs and guns cases discussed above. With the Ninth Circuit's ruling in Morales, it may be difficult to exclude such testimony altogether. However, the logic

of the Boyd decision may be useful to keep out some of the most damaging forms of modus operandi expert testimony.

Opportunities to Strengthen Defenses with Expert Testimony Concerning Mens Rea

The Ninth Circuit's decision in Morales provides defense counsel with an excellent tool to introduce expert testimony to buttress defenses that turn on a client's mental state. It is a tool that should not be left to the prosecution's devices alone.

The situations in which such testimony can be offered are limited only by one's creativity. The Morales case is a good example. The government had presented three witnesses who testified that in their opinions Morales was knowledgeable about bookkeeping duties and had a strong grasp of bookkeeping principles. Morales's attorney offered his bookkeeping expert to show Morales's limited understanding about bookkeeping and to support Morales's own testimony that she did not know that her entries in the books were false. 108 F.3d at 1039-40. The Ninth Circuit not only found such expert testimony admissible under Rule 704(b), it held that its exclusion deprived the defendant of her only corroborating evidence and was thus not harmless error.

Another creative example of a defendant's use of an expert on the defendant's mental state is found in United States v. Frost, 125 F.3d 346 (9th Cir. 1997). The defendants were charged with mail fraud and other offenses related to an alleged scheme to exchange government contracts for university degrees and to alleged fraudulent billing practices. A defense counsel offered expert testimony that Frost had used a billing method which made it obvious what he was doing and that businesses like Frost's often billed costs in ways that they believe are correct but which technically are not allowable. 125 F.3d at 383. The district court excluded the testimony under Rule 704(b), and the Ninth Circuit reversed, finding the error not harmless as to the counts to which the expert would have testified. The court held that such expert testimony was admissible and would have provided the jury with facts from which they could have inferred a lack of intent to defraud.

Defense counsel must be on the lookout for opportunities to use expert testimony such as that offered in Morales and Frost. Counsel should also consider ways to use modus operandi evidence against the government. In Frost, defense counsel essentially argued the converse of the government's usual modus operandi inference – that the defendant, having engaged in practices similar to the practices of criminals, himself possessed the requisite intent. Frost's position was that he engaged in the same common practices of those who lacked criminal intent, giving rise to the inference that he too lacked such intent.

The broader scope now permitted in the Ninth Circuit for evidence relating to a defendant's mental state can be a powerful evidentiary weapon. We must be certain that it is not a weapon that we leave to the prosecution.