**United States District Court**
**Eastern District of Wisconsin**

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United States of America,

Plaintiff,

Case No. 06-CR-335

v.

Pedro Romo, and
Alejandro Romo

Defendant.

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## Defendants' Joint Trial Brief

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### Introduction

Based on counsel's review of the discovery materials provided by the government in this case, the government's case will depend largely upon intercepted and recorded telephone calls between the various alleged participants in this conspiracy. As will be set forth in more detail below, before any recorded telephone call may be played for the jury the government must establish the identity of the parties to the telephone call. Additionally, although witnesses who have knowledge of "drug code words" used by the group in question may testify as to the meaning of any such code words, no witness may offer an opinion as to what any particular defendant meant when he used any particular word.

### Discussion

#### I. Voice Identification

Rule 901 F.R.E., which governs the requirement of authentication or identification of evidence proffered at trial provides:

> (5) **Voice identification**. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon

> hearing the voice at any time under circumstances connecting it with the alleged speaker.
>
> (6) **Telephone conversations**. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

Significantly, self-identification by a speaker alone is not sufficient authentication. See, e.g., *United States v. Pool,* 660 F.2d 547, 560 (5th Cir. 1981). Where there is self-identification, though, "The authentication may be established by circumstantial evidence such as the similarity between what was discussed by the speakers and what each subsequently did." *United States v. Puerta Restrepo*, 814 F.2d 1236, 1239 (7th Cir. 1987)

Thus, before the government may present recordings of intercepted telephone calls, and before they may attribute the call to any particular defendant, the following foundation must be established:

(1) The government must establish that the phone call involved a telephone number that is listed to the defendant and that other circumstances, including self-identification, establish that the defendant is the one who answered the call; or,

(2) The voice of the caller is identified by a person who has first-hand knowledge of the caller's voice by hearing it on some other occasion.

**II. No expert witness may offer an opinion as to what any defendant meant when they used any certain words during intercepted telephone calls.**

The Seventh Circuit has frequently acknowledged that drug dealers often use "code words" in narcotic transactions in an attempt to conceal their criminal conduct. These "code words," when considered in isolation, might seem unclear or almost nonsensical. The jury therefore must analyze them in the context of the totality of the

evidence in order to understand their true meaning. *See United States v. Garcia*, 35 F. 3d 1125, 1127 n.3 (7th Cir. 1994); *United States v. Olson*, 978 F.2d 1472, 1479 n.6 (7th Cir. 1992), cert. denied, 123 L. Ed. 2d 174, 113 S. Ct. 1614 (1993); *United States v. Martinez*, 937 F.2d 299, 306 n.5 (7th Cir. 1991); *United States v. Vega*, 860 F.2d 779, 795 (7th Cir. 1988). In other words, persons who are parties to the conversation may testify as to the meaning of the code words. *See, e.g., United States v. Benitez,* 92 F. 3d 528, 532 (7th Cir. 1996)[1]

Contrary to the prosecutor's assertions in this case, though, no case has held that a government agent, who is not a party to an intercepted telephone conversation, may as a matter of course "interpret" the language used by the parties to the conversation. Such testimony is plainly expert opinion evidence because it is based on the purported "specialized knowledge" of the government agent.[2] If the code language were a matter of common knowledge there would be no need to have anyone explain its meaning to the jury.

Thus, since such testimony is expert testimony because it involves specialized knowledge, Rule 704(b) F.R.E., comes into play. That section provides that:

> (b) 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.

Interpreting the words used by a defendant, contrary to the common meaning of the words, is nothing if it is not offering an opinion as to the mental state of the defendant while using such words.[3] In a conspiracy case this amounts to an opinion on

1 In *Benitez*, a government informant, Varela, was permitted to testify concerning the meaning of telephone conversations he had with Benitez in which the two discussed buying "horses" for the "ranch." Varela, though, was a party to the telephone conversation.

2 Rule 702 FRE provides as follows: "If . . . . specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

3 Put another way, if a person says, "I went to the store", and if we give the words their common meaning, we all may understand that the person is communicating the fact that he went to the store.

the defendant's state of mind that constitutes an element of the crime charged (i.e. that in saying those words the defendant intended make an agreement with another to distribute drugs- even though the plain meaning of the words is something else).

In*, United States v. Lipscomb,* 14 F.3d 1236 (7th Cir. 1994), the Seventh Circuit explained:

> [W]e simply cannot ignore the fact that this court and others have routinely assumed that Rule 704(b) imposes an additional limitation, however slight, on the expert testimony of law enforcement officials. To reconcile that fact with our impression . . . that the rule is of more limited scope, we conclude that when a law enforcement official states an opinion about the criminal nature of a defendant's activities, such testimony should not be excluded under Rule 704(b) as long as it is made clear, either by the court expressly or in the nature of the examination, that the opinion is based on the expert's knowledge of common criminal practices, and *not on some special knowledge of the defendant's mental processes*. Relevant in this regard, though not determinative, is the degree to which the expert refers specifically to the "intent" of the defendant, for this may indeed suggest, improperly, that the opinion is based on some special knowledge of the defendant's mental processes.

There is no universal "drug code language" in the same way that there is one Spanish language. Every group of persons involved in the distribution of drugs develops their own code. Other members of the group may testify as to the meaning of the code words. The jury, though, must determine whether on the occasion in question the defendant meant to talk about "paint" or about "cocaine." A case agent is not allowed to tell the jury that, during one particular conversation, the two participants said they needed some paint but they really meant that the needed some cocaine.

To be sure, the appellate courts have not flatly banned the testimony of case agents as to the meaning of "drug code" language. Rather, the courts have cautioned that there is a great danger of unfair prejudice in allowing such expert testimony. For example, in *United States v. Dukagjini*, 326 F.3d 45, 53 (2d Cir. 2002) the Second

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On the other hand, if a person says, "I went to the store" and another witness testifies that what the speaker really meant is that he went to buy cocaine then the witness is testifying as to the mental state of the speaker (i.e. the speaker is saying one thing but means something else).

Circuit cautioned that,

> [W]e have observed elsewhere, when a fact witness or a case agent also functions as an expert for the government, the government confers upon him "the aura of special reliability and trustworthiness surrounding expert testimony, which ought to caution its use." (internal citations omitted) This aura creates a risk of prejudice "because the jury may infer that the agent's opinion about the criminal nature of the defendant's activity is based on knowledge of the defendant beyond the evidence at trial," a risk that increases when the witness has supervised the case. Id. Simply by qualifying as an "expert," the witness attains unmerited credibility when testifying about factual matters from first-hand knowledge. Additionally, when the expert bases his opinion on in-court testimony of fact witnesses, such testimony may improperly bolster that testimony and may "suggest[] to the jury that a law enforcement specialist . . . believes the government's witness[] to be credible and the defendant to be guilty, suggestions we have previously condemned."

Therefore, the appellate courts have instructed the district court, in its role as "gatekeeper", to carefully conduct a Daubert analysis when the government proposes to introduce expert testimony concerning drug code language.

### A. The government has not provided the defendants with any summary of expert testimony

> (G) **Expert witnesses.** 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 . . . .

Here, the government stated on the record that it would follow the "open file policy" under local rules and this, by rule, amounts to a demand for discovery by the defendant[4]. Thus, the government has an obligation to provide the defense with a

4 **Criminal L.R. 16.1 Open File Policy** (a) At arraignment, the government must state on the record to the presiding judicial officer whether it is following the open file policy as defined in Criminal L.R. 16.1(b). If the government states that it is following the open file policy and the defendant accepts such discovery materials, then the defendant's discovery obligations under Fed.R.Crim.P. 16(b) arise without further government motion or request and both parties shall be treated for all purposes in the trial court and on appeal as if each had filed timely written motions requesting all materials required to

summary of any expert testimony it intends to introduce at trial.

There was no notice of expert testimony provided in this case and, therefore, the court should exclude any expert testimony by the government. *See* Rule 16(d)(2)(C) F.R.Crim. P.

**B. The court must conduct a Daubert hearing into whether there is a sufficient foundation to permit any case agent to interpret drug code language contained on the recordings of the intercepted calls.**

The Notes of the Advisory Committee on 2000 Amendments to Rule 702 explain:

> Rule 702 has been amended in response to *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 [125 L. Ed. 2d 469] (1993), and to the many cases applying *Daubert*, including *Kumho Tire Co. v. Carmichael,* [143 L. Ed. 2d 238,] 119 S.Ct. 1167 (1999). In *Daubert* the Court charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony, and the Court in *Kumho* clarified that this gatekeeper function applies to all expert testimony, not just testimony based in science. *See also Kumho*, 119 S.Ct. at 1178 (citing the Committee Note to the proposed amendment to Rule 702, which had been released for public comment before the date of the *Kumho* decision). The amendment affirms the trial court's role as gatekeeper and provides some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony. Consistently with *Kumho,* the Rule as amended provides that all types of expert testimony present questions of admissibility for the trial court in deciding whether the evidence is reliable and helpful. Consequently, the admissibility of all expert testimony is governed by the principles of Rule 104(a). Under that Rule, the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence. *See Bourjaily v. United States*, 483 U.S. 171 [97 L. Ed. 2d 144] (1987).

*Daubert* set forth a non-exclusive checklist for trial courts to use in assessing the reliability of scientific expert testimony. The specific factors explicated by the Daubert Court are (1) whether the expert's technique or theory can be or has been tested--that

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be produced under Fed.R.Crim.P. 16(a)(1)(A), (B), (C), (D), (E) and 16 (b)(1)(A), (B), and (C), and invoking Fed.R.Crim.P. 16(c).

is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community. The Court in *Kumho* held that these factors might also be applicable in assessing the reliability of non-scientific expert testimony, depending upon "the particular circumstances of the particular case at issue." 119 S.Ct. at 1175.

### C. So what testimony is allowed?

With regard to "interpreting" the drug code language used in the intercepted telephone calls the court must abide by the following considerations:

(1) Under *Daubert*, there must be a foundation that a drug code language actually exists within this conspiracy and that the witness interpreting it has first-hand knowledge of the code (i.e. the witness was part of the conspiracy);

(2) If so, then the witness may testify, in general terms, as to the code meaning of certain words within the group in question;

(3) Under Rule 704 F.R.E. and *Lipscomb,* though, the witness may *not* offer an opinion as to what an individual defendant meant by using the words during the court of any given telephone call. Rather, under *Garcia, et al.,* the jury must determine the meaning of the words used by the parties to the intercepted telephone call based upon the totality of the evidence in the case; and,

(4) Given "aura of reliability" that attends to an expert witness the court should be very reluctant to permit a government case agent to interpret the language because, under Rule 403 F.R.E., there is a great possibility of unfair prejudice because the jury may believe that the case agent has additional information about the defendant that is not being presented in court.

Dated at Milwaukee, Wisconsin, this 3rd day of April, 2008.

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